
Thirteenth Report to Court of Duff &
Phelps Canada Restructuring Inc.
as Court-Appointed Receiver of the
Estate of Robert Mander, E.M.B.
Asset Group Inc. and the Related
Entities

April 30, 2012

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

B E T W E E N:

SA CAPITAL GROWTH CORP.

Applicant

-and-

**CHRISTINE BROOKS AS EXECUTOR OF THE ESTATE OF ROBERT MANDER,
DECEASED AND E.M.B. ASSET GROUP INC.**

Respondent

**IN THE MATTER OF RULE 14.05(3)(G) OF THE
RULES OF CIVIL PROCEDURE AND SECTION 101 OF
THE COURTS OF JUSTICE ACT, R.S.O. 1990, C. C.43, AS AMENDED**

**THIRTEENTH REPORT OF THE RECEIVER
April 30, 2012**

1.0 Introduction

- a) Pursuant to an order of the Ontario Superior Court of Justice (Commercial List) ("Court") made on March 17, 2010 ("Receivership Order"), as amended by orders of the Court made on March 17, 2010, March 19, 2010 and March 31, 2010 (the March 31, 2010 order being the "Fresh as Amended Receivership Order"), RSM Richter Inc. ("Richter") was appointed receiver ("Receiver") over the assets, property and undertaking of E.M.B. Asset Group Inc. ("EMB") and Robert Mander ("Mander") (jointly, EMB and Mander are defined as the "Respondents") under Section 101 of the Courts of Justice Act, R.S.O. 1990, c. C.43, as amended. A copy of the Fresh as Amended Receivership Order (the "Order") is attached as Appendix "A".
- b) As a result of the amendments to the Receivership Order, the Receivership Order provides the Receiver authority regarding the assets, property and undertaking of entities related to EMB or Mander. These entities include, but are not limited to, Mand Asset Inc., Dunn Street Gallery Inc., Trafalgar Capital Growth Inc., Stonebury Inc. and Mander Group Inc. (collectively the "Related Entities") (the Related Entities and the Respondents are collectively referred to as the "Mander Debtors").

- c) On March 31, 2010, due to the death of Mander, this proceeding was continued against Christine Brooks as Executor of the Estate of Robert Mander and the title of proceedings was changed to reflect the continuance.
- d) On July 14, 2010, an order was made by the Court authorizing and directing the Receiver to investigate the affairs of C.O. Capital Growth Corp. ("CO Capital"), 91 Days Hygiene Inc., Peter Sbaraglia ("Sbaraglia") and Mandy Sbaraglia (collectively the "CO Capital Debtors").
- e) On December 23, 2010, an order was made by the Court appointing Richter as receiver over the assets of the CO Capital Debtors, including Sbaraglia.
- f) Pursuant to an order of the Court made on December 12, 2011 ("Substitution Order"), as a result of the sale of Richter's restructuring practice in Toronto to Duff & Phelps Canada Restructuring Inc. ("D&P"), D&P was substituted in place of Richter as Receiver. The licensed trustees/restructuring professionals overseeing this mandate prior to December 9, 2011 remain unchanged.

1.1 Purposes of this Report

- a) In February, 2011 the Ontario Securities Commission ("OSC") issued a Statement of Allegations that, among other things, alleges that Sbaraglia was engaged in securities fraud and misled the OSC.
- b) In his motion materials served on the Receiver on April 23, 2012 Sbaraglia requests an order compelling the Receiver to provide copies of certain materials to Sbaraglia and requiring the Receiver to prepare an index of materials. Specifically, the items requested are as follows:
 - Transcripts, recordings and/or notes of interviews conducted with sixteen (16) individuals;
 - Documents provided by the individuals interviewed to the Receiver in connection with their interviews;
 - The "deleted e-mails" referred to in the Receiver's fourth report to Court dated July 2, 2010 ("Fourth Report");
 - Documents produced by Peter Tonin and Peter Welsh to the Receiver pursuant to Court orders;
 - An index of the materials in the Receiver's power, possession and/or control; and
 - Copies of additional documents in the Receiver's power, possession and/or control relevant to the allegations made by the OSC against Sbaraglia that he may request once he has been provided with an index.

- c) The purpose of this report ("Report") is to respond to the above requests made by Sbaraglia.

1.2 Restrictions

- a) In preparing this Report, the Receiver has relied upon unaudited financial information and books and records located at the premises of the Debtors, as well as at various other locations where Mander carried on business or is believed to have carried on business, maintained an office, files or a safe, whether presently, in the past and/or periodically, and documents, records and information provided by various individuals and financial institutions. The Receiver has not performed an audit or other verification of the documents and information it has accumulated.
- b) The Receiver expresses no opinion or other form of assurance with respect to the accuracy of any information, documents and financial information presented in and/or discussed in this Report, or relied upon by the Receiver in preparing this Report.

2.0 Background Information

- a) Background information concerning the Mander Debtors' receivership proceedings ("Mander Receivership Proceedings") and the CO Capital Debtors' receivership Proceedings ("CO Capital Receivership Proceedings") is included in the initial application materials and in the Receiver's twelve reports and related supplemental reports to Court filed in the Mander Receivership Proceedings and in the two reports and related supplemental reports to Court filed in the CO Capital Receivership Proceedings. These documents are available on D&P's website at www.duffandphelps.com/restructuringcases.
- b) As referred to in Section 1 of this Report, in March, 2010 these receivership proceedings were commenced against Mander and his company EMB. It was alleged that Mander was carrying on a Ponzi scheme and that he had misappropriated tens of millions of dollars from investors in Ontario.
- c) On March 17, 2010, the date the receivership application was returnable, Mander committed suicide and on the return of the application Justice Morawetz granted the Receivership Order.
- d) After its appointment, in accordance with the Receivership Order, the Receiver compelled production of documents from certain parties with knowledge of the affairs of the Mander Debtors, including their lawyers (Peter Welsh and Aylesworth LLP) and accountant (Tonin & Co. LLP). Also in accordance with the Receivership Order, the Receiver requested and held meetings with several individuals with knowledge of the Mander Debtors.

- e) In its Fourth Report the Receiver advised the Court that numerous questions and issues identified by the Receiver as part of its investigation of the Mander Debtors suggested that an investigation should be undertaken of the CO Capital Debtors, including Sbaraglia.
- f) Based on the evidence provided in the Fourth Report the Court issued an order on July 14, 2010 authorizing and directing the Receiver to commence an investigation into the affairs of the CO Capital Debtors.
- g) On September 8, 2010 the OSC filed an application seeking the appointment of a receiver over the business, assets and undertakings of the CO Capital Debtors.
- h) On September 9, 2010 the Receiver filed its seventh report to Court summarizing its findings from its investigation of the CO Capital Debtors. In its report the Receiver recommended that a receiver be appointed over the CO Capital Debtors, and based on the evidence it obtained, the Receiver strongly suggested that the CO Capital Debtors should not oppose the appointment of a receiver as the evidence suggested improper conduct on behalf of the CO Capital Debtors, including Sbaraglia, and that contested proceedings would most certainly result in the appointment of a receiver and would be very expensive and to the detriment of the investors and creditors.
- i) Notwithstanding the Receiver's advice, the CO Capital Debtors' strenuously opposed the appointment of a receiver and took the position that they had done nothing wrong and were victims of Mander's fraud. As a result, there were extensive materials filed in opposition of the motion and many cross-examinations.
- j) The Receiver also filed its ninth report to Court dated November 12, 2010, which set out the results of the Receiver's further investigations and the result of the cross-examinations. All of the costs of the Receiver's work regarding the CO Capital Debtors, including the work of its counsel, were funded by the estate of the Mander Debtors. The cost to the estate was approximately \$700,000.
- k) By Order of Justice Morawetz dated December 23, 2010, the Receiver was appointed as receiver over the CO Capital Debtors. In His Honour's Decision, several critical findings were made, including that: (i) Peter Sbaraglia and his counsel misled the OSC during the OSC's investigation in 2009, including statements by Peter Sbaraglia under oath; (ii) CO Capital used funds received from one investor to repay amounts owing to other investors (i.e. conducted a "Ponzi" scheme); (iii) the Sbaraglias used investor monies to fund their lifestyle and the business expenses of CO Capital; and (iv) of the \$21 million received by the CO Capital Debtors from investors, \$6 million was retained by the CO Capital Debtors to fund personal expenses, business expenses and trading losses. The Honourable Justice Morawetz's "reasons for judgement" are attached as Appendix "B" to this Report.

3.0 Sbaraglia's Requests

3.1 Interviews

- a) Sbaraglia has requested transcripts and/or notes of interviews between the Receiver and 16 individuals.
- b) In accordance with the Receivership Order, the Receiver met with, interviewed and/or corresponded with all but two of the individuals. The Receiver conducted these interviews for the sole purpose of assisting it in connection with its obligations and authority under the Receivership Order. It did not tell any individual it interviewed that the information obtained would be used for any other purpose.
- c) The Receiver did not interview or correspond with Grant Walton or Tascha Fluke. Early in the proceedings, the Receiver met with Mehran Shahviri of the OSC in order to obtain background information regarding these proceedings. The Receiver did not interview Mr. Shahviri. With respect to the remaining individuals (the "Individuals"), the Receiver interviewed, had discussions with and communicated periodically with them, to varying degrees.
- d) The primary purpose of the interviews was to gather background information regarding the Mander Debtors. However, a majority of the information obtained from the Individuals was highly speculative, unsupported and anecdotal; much of it related to the stories woven by Mander to justify his investment techniques and the whereabouts of investor monies. Accordingly, in preparing its reports to Court, the Receiver relied on the financial information that it analyzed.
- e) Over the course of carrying out its mandate, the Receiver generated various notes and internal memoranda regarding the interviews, which were created solely for its internal purposes and were not intended to be relied upon by other parties. The notes were not reviewed by the Individuals. The notes prepared were not intended to be a verbatim transcript of what was said by the Individuals and the Receiver cannot confirm that the notes are an accurate or complete review of all that was discussed. The Receiver cannot confirm that its notes summarize all of the discussions that the Receiver had with the Individuals. The notes were only meant to be used by the Receiver for its purposes in the context of the discussions that were had with the respective Individuals.
- f) With the exception of interviews with Julia Dublin and Michael Miller, none of the interviews was recorded nor transcribed. The interviews of Dublin and Miller were recorded.
- g) The Receiver did not keep a schedule of documents received from the Individuals. The Receiver is concerned that assembling all of its notes, as well as any documents

provided, from all parties with whom it met would be time consuming and costly. Since the commencement of the Mander Receivership Proceedings over two years ago there were numerous conversations with certain of the Individuals; therefore, the notes that were taken are in a number of notebooks and files. The Receiver would have to review numerous files and/or notebooks to assemble the information requested.

3.2 Index of Documents

- a) Sbaraglia is also seeking an order compelling the Receiver to provide an index of materials in the Receiver's power, possession and/or control. The request is extremely broad - it does not seem to be limited to the CO Capital matter.
- b) In paragraph 89 of his affidavit, Sbaraglia advises that his counsel, Brauti Thorning Zibarras LLP ("BTZ"), had previously requested that the Receiver provide an index of the documents in its power, possession and/or control. At that time, the Receiver's counsel advised that an index does not exist.
- c) These receivership proceedings commenced over two years ago. The Receiver has obtained thousands of documents from a variety of sources. It also has various data and information in its possession in electronic form, including data on computers and mobile devices. The Receiver does not presently have an index of all of these documents. To create such an index would also be time consuming and costly. The Receiver believes it could take in excess of one month and would cost approximately \$25,000 to assemble.

3.3 Tonin and Welsh Records

- a) The documents that were provided by Tonin and Welsh were provided pursuant to the Fresh as Amended Receivership Order.
- b) As at the date of this Report the Receiver has not heard back from Gowling Lafleur Henderson LLP, Tonin's counsel, regarding its position on this matter.
- c) Lerner LLP, Welsh's counsel, has advised the he takes no position on this matter.
- d) The Receiver will follow the Court's direction as it relates to providing this information to Sbaraglia.

3.4 Deleted E-mails

- a) Sbaraglia has requested copies of the e-mails that were identified by the Receiver as having been deleted.

- b) The Receiver identified the missing e-mails by comparing an image of Sbaraglia's computer to the e-mails on CO Capital's host email server.
- c) Copies of the e-mails obtained from the image of Sbaraglia's computer and those obtained from CO Capital's host e-mail server are available to be provided to Sbaraglia should this Court so order.

4.0 Receiver's Reports

- a) As evidenced by its various reports to Court, in coming to the determination that an investigation of the CO Capital Debtors should be performed, and ultimately, that the CO Capital Debtors should be placed in receivership, the Receiver placed essentially no reliance on its discussions and interviews with any of the Individuals with whom it met or corresponded.
- b) As mentioned in Section 3.1 above, the overwhelming majority of the information provided by the Individuals was of no utility, was highly speculative, unsupported and anecdotal.
- c) In the context of its investigation of the CO Capital Debtors, the Receiver's findings and recommendations were based on:
 - the financial analysis it performed of bank statements, cancelled cheques, credit card statements and investment account statements; and
 - interviews performed by the OSC, including transcripts from the OSC's interviews of Sbaraglia and Mander in July, 2009, the cross-examinations conducted by the OSC, examinations performed by the Receiver and Sbaraglia's counsel prior to the commencement of the CO Capital Receivership Proceedings, and the various affidavits filed by Sbaraglia in these proceedings.

5.0 Distributions to Stakeholders

- a) There is presently approximately \$1.2 million¹ being held by the Receiver for distribution to stakeholders, net of future costs.
- b) Prior to receiving the motion materials served by BTZ on April 23, 2012, the Receiver was in the process of finalizing motion materials seeking approval of a distribution to stakeholders of CO Capital and Mander.

¹ Prior to additional costs related to finalizing the administration of the Mander Debtors' and the CO Capital Debtors' estates.

- c) The Receiver has postponed the distribution motion as the breadth of Sbaraglia's request, including the information production, may be exceedingly costly and time consuming. Sbaraglia has also suggested that the Receiver may be called as a witness in his trial. The cost of preparing to testify would add additional significant cost.
- d) Sbaraglia's requests will substantially reduce the amounts available for distribution to stakeholders.

6.0 Conclusions and Recommendation

- a) The Receiver is of the view that the cost related to providing the information requested by Sbaraglia will be very significant. It will take considerable time to accumulate and index all of the information in its possession.
- b) The information requested by Sbaraglia will not result in further recoveries for stakeholders – it will greatly reduce recoveries. The Receiver does not believe that the costs of these activities should be funded by the estate.
- c) As evidenced by its Reports, the Receiver's findings were based on its financial investigation, as well as transcripts of interviews of Mander and Sbaraglia, and affidavits of Sbaraglia himself.
- d) The Receiver will provide third party documents in its possession, including those provided by Tonin and Welsh, should the Court so order.

* * *

All of which is respectfully submitted,

Duff & Phelps Canada Restructuring Inc.

**DUFF & PHELPS CANADA RESTRUCTURING INC.
IN ITS CAPACITY AS COURT-APPOINTED
RECEIVER OF THE ESTATE OF ROBERT MANDER,
E.M.B. ASSET GROUP INC. AND THE RELATED ENTITIES
AND NOT IN ITS PERSONAL CAPACITY**

Appendix “A”

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE) WEDNESDAY, THE 31ST DAY
)
JUSTICE MORAWETZ) OF MARCH, 2010

BETWEEN:

SA CAPITAL GROWTH CORP.

Applicant

- and -

**CHRISTINE BROOKS AS EXECUTOR OF THE ESTATE OF ROBERT MANDER,
DECEASED AND E.M.B. ASSET GROUP INC.**

Respondents



**APPLICATION UNDER Rule 14.05(3)(g) of the *Rules of Civil Procedure* and section 101 of the *Courts of Justice Act*,
R.S.O. 1990. c. C.43, as amended**

FRESH AS AMENDED RECEIVERSHIP ORDER

THIS MOTION made by RSM Richter Inc. (the "Receiver"), in its capacity as Receiver of all of the assets, undertakings and properties of the estate of Robert Mander and E.M.B. Asset Group Inc. (the "Debtors") was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the First Report of the Receiver dated March 29, 2010 (the "First Report"), the Supplement to the First Report date March 30, 2010 (the "Supplement") and on hearing the submissions of counsel for the Receiver and others,

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion is hereby abridged and validated so that this motion is properly returnable today and hereby dispenses with further service thereof.

APPOINTMENT

2. **THIS COURT ORDERS** that pursuant to section 101 of the *Courts of Justice Act*, R.S.O., c. 43, as amended, RSM Richter Inc. is hereby appointed Receiver, without security, of all of the assets, undertakings and properties of the Debtors and any corporations or other entities associated with, related to or controlled by the Debtors (the "Related Entities") (the "Property").

3. **THIS COURT ORDERS** that "Related Entities" includes, in particular, but is not limited to the following corporations: Mand Asset Inc.; Dunn Street Gallery Inc.; Trafalgar Capital Growth Inc. and Mander Group Inc. and Stonebury Inc.

RECEIVER'S POWERS

4. **THIS COURT ORDERS** that the Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Property and, without in any way limiting the generality of the foregoing, the Receiver is hereby expressly empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:

- (a) to take possession of and exercise control over the Property and any and all proceeds, receipts and disbursements arising out of or from the Property;
- (b) to receive, preserve, and protect of the Property, or any part or parts thereof, including, but not limited to, the changing of locks and security codes, the relocating of Property to safeguard it, the engaging of

independent security personnel, the taking of physical inventories and the placement of such insurance coverage as may be necessary or desirable;

- (c) to take any steps that the Receiver may, in its sole discretion, deem necessary or desirable to prevent any disbursement, withdrawal or transfer of funds by the Debtors or Related Entities or the sale, encumbrance or transfer of personal or real property of the Debtors or Related Entities, including the real property listed in Schedule B hereto (collectively, "Dispositions"), pending further order of this Court;
- (d) to direct any financial institution, wherever located and including those listed on Schedule A hereto to cease to allow any withdrawals or transfers from any account that the Debtors or Related Entities hold with such institution, including those listed on Schedule A hereto, unless otherwise directed by the Receiver in writing or by order of this Court;
- (e) to monitor and investigate the affairs of the Debtors and Related Entities;
- (f) to conduct examinations of any Person (as defined below), if deemed necessary or desirable in the Receiver's discretion;
- (g) to manage, operate, and carry on the business of the Debtors or Related Entities, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part of the business, or cease to perform any contracts of the Debtors or Related Entities;
- (h) to engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Receiver's powers and duties, including without limitation those conferred by this Order;

- (i) to purchase or lease such machinery, equipment, inventories, supplies, premises or other assets to continue the business of the Debtors or Related Entities or any part or parts thereof;
- (j) to receive and collect all monies and accounts now owed or hereafter owing to the Debtors or Related Entities and to exercise all remedies of the Debtors or Related Entities in collecting such monies, including, without limitation, to enforce any security held by the Debtors or Related Entities;
- (k) to settle, extend or compromise any indebtedness owing to the Debtors or Related Entities;
- (l) to execute, assign, issue and endorse documents of whatever nature in respect of any of the Property, whether in the Receiver's name or in the name and on behalf of the Debtors or Related Entities, for any purpose pursuant to this Order;
- (m) to initiate, prosecute and continue the prosecution of any and all proceedings and to defend all proceedings now pending or hereafter instituted with respect to the Debtors or Related Entities, the Property or the Receiver, and to settle or compromise any such proceedings. The authority hereby conveyed shall extend to such appeals or applications for judicial review in respect of any order or judgment pronounced in any such proceeding;
- (n) to market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate;
- (o) to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business,

- (i) without the approval of this Court in respect of any transaction not exceeding \$100,000, provided that the aggregate consideration for all such transactions does not exceed \$300,000; and
- (ii) with the approval of this Court in respect of any transaction in which the purchase price or the aggregate purchase price exceeds the applicable amount set out in the preceding clause;

and in each such case notice under subsection 63(4) of the Ontario *Personal Property Security Act*, or section 31 of the Ontario *Mortgages Act*, as the case may be, shall not be required, and in each case the Ontario *Bulk Sales Act* shall not apply.

- (p) to apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property;
- (q) to report to, meet with and discuss with such affected Persons (as defined below) as the Receiver deems appropriate on all matters relating to the Property and the receivership, and to share information, subject to such terms as to confidentiality as the Receiver deems advisable;
- (r) to register a copy of this Order and any other Orders in respect of the Property against title to any of the Property;
- (s) to apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and, if thought desirable by the Receiver, in the name of the Debtors or Related Entities;
- (t) to enter into agreements with any trustee in bankruptcy appointed in respect of the Debtors or Related Entities, including, without limiting the generality of the foregoing, the ability to enter into occupation agreements for any property owned or leased by the Debtors or Related Entities;

- (u) to exercise any shareholder, partnership, joint venture or other rights which the Debtors or Related Entities may have;
- (v) to make or cause to be made an assignment in bankruptcy of any of the Debtors or Related Entities and to act as trustee in bankruptcy thereof; and
- (w) to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations.

and in each case where the Receiver takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other Persons (as defined below), including the Debtors or Related Entities, and without interference from any other Person.

5. **THIS COURT ORDERS** that the Receiver shall file with the Court a report outlining its preliminary findings and recommendations with respect to the Debtors and Related Entities within 14 calendar days from March 17, 2010.

6. **THIS COURT ORDERS** that the Receiver may, in its sole discretion, apply to the Court at any time on three (3) days notice, for an Order that the Receiver shall be discharged as Receiver.

7. **THIS COURT ORDERS** that in the event that the Receiver applies for discharge in accordance with paragraph 6 above, such discharge shall be granted on such terms as this Court deems appropriate.

8. **THIS COURT ORDERS** that no party shall undertake any Dispositions except with the prior written consent of the Receiver or leave of this Court.

9. **THIS COURT ORDERS** that any transfer, disposition, encumbrance or other dealing with the real property legally or beneficially owned by the Debtors or Related Entities, including that real property specified in Schedule B, following registration of the Order of this Honourable Court made March 17, 2010 granted in this proceeding on title to such real property shall be invalid.

10. **THIS COURT ORDERS** that no financial institution, wherever located, with notice of this Order shall permit any transfer or disbursement of any funds whether currently deposited or received in the future in any account held in the name of either of the Debtors or Related Entities without the prior written consent of the Receiver or leave of this Court.

11. **THIS COURT ORDERS** that the Receiver may, in its discretion, provide a key to access the premises at 223 Church St., Oakville, to Colleen Auriemma, and in the event that a key is so provided, Colleen Auriemma shall not provide that key or a copy thereof to any other person.

DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE RECEIVER

12. **THIS COURT ORDERS** that (i) the Debtors or Related Entities, (ii) all of their current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on their instructions or behalf, and (iii) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order (all of the foregoing, collectively, being "Persons" and each being a "Person") shall forthwith advise the Receiver of the existence of any Property in such Person's possession or control, shall grant immediate and continued access to the Property to the Receiver, and shall deliver all such Property to the Receiver upon the Receiver's request.

13. **THIS COURT ORDERS** that all Persons shall forthwith advise the Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the Debtors or Related Entities, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the "Records") in that Person's possession or control, and shall provide to the Receiver or permit the Receiver to make, retain and take away copies thereof and grant to the Receiver unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this paragraph 13 or in paragraph 14 of this

Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Receiver due to the privilege attaching to solicitor-client communication or due to statutory provisions prohibiting such disclosure.

14. **THIS COURT ORDERS** that if any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service provider or otherwise, all Persons in possession or control of such Records shall forthwith give unfettered access to the Receiver for the purpose of allowing the Receiver to recover and fully copy all of the information contained therein whether by way of printing the information onto paper or making copies of computer disks or such other manner of retrieving and copying the information as the Receiver in its discretion deems expedient, and shall not alter, erase or destroy any Records without the prior written consent of the Receiver. Further, for the purposes of this paragraph, all Persons shall provide the Receiver with all such assistance in gaining immediate access to the information in the Records as the Receiver may in its discretion require including providing the Receiver with instructions on the use of any computer or other system and providing the Receiver with any and all access codes, account names and account numbers that may be required to gain access to the information.

NO PROCEEDINGS AGAINST THE RECEIVER

15. **THIS COURT ORDERS** that no proceeding or enforcement process in any court or tribunal (each, a "Proceeding"), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.

NO PROCEEDINGS AGAINST THE DEBTOR OR THE PROPERTY

16. **THIS COURT ORDERS** that no Proceeding against or in respect of the Debtors or Related Entities or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtors or Related Entities or the Property are hereby stayed and suspended pending further Order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

17. **THIS COURT ORDERS** that all rights and remedies against the Debtors or Related Entities, the Receiver, or affecting the Property, are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court, provided however that this stay and suspension does not apply in respect of any "eligible financial contract" as defined in the BIA, and further provided that nothing in this paragraph shall (i) empower the Receiver or the Debtors or Related Entities to carry on any business which the Debtors or Related Entities are not lawfully entitled to carry on, (ii) exempt the Receiver or the Debtors or Related Entities from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

NO INTERFERENCE WITH THE RECEIVER

18. **THIS COURT ORDERS** that no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Debtors or Related Entities, without written consent of the Receiver or leave of this Court.

CONTINUATION OF SERVICES

19. **THIS COURT ORDERS** that all Persons having oral or written agreements with the Debtors or Related Entities or statutory or regulatory mandates for the supply of goods and/or services, including without limitation, all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Debtors or Related Entities are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Receiver, and that the Receiver shall be entitled to the continued use of the Debtors' or Related Entities' current telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges

for all such goods or services received after the date of this Order are paid by the Receiver in accordance with normal payment practices of the Debtors or Related Entities or such other practices as may be agreed upon by the supplier or service provider and the Receiver, or as may be ordered by this Court.

RECEIVER TO HOLD FUNDS

20. **THIS COURT ORDERS** that all funds, monies, cheques, instruments, and other forms of payments received or collected by the Receiver from and after the making of this Order from any source whatsoever, including without limitation the sale of all or any of the Property and the collection of any accounts receivable in whole or in part, whether in existence on the date of this Order or hereafter coming into existence, shall be deposited into one or more new accounts to be opened by the Receiver (the "Post Receivership Accounts") and the monies standing to the credit of such Post Receivership Accounts from time to time, net of any disbursements provided for herein, shall be held by the Receiver to be paid in accordance with the terms of this Order or any further Order of this Court.

EMPLOYEES

21. **THIS COURT ORDERS** that all employees of the Debtors or Related Entities shall remain the employees of the Debtors or Related Entities until such time as the Receiver, on the Debtors' or Related Entities' behalf, may terminate the employment of such employees. The Receiver shall not be liable for any employee-related liabilities, including any successor employer liabilities as provided for in section 14.06(1.2) of the BIA, other than such amounts as the Receiver may specifically agree in writing to pay, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*.

LIMITATION ON ENVIRONMENTAL LIABILITIES

22. **THIS COURT ORDERS** that nothing herein contained shall require the Receiver to occupy or to take control, care, charge, possession or management

(separately and/or collectively, "Possession") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the *Ontario Environmental Protection Act*, the *Ontario Water Resources Act*, or the *Ontario Occupational Health and Safety Act* and regulations thereunder (the "Environmental Legislation"), provided however that nothing herein shall exempt the Receiver from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Receiver shall not, as a result of this Order or anything done in pursuance of the Receiver's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

LIMITATION ON THE RECEIVER'S LIABILITY

23. **THIS COURT ORDERS** that the Receiver shall incur no liability or obligation as a result of its appointment or the carrying out the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*. Nothing in this Order shall derogate from the protections afforded the Receiver by section 14.06 of the BIA or by any other applicable legislation.

RECEIVER'S ACCOUNTS

24. **THIS COURT ORDERS** that the Receiver and counsel to the Receiver shall be paid their reasonable fees and disbursements in respect of either Respondent, in each case at their standard rates and charges, and that the Receiver and counsel to the Receiver shall be entitled to and are hereby granted a charge (the "Receiver's Charge") on the Property, as security for all such fees and disbursements in respect of either Respondent, both before and after the making of this Order in respect of these

proceedings, and that the Receiver's Charge shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subject to sections 14.06(7), 81.4(4), and 81.6(2) of the BIA, and also subject to any security interest perfected in accordance with the *Personal Property Security Act* (Ontario) as of March 17, 2010 or any security interest in real property of the Debtors or Related Entities, including the real property listed in Schedule B, which has been properly registered on title to such real property prior to March 17, 2010.

25. **THIS COURT ORDERS** that the Receiver and its legal counsel shall pass its accounts from time to time, and for this purpose the accounts of the Receiver and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

26. **THIS COURT ORDERS** that prior to the passing of its accounts, the Receiver shall be at liberty from time to time to apply reasonable amounts, out of the monies in its hands, against its fees and disbursements, including legal fees and disbursements, incurred at the normal rates and charges of the Receiver or its counsel, and such amounts shall constitute advances against its remuneration and disbursements when and as approved by this Court.

APPROVAL OF REPORTS AND ACTIVITIES

27. **THIS COURT ORDERS** that the First Report and the Supplement and the activities of the Receiver referred to therein be and are hereby approved.

GENERAL

28. **THIS COURT ORDERS** that the Receiver may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

29. **THIS COURT ORDERS** that nothing in this Order shall prevent the Receiver from acting as a trustee in bankruptcy of the Debtors or Related Entities.

30. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

31. **THIS COURT ORDERS** that the Receiver be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Receiver is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

32. **THIS COURT ORDERS** that the Applicant shall have its costs of this motion, up to and including entry and service of this Order, on a substantial indemnity basis to be paid by the Receiver from the Property with such priority and at such time as this Court may determine.

33. **THIS COURT ORDERS** that any interested party may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to the Receiver and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.



ENTERED AT / INSCRIT A TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

APR 01 2010

Schedule A

Banking Institutions

HSBC Bank Canada
102-271 Cornwall Road, Unit A
Oakville, Ontario L6J 7Z5

Account # : 930289 010

HSBC Bank Canada
2500 Appleby Line
Burlington, Ontario L7L 0A2

Account # : 003747 150

EMB Asset Group
Scotia Bank
207 Lakeshore Road East at George
Oakville ON L6J 1N4

Account Number: 30742 00840 18

EMB Asset Group
HSBC Bank Canada
2500 Appleby Line
Burlington, ON L7L 0A2

Account number: 342-013734-001
342-013734-002

Dunn Street Gallery Inc.
HSBC Bank Canada
2500 Appleby Line
Burlington, ON L7L 0A2

Account number: 342-013734-001

Schedule B

Real Property

Lot 1, Plan 466, Oakville, being all of PIN 24796-0025 (LT), Land Registry Office #20, municipally known as 1225 Lawrence Cres., Oakville, Ontario.

Part Lot E, Block 3, Plan 1, Parts 9 and 27, Reference Plan 20R12967, Parts 2 and 4, Reference Plan 20R12968; Oakville, being all of PIN 24813-0327 (LT), Land Registry Office #20, municipally known as 223 Church St., Oakville, Ontario.

Part Lot E, Block 3, Plan 1, Parts 11 and 29, Reference Plan 20R12967, Parts 1 and 3, Reference Plan 20R12968, being all of PIN 24813-0328 (LT), Land Registry Office #20, municipally known as 225 Church St., Oakville, Ontario.

Parcel 8-1, Section 62M547; Lot 8, Plan 62M547; subject to LT235295; subject to LT220459; Flamborough City of Hamilton, being all of PIN 17524-0005 (LT), Land Registry Office #62, municipally known as 17 Stonebury Place, Freelon, Ontario.

Part Lot 26, Concession 3 WHS Caledon as in RO1108476, save and except Part 5 Plan 43R-16764; Caledon, being all of PIN 14280-0322 (LT), Land Registry Office #43, municipally known as 1650 High Point Road, Caledon, Ontario.

Part Lot 26, Concession 3 WHS Caledon, Part 4, Reference Plan 43R16764; Caledon, being all of PIN 14280-0316 (LT), Land Registry Office #43.

SA CAPITAL GROWTH CORP. and CHRISTINE BROOKS AS EXECUTOR OF THE ESTATE OF ROBERT
Applicant MANDER, DECEASED AND E.M.B. ASSET GROUP INC.
Respondents

APPLICATION UNDER Rule 14.05(3)(g) of the Rules of Civil Procedure and section 101 of the Courts of Justice
Act, R.S.O. 1990. c. C.43, as amended

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at Toronto

**FRESH AS AMENDED
RECEIVERSHIP ORDER
(RETURNABLE March 31, 2010)**

DAVIES WARD PHILLIPS & VINEBERG LLP
44th Floor, 1 First Canadian Place
Toronto, ON M5X 1B1

Matthew Gottlieb (LSUC #32268B)

Tel: 416.863.5516

Fax: 416.863.0971

Lawyers for the Receiver

Appendix “B”

1
December 23, 2010
Mr. Justice Morawetz,

REASONS FOR JUDGMENT

5 The Ontario Securities Commission ("OSC") brings this application for an order appointing RSM Richter Inc. as receiver of the assets, undertakings and property of Dr. Peter Sbaraglia, Ms. Mandy Sbaraglia, CO Capital Growth Inc. and 91 Days Hygiene Services Inc.

10 This matter has a long history. In July 2008, staff of the OSC obtained an order from the Commission pursuant to s. 11(1) of the Securities Act to investigate and inquire into the business and affairs of Dr. Sbaraglia, Mr. Robert Mander, CO and Pero Assets Inc. with respect to trading in securities
15 and potential breaches of Ontario securities law.

Based on the information that OSC staff received, it appeared that CO was obtaining funds from investors and investing those funds in securities.

20 The primary concern of the Commission was the use of investor funds by CO and Mr. Mander and Dr. Sbaraglia and whether funds and assets were available so as to ensure that the investors would be repaid.

25 During its investigation, the staff learned that a significant amount of funds obtained from investors had been transferred to Mr. Mander and his companies.

Mr. Mander operated and owned EMB Asset Group Inc. Through
30 EMB, Mr. Mander operated a fraudulent Ponzi scheme involving in excess of \$40 million of investors' funds. In certain instances, investors, such as CO Capital, invested money with

Reasons, Morawetz, J.,

Mr. Mander or EMB which had been loaned to them from third-party investors.

CO was run by D. Sbaraglia and Mr. Mander. The record also establishes that Ms. Sbaraglia was integrally involved in the business of CO.

10 Throughout the period under review, CO was used by Dr. and Ms. Sbaraglia as an investment vehicle to solicit third-party investors to invest with Mr. Mander through CO.

Neither Dr. or Ms. Sbaraglia were registered with the OSC.
15 CO raised approximately \$21.2 million from investors, who Dr. Sbaraglia described as both friends and family. There were approximately 25 to 30 CO investors.

It has been determined that a significant portion of investor funds were not invested at all. Rather, the funds were used
20 by Mr. Mander, and by CO to repay other investors.

The OSC takes the position that the Sbaraglias, through their role in CO and their close involvement with Mr. Mander, participated in the Ponzi scheme in a manner which they knew
25 or ought reasonably to have known, perpetrated a fraud on investors contrary to s. 126(1)(e) of the Securities Act.

This is disputed by the Sbaraglias who take the position that they were victims of the fraud and not perpetrators of the fraud as they did not know about the fraud until the summer
30 of 2009.

CO was incorporated on January 5, 2006. The first investor

Reasons, Morawetz, J.,

agreement is dated January 9, 2006 and CO continued to enter into loan agreements with investors until August 2009.

The OSC takes the position that CO's purported business model provided that CO would solicit investors to loan money; funds would then be loaned to CO for a fixed term, generally 1 to 3 years at a fixed high rate of interest ranging from 20% to 30%. CO would issue a loan agreement to each investor; funds from CO were transferred to Mr. Mander personally or through EMB or other Mander controlled companies for investment purposes and the profits generated from these investments above the fixed interest rate promised to investors were to be split equally between CO and Mr. Mander.

The record established that CO's actual business varied from the above model in a number of ways.. First, CO did not transfer all of the funds of CO investors to Mr. Mander as approximately \$6 - 7 million was not transferred directly to Mr. Mander or EMB. These funds were used in a number of ways by Dr. Sbaraglia, acting on behalf of CO, by making payments to CO investors with newly received funds from other CO investors, or in making investments in securities either directly in trading accounts in the names of other companies, which resulted in significant losses.

Further, it became clear that the funds that Mr. Mander did receive from CO were not invested, but were used to pay the returns to other investors that he was dealing with independently from CO.

RSM Richter as receiver of the EMB Asset Group, Mr. Mander and related entities obtained an order on July 14, 2010 in

Reasons, Morawetz, J.,

the receivership proceedings of EMB, which authorized the receiver to conduct investigations into the business and affairs of Dr. Sbaraglia and Ms. Sbaraglia and the CO group.

According to the receiver's reports, \$15.4 million of the \$21.2 million raised by CO from its investors was transferred to Mr. Mander/EMB.

10

The balance of what CO raised, estimated to be between \$6 and 7 million can be accounted for as follows. \$2.1 million was received personally by Dr. and Ms. Sbaraglia at the direction of Mr. Mander, purportedly for profits earned by them from the actions of Mr. Mander.

15

Approximately \$2.4 million was lost through trading accounts.

Approximately \$985,000 in general expenses of CO were paid from the CO bank accounts. Approximately \$585,000 was used by CO to purchase open ventures securities, which securities have very little value today. Approximately \$213,000 in rent payments in respect of a property located at 239 Church Street, Oakville, Ontario were made by CO to 91 Days Hygiene, a company wholly owned by Ms. Sbaraglia. Approximately \$383,000 in charges were incurred on a corporate visa in the name of CO, a significant number of which were not for the benefit of CO investors, but rather, were for the personal benefit of the Sbaraglias, including significant payments for restaurants, renovations of 239 Church Street and numerous other personal expenses.

20

Dr. Sbaraglia, on behalf of CO, opened bank accounts over which he had signing authority. The accounts were used to pool investor funds. At no time were the funds segregated in

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Reasons, Morawetz, J.,

any manner.

5
Dr. Sbaraglia acknowledged that throughout the review period CO used funds raised from one investor to pay amounts owing to other investors. This issue was specifically referenced in cross-examination, the transcript of which reads, commencing at Question 954 as follows:

10 Q. And Ms. Burton was an investor?

A. Yes.

Q. And this payment of \$63,250 was paid to her in connection with her investment?

A. Yes.

15 Q. And that payment was made just using other investors' funds also? Correct?

A. Yes.

Q. And I can keep going through this book, but what we will see is throughout this entire piece payments are being made by CO Capital directly from funds paid into CO Capital from other investors?

20

A. Right.

Q. And you are aware of that?

A. Yes.

25 Q. And you were aware that this was going on throughout the piece?

A. Yes.

The payments to investors from the CO bank accounts were made with cheques signed by Dr. Sbaraglia. Ms. Sbaraglia
30 undertook the bank statement and loan reconciliations for the payments.

Reasons, Morawetz, J.,

In July 2009, as part of its investigation, OSC staff conducted examinations of Mr. Mander and Dr. Sbaraglia. They were represented by the same legal counsel, who attended with each of them at their respective examinations.

Dr. Sbaraglia had retained legal counsel in or around June 2009 and it is apparent that Dr. Sbaraglia knew that the OSC's primary concern was whether investors' funds were at risk and whether CO could properly account for the funds. Dr. Sbaraglia understood that the OSC staff would be seeking verification from CO that the assets as between CO and Mr. Mander and EMB were in excess of what was owed to CO investors.

Dr. Sbaraglia specifically acknowledged that he was under oath and he swore to tell the truth at this OSC examination.

During the examination, OSC staff were advised by counsel to Dr. Sbaraglia of the following: CO investors consisted of only friends and family and that each of the investors had approached Dr. Sbaraglia about investing; CO had relied on legal advice obtained from another law firm with respect to CO's compliance with Ontario securities law in raising funds from third parties; CO investor funds were not at risk; the amount owing by CO to the CO investors was approximately \$8.5 million, but the bulk of the value of CO investors' funds were invested in real estate assets purchased by Mr. Mander and Dr. Sbaraglia; Dr. Sbaraglia and Mr. Mander had a verbal arrangement whereby all assets held by the Sbaraglias were used by Mr. Mander for the benefit of CO investors and that the assets held by Dr. Sbaraglia and Mr. Mander were valued at approximately \$12 million, and therefore well in excess of

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Reasons, Morawetz, J.,

all amounts owing to CO investors.

5

At no time during the examination did Dr. Sbaraglia correct his legal counsel. Further, it is clear that Dr. Sbaraglia was aware that his legal counsel was speaking on his behalf during the examination.

10

OSC takes the position that the statements made by Dr. Sbaraglia were materially misleading and that among other things, Dr. Sbaraglia did not advise that CO had raised almost \$1 million in 2006 prior to obtaining any legal advice as to whether CO was in compliance with Ontario securities law. Dr. Sbaraglia did not disclose a \$6 million obligation to CO to Pero pursuant to a loan agreement dated March 1, 2009. Dr. Sbaraglia does take the position that the obligation is not one of CO and that it was transferred to Mr. Mander. Documentation was produced that evidences a transfer to EMB/Mander, but there is no documented release from Pero in favour of CO or Dr. Sbaraglia. Further, Dr. Sbaraglia now claims that he feels only morally obligated to CO investors. Dr. and Ms. Sbaraglia wish to use the proceeds from the sale of their assets to pay certain of the CO investors in priority to others based on their assessment of the relative needs of the CO investors. It is also apparent that all the assets of the Sbaraglias and Mr. Mander and CO were not, in fact, available to satisfy the amounts owing to CO investors as Mander had loans outstanding with many additional investors, other than the CO investors, all of which has been documented in the Mander receivership.

25
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On August 7, 2009, following the examination, Dr. Sbaraglia's counsel provided OSC staff with a loan agreement between EMB

Reasons, Morawetz, J.,

and CO and an undertaking to the OSC in respect of loans made by CO investors to the real assets, which are being held for the benefit of those investors.

The undertaking provided that: (a) CO would not enter into any further loan agreements with third-party investors; (b) CO would cause outstanding loans to CO investors to be paid as they became due; (c) CO had used the loans from CO investors to acquire the assets listed in the schedule to the undertaking.

OSC takes the position that the undertaking constitutes an obligation and commitment in favour of OSC.

OSC also takes the position that immediately after entering into the undertaking, CO breached the terms of the undertaking by entering into a new loan agreement on August 21, 2009 in the amount of approximately \$54,000. Dr. Sbaraglia takes the position that this was not a new loan agreement, but a rollover of an existing agreement.

OSC also takes the position that Dr. Sbaraglia failed to identify material obligations in its schedule of outstanding loans. The undertaking failed to list nine loan agreements for a total of approximately \$9.4 million, which includes the Pero investment of \$6 million. Even taking into account the position put forth by Dr. Sbaraglia that the \$6 million Pero investment was an obligation transferred to Mr. Mander, there remains \$3.4 million in loans which were not listed.

Counsel for Dr. Sbaraglia and Ms. Sbaraglia and the CO Group paints a very different picture of events. Counsel suggests

Reasons, Morawetz, J.,

that the proper narrative should be that a well-intentioned family was caught in the middle of a Ponzi scheme, that they were led into error by a career fraudster and ill-advising lawyers. Counsel portrays his clients as victims of Mr. Mander, a predator fraudster. Counsel puts forth that his clients are guilty of no wrong-doing and that no investor had sued or made any claim against them. In fact, all investors without exception, support them. Mr. Davis does acknowledge that Mr. Obradovich is one investor who raises the spectre of a claim against Dr. Sbaraglia through Pero, on the basis that notwithstanding the transfer of the obligation to Mr. Mander there is still no obligation from CO.

Counsel for the Sbaraglias takes the position that his clients are not to blame, but rather, others were involved. These include the lawyers who acted for both the Sbaraglias and also Mr. Mander. Mr. Davis also contends that these lawyers breached their fiduciary duty, hid information from the Sbaraglias in their representation before the OSC and despite a grave conflict of interest, counsel advised the Sbaraglias and misinformed the OSC.

Mr. Davis also puts forth that Dr. Sbaraglia and Ms. Sbaraglia have been and remain committed to helping repair the damage to repay those who invested with them and to co-operate with the OSC. The Sbaraglias are also suing their lawyers to pay for the repairs.

The Sbaraglias also take the position that the OSC has been deficient in its investigation insofar as it had in its possession evidence of Mr. Mander's fraud for the better part of the year before examining Dr. Sbaraglia. Further, it

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Reasons, Morawetz, J.,

takes the position that the receivership is not necessary for
5a number of reasons including: (a) the creditors - who are
also victims of Mr. Mander - oppose the receivership; (b)
the receivership would strip the Sbaraglias of their assets
without any action or proceeding having been commenced, in
effect denying them due process; (c) the receivership would
be destructive, and it would diminish the Sbaraglias' efforts
10 to make the creditors whole; (d) it would punish the
Sbaraglias for Mr. Mander's wrong-doing and would ignore
their innocence; and (e) it would ignore the Sbaraglias'
diligence in trying to avoid this current predicament as it
would reduce the prospects of recovery in the litigation
15 against the lawyers. In all respects the Sbaraglias remain
transparent and wish to co-operate with the OSC.

The Sbaraglias also take the position that the receivership
will benefit no one and will be costly and consequently the
OSC's application, they take the position, should be
20 dismissed, and they should be relieved of their undertaking
and allowed to continue with their work.

From their standpoint, the matter began to unravel in the
spring of 2009 when CO Capital stopped making money for new
investments. As noted previously, the OSC served Dr.
25 Sbaraglia and Ms. Sbaraglia with a summons under the
Securities Act and they were required to attend examinations.
The Sbaraglias had no reasons, they say, to have known about
Mr. Mander's fraud at that point. There was also no reason
to think that they were caught in a fraudulent scheme, as Mr.
30 Mander had paid all investors to that date.

Dr. Sbaraglia acknowledges that his OSC examination and the

participation of his counsel at this examination resulted in
5 statements that may not have been accurate. Certain aspects
were not true. He now says that he knew that some of the
statements being made by his counsel were not true at the
time, but he did not correct these statements. He now
states that he was surprised by the disclosure. He also
felt that he was under duress at the time. He acknowledges
10 that he knew the information was inaccurate, but he did not
speak up. Dr. Sbaraglia is of the view that he has paid
dearly for his legal counsel's transgressions and having
already been victimized by the fraud, he now find himself
victimized by his own lawyer. He has sued that lawyer.

15 Dr. Sbaraglia also referenced the undertaking to the OSC.
It is described in his counsel's factum as being an ill-
advised undertaking. It is also referenced that the
undertaking was a misrepresentation in certain respects.
The undertaking states that the property had been bought with
20 CO Capital's money; this was false. It was also false
insofar as certain properties had been bought before CO
Capital's incorporation.

Dr. Sbaraglia takes the position his legal counsel had
prepared the statutory declaration which he had signed and
25 swore that assets that he owned or controlled would be held
in trust as security for the repayment of loans. He also
took the position that it was his legal counsel who provided
assurances to him which misled him into signing the
undertaking. Dr. Sbaraglia also takes the position that he
30 should be relieved of the undertaking as it was not freely
given or independently given and that it was not accurate.

Reasons, Morawetz, J.,

It is apparent that the Sbaraglias have also acknowledged that they have suffered financial and personal devastation at Mr. Mander's hands and that they are now working to repay investors fully, but they are struggling to meet their expenses. Their insolvency has been acknowledged.

Dr. Sbaraglia also takes the position that the OSC and the receiver are trying to access their personal assets, i.e., the proceeds or potential proceeds from the sale of their home or corporate assets, i.e. the proceeds through the sale of 239 Church Street to repay investors, most of whom are unrelated to the Sbaraglias.

The Sbaraglias also take the position that both the OSC and the receiver ignored the fact that the three properties in question were bought before the Sbaraglias met Mr. Mander and that there is no basis in law for stripping them of their personal assets.

The Sbaraglias also place certain responsibility on the OSC. The OSC was investigating Mr. Mander as early as 2008 and by August 2008 the OSC obtained bank records showing millions of dollars flowing to EMB, yet the Sbaraglias contend the OSC stood back and did nothing.

They do not accept the receiver's report as being accurate. They also stress that the receiver has not reviewed monies paid by CO Capital to its investors and, as a result, the accounting and subsequent allegations against Dr. Sbaraglia and Ms. Sbaraglia have been skewed.

Counsel for the Sbaraglias does acknowledge that mistakes

were made and that misrepresentations were made. However, she submits that there is nothing to be gained from a receivership; there are no hidden assets, the investigations have been complete and the most viable assets that the Sbaraglias have, mainly litigation against former counsel, can only be optimized in the absence of a receivership.

10 He also stressed that a number of CO Capital investors are in dire straits, that they are losing homes or businesses and that his clients are trying to arrange for these investors to receive some monies now so as to avoid disaster. Further, counsel contends that the Sbaraglias themselves are in dire
15 need and that while they seek to re-establish themselves professionally they need money for basic living expenses.

The two positions are diametrically opposed. The position put forward by the OSC is supported by the receiver and by counsel to Mr. Obradovich who claims he is a creditor for
20 some \$6 million. The position of Dr. Sbaraglia is supported by all of the remaining creditors, most of whom are family and friends.

Turning now to an analysis of the law. Section 129 of the Securities Act permits the commission to apply to the court
25 for an order appointing a receiver for all the property, assets and undertakings of a person or company. Such an order can be made where the court is satisfied that such an appointment is in the best interest of the company's creditors or the security holders or if it is appropriate for
30 the due administration of Ontario securities law.

A threshold question was raised by counsel on behalf of

certain creditors of CO Capital, contending that the court has no jurisdiction to appoint a receiver under s. 120 of the Act because constitutional principles impose a limitation on the power of the court to appoint a receiver under a provincial statute in situations where the entity over whose assets the receiver is sought to be appointed is insolvent

10 This position is based on the Constitution Act 1867, which gives exclusive jurisdiction over bankruptcy and insolvency to the federal parliament. On this basis, counsel contends that the Supreme Court has repeatedly held that a provincial statute which purports to impact creditors' priorities or to
15 otherwise substantially regulate the affairs of an insolvent person or company vis-à-vis its debtors is unconstitutional.

Counsel goes on to submit that in the present case, there is no challenge to the validity of s. 129 itself. It is not a necessary condition for the appointment of a receiver under
20 s. 129 that the person or company over whose assets the receiver is being appointed be insolvent. Section 129, therefore, does not in pith and substance relate to bankruptcy and insolvency.

25 The constitutional challenge was raised on behalf of creditors of CO Capital and not by counsel on behalf of Dr. Sbaraglia and Ms. Sbaraglia of CO Capital, who declined to take a position.

No notice of a constitutional question was served on the
30 Attorney General of Canada and the Attorney General of Ontario as provided for in s. 109 of the Courts of Justice Act. Counsel for the creditors who put forth this argument

relies on his statement that there is no direct challenge to the validity of s. 129 itself.

Counsel to the receiver submits that this submission is belied by the statements contained at paragraph 25 of the factum of counsel for the CO Capital creditors, which takes direct aim on the constitutional validity or constitutional applicability of the Act in this context, and further, that the notice provision in s. 109 of the Courts of Justice is mandatory. In the absence of such notice, s. 109(2) of the Courts of Justice Act provides that the Act, Regulation and Bylaw, a rule of common law shall not be adjudged to be invalid or inapplicable.

In my view, the position put forth by the creditors of CO Capital calls into question the constitutional validity of the Securities Act in this context. No case law was put forward to support this position. This seems unusual because, as was pointed out to counsel in argument, if this position is correct with respect to the Securities Act, it would also call into question the thousands and thousands of receivership orders granted over the years under s. 101 of the Courts of Justice Act. Counsel was unable to reference any case law under which such a challenge had been successfully made to receiverships granted under the Courts of Justice Act.

I am satisfied that if counsel wished to raise this issue, the same should have been done after providing the required Notice of Constitutional Question.

A number of disputes have been raised by the Sbaraglias with

respect to the factual background. However, putting their position at its highest, there are still a number of facts that are most troubling:

1. Neither Dr. Sbaraglia or Ms. Sbaraglia ~~were~~ registered with the Commission. CO raised approximately \$21.2 million from CO investors.

10 2. CO did not transfer all the funds of CO investors to Mr. Mander and EMB. Approximately one-third of the funds raised, namely \$6 - 7 million, were not transferred. These funds were used in part to make
15 investments with newly received funds from other CO investors. This activity took place over a number of months. It cannot be characterized as a mistake.

20 3. \$ 213,000 in payments were made in respect to property located at 239 Church Street. These payments were made by CO to 91 Days Hygiene Services Inc.

25 4. \$383,000 in charges were incurred on a corporate visa in the name of CO with a significant number of payments being made ~~at~~ for the benefit of CO investors, but rather, for the personal benefit of the Sbaraglias.

30 5. It is also clear that the OSC was misled in its investigation. The Sbaraglias did ~~n~~ advise the OSC that they raised almost \$ 1 million prior to receiving any legal advice as

5 to whether they were in compliance w i t h securities law. They did not disclose the \$6 million obligation to Pero, regardless of whether the matter had been transferred to Mander. They did not fully disclose their remaining creditors.

10 6. With respect to the undertaking, it seems to me clear that the Sbaraglias knew counsel's strategy was to convince the OSC that there were sufficient assets to repay a l l C O investors and accordingly proceedings should not be taken against them. Through-out the investigation, the Sbaraglias sat by and let legal counsel make representations to the OSC that they knew were false. In this respect, the Sbaraglias did have options. They could have taken steps to ensure that the truth came out. They chose to remain silent.

20 The Sbaraglias take the position that the receivership will achieve nothing. They insist that the litigation can only be maximized under their direction. They insist that they are the ones who should be able to direct the payment of funds to creditors in dire straits.

25 Counsel to the Sbaraglias and also to the CO creditors submit that if there are any issues that require a resolution they can be brought forth to the court. In this respect, I take it from their submissions that there is a tacit
30 acknowledgement that there are several loose ends in this matter that will require further direction.

The criteria for determining what is in the best interests of
5 creditors, security holders or subscribers for the purposes
of the appointment of a receiver pursuant to securities
legislation is broader than the solvency test. The criteria
should take into consideration all the circumstances and
whether in the context of the circumstances it is in the best
interests of creditors that a receiver be appointed. The
10 criteria should also take into account the interest of all
stakeholders (OSC v. Factorcorp 2007 OJ 4496; OSC v. Sextant
2009 OJ 3063).

Further, where there is a history of mismanagement, no
15 evidence of a tangible alternative resolution, evidence that
investors' interests will not be served by maintaining the
status quo and evidence that the company is not in a better
position than a receiver to protect investors' interests, it
is appropriate to appoint a receiver.

20 Further, where there is evidence of regulatory breaches and
evidence that the value and integrity of the assets purchased
with investor funds has been compromised, it is in the
investors' best interests that a receiver be appointed such
that the investors are provided with an independent and
verifiable review and analysis. Investors deserve
25 treatment they can rely on (see Factorcorp., Sextant, and OSC
v. ASL Direct).

The second part of the test, the alternate test, is that
securities legislation has as its primary goal, the
30 protection of the investing public and the protection of the
integrity of the capital markets. Section 1.1 of the Act
provides that the purposes of the Act are to provide

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protection to investors from unfair or improper or fraudulent practices and to foster fair and efficient capital markets and confidence in the capital markets.

It seems to me that an assessment of whether the appointment of a receiver is appropriate for the due administration of Ontario Securities law must therefore take into consideration the purposes of the Act to be undertaken with a view to determining whether such an appointment is consistent with the goals of protecting investors and protecting the integrity of the capital markets.

In this respect, it is noteworthy that, pursuant to s. 122 of the Act, it is an offence to mislead staff of the Commission during the course of an examination taken as part of an investigation.

The failure to advise staff of complete information about the flow of investor funds in the operation and business of the entity in question amounts to a contravention of s. 122 of the Act. The offence of misleading staff can occur by making affirmative statements and can equally occur by omission (Norshield Asset Management Canada Limited 2010, 33 OSCB 7171).

In addition, s. 126 of the Act prohibits conduct which perpetrates a fraud on investors. The use of investor funds to repay other investors and for personal benefit constitutes securities fraud pursuant to s. 126.1(b) of the Act.

Having considered the uncontradicted facts noted above, it is clear to me that this is a situation that cries out for the

appointment of a receiver. I am satisfied that by using investor funds to repay other investors, by using investor funds for personal use, by being untruthful to the OSC, by not fully disclosing creditors of CO to the OSC, it cannot be in the best interests of creditors of CO Capital that the continued administration of creditors' affairs be administered by the Sbaraglias. This is a situation that
10 requires an independent court officer to oversee.

I am making this finding notwithstanding the level of support provided by the family and friends who are creditors of the Sbaraglias. It could very well be that there are other
15 creditors, most notably Mr. Obradovich. It is essential, in my view, that a claims process be established which can be verified as being accurate. I am not satisfied that this can be accomplished without an independent court officer overseeing the process.

20 In making this determination I cannot overlook that CO, Dr. Sbaraglia and Ms. Sbaraglia retained and had access to funds in excess of \$6 million. I also cannot overlook that they improperly used some of these funds for personal use or for related corporate use. I also cannot overlook that some of
25 the new money was used to pay interest payments to old investors. To use the words of counsel of the receiver, "This is the hallmark of a Ponzi scheme where you keep the dollars rolling."

I have no doubt that Mr. Mander contributed significantly to
30 the problems that the Sbaraglias currently face. I also have to take into account that there may be issues with respect to deficiencies in the legal advice that can be

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pursued in due course. With respect to the litigation against former counsel, I have not been persuaded that the Sbaraglias are the best party to direct such litigation. Rather, it seems to me that the insertion of an independent court officer is essential to ensure the best outcome for creditors.

10 The Sbaraglias have also blamed the OSC for not taking more prompt action. It could very well be that the OSC could have acted more promptly. However, the timing of the OSC's involvement does not excuse or explain the activities of the Sbaraglias that led to the determination being made today.

15 The Sbaraglias also take the position that breaches of securities legislation have not been clearly proven. I do note that under s. 129 there is a broad discretion that the courts can make such an order which does not require evidence of a breach. Having said that, there are certain very serious
20 concerns that have been raised by the OSC with respect to possible breaches of the statute.

With respect to the second part of the test which provides a receiver can be appointed if it is appropriate for the due
25 administration of Ontario securities law, I am satisfied that this is the type of case that calls for such an appointment.

The factors that have led to my decision to appoint a receiver as being in the best interests of the company's creditors and the potential Sbaraglia creditors is also applicable for the appointment under the second part of the
30 test. This was a Ponzi scheme. Although Mr. Mander may have been the head of the Ponzi scheme, it is clearly apparent that by using investors' money to repay other investors,

steps were taken by the Sbaraglias that were improper. The use of investors' money to pay personal and related company expenses is also improper. It also cannot be overlooked that the Sbaraglias misled the OSC in the course of its investigation. This type of activity cannot and should not be overlooked and I am satisfied that the appointment of the receiver is also justified under the second part of the test.

10

As Mr. Gottlieb summed up in his reply, the remedy of the appointment of a receiver goes beyond certain principles, it also takes into account the importance of a neutral court officer to oversee the claims process, the evaluation process and to provide appropriate recommendations as to the administration of the estate.

15

A considerable amount of investigation has already been done. Most assets have been identified. However, issues remain outstanding with respect to the identification of proper creditors, maximizing asset realization through litigation and the necessity to demonstrate that transparency exists in all respects in the resolution of all outstanding matters.

20

For the foregoing reasons, the application of the OSC is granted. I would be grateful if counsel could prepare an appropriate order for my review.

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CERTIFIED

HELEN P. SINCLAIR
OFFICIAL COURT REPORTER
SUPERIOR COURT OF JUSTICE

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