

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

BETWEEN:

**CHIEF EXECUTIVE OFFICER OF THE  
FINANCIAL SERVICES REGULATORY AUTHORITY OF ONTARIO**

Applicant

- and -

**FIRST SWISS MORTGAGE CORP.**

Respondent

APPLICATION UNDER SUBSECTION 37 OF THE *MORTGAGE BROKERAGES, LENDERS AND ADMINISTRATORS ACT*, 2006, S.O. 2006, c. 29, AS AMENDED, AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c.C.43, AS AMENDED

**FACTUM OF THE APPLICANT  
(Application Returnable March 17, 2023)**

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**Lawyers for the Applicant**

**TO: SERVICE LIST**

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SUPERIOR COURT OF JUSTICE  
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**I – NATURE OF THE APPLICATION**

1. This receivership application has been brought on an urgent basis as a result of recent and very serious allegations of wrongdoing by First Swiss Mortgage Corp. (“**First Swiss**”) that have been brought to the attention of the Financial Services Regulatory Authority of Ontario (“**FSRA**”).

2. The affidavit evidence on this application, which includes communications between First Swiss and lenders for whom it purported to place and hold mortgages in trust, title registration documents and other material, indicates that First Swiss (among other things):

- (a) under-reported the value of mortgages under administration in filings with FSRA;
- (b) discharged mortgages represented to have been held in trust for individual investors, without notice to these investors and without funds being repaid to them;
- (c) failed to ever register on title certain mortgages represented by First Swiss to have been entered into on behalf of investors;

- (d) has ceased operations without accounting to investors for their funds; and
- (e) has declared itself to be insolvent and delivered a sworn statement of affairs in a bankruptcy filing that fails to account for investors' funds.

3. It appears that First Swiss filed an assignment in bankruptcy on Wednesday March 15, 2023, possibly as a preemptive step in response to this receivership application. In any event, as explained below, the bankruptcy of First Swiss does not give rise to a stay of this application, and the trustee in bankruptcy is not opposing this application.

4. It is in the public interest that a receiver be immediately appointed. A receivership on the terms set out in the draft order submitted by FSRA is supported by investors who have millions of dollars at risk. The draft order contemplates that the proposed receiver will file a report with the Court within 15 days to provide its findings and recommendations for the benefit of all interested parties, at which time a subsequent hearing would take place to deal with any relevant issues based on a more complete factual record with respect to the affairs of First Swiss.

## **II - FACTS**

### **Background**

5. FSRA monitors regulated mortgage brokers and brokerages to ensure they uphold the required standard of conduct and possesses the ability to take enforcement action if mortgage brokers or brokerages fail to comply with the law.

6. First Swiss is a corporation incorporated under the laws of Canada and has its registered head office at 5700 Yonge St., Suite 200, Toronto, Ontario (“**5700 Yonge**”), which was also the address listed on its website.<sup>1</sup>

7. First Swiss held itself out to be a “leading institutional lender for residential and commercial properties”.

8. First Swiss’ business is regulated by FSRA. First Swiss is licensed as a mortgage brokerage (license no. 10550) and a mortgage administrator (license no. 11956) under the MBLAA. First Swiss’ mailing address as a mortgage brokerage and mortgage administrator is listed as 5775 Yonge St., Suite 525, Toronto, Ontario (“**5775 Yonge**”).<sup>2</sup>

9. Reza Nezami-Nia, also known as Reza Nezami, is an individual who resides in Richmond Hill, and at all material times was listed as the sole officer and director of First Swiss. Mr. Nezami is also listed as the Principal Broker on record for First Swiss (license no. M08003821).<sup>3</sup>

#### **Annual Information Return as Reported by First Swiss**

10. In its 2021 Annual Information Return, First Swiss stated that:

- (a) 5775 Yonge was its principal business address;
- (b) It had 34 mortgages under administration, with a total value of \$3,210,000 (with a total of 29 mortgages located in Ontario bearing a value of \$2,850,000); and

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<sup>1</sup> Exhibit “D” to the Affidavit of Cameron Clarke affirmed March 15, 2023 (“**Clarke Affidavit**”), Tab 2 of the Application Record returnable March 17, 2023 (“**Application Record**”), at para. 6.

<sup>2</sup> Clarke Affidavit at paras. 3-4.

<sup>3</sup> Exhibit “D” to the Clarke Affidavit; Exhibit “E” to the Clarke Affidavit Tab 2 of the Application Record, at para. 7.

- (c) Mr. Nezami was the First Swiss compliance officer.<sup>4</sup>

### **Complaints Received by FSRA**

11. Beginning in March 2023, FSRA received a series of complaints concerning the conduct of First Swiss and its representatives from parties that had invested in mortgages through First Swiss.

These complaints allege, among other things, that:

- (a) First Swiss had failed to send statements of their mortgage investments;<sup>5</sup>
- (b) First Swiss had failed to make payments when due to the complainants;<sup>6</sup>
- (c) First Swiss was not responding promptly or at all when contacted via email, phone call or at its physical addresses;<sup>7</sup>
- (d) mortgages administered by First Swiss were discharged without notice to their beneficial owners and without funds being repaid to them;<sup>8</sup> and
- (e) mortgages represented by First Swiss to have been entered into on behalf of beneficial owners were not registered on title.<sup>9</sup>

12. Daniel Baum, Rose Baum and Jared Green have sworn affidavits indicating, among other things, as follows:

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<sup>4</sup> Clarke Affidavit at para. 5; Exhibit “C” to the Clarke Affidavit, Tab 2 of the Application Record.

<sup>5</sup> Clarke Affidavit at para. 12; Exhibit “I” to the Clarke Affidavit, Tab 2 of the Application Record.

<sup>6</sup> Clarke Affidavit at paras. 12-15; Exhibits “I” to “L” to the Clarke Affidavit, Tab 2 of the Application Record.

<sup>7</sup> Clarke Affidavit at paras. 12-13; Exhibits “I” and “J” to the Clarke Affidavit, Tab 2 of the Application Record.

<sup>8</sup> Clarke Affidavit at paras. 13 and 15; Exhibits “J” and “L” to the Clarke Affidavit, Tab 2 of the Application Record.

<sup>9</sup> Clarke Affidavit at para. 14; Exhibit “K” to the Clarke Affidavit, Tab 2 of the Application Record.

- (a) They began investing with First Swiss in 2011, 2012 and 2018 respectively.<sup>10</sup>
- (b) Ms. Baum made 31 mortgage investments through First Swiss. The investments were made in her name and also in the names of her children and grandchildren. Mr. Baum made 8 mortgage investments through First Swiss. Mr. Green made 3 mortgage investments through First Swiss.<sup>11</sup>
- (c) Pursuant to a servicing agreement and trust and beneficial owner agreement and subsequent addendum agreements for each of their respective mortgage investments, First Swiss assigned, transferred and set over to Ms. Baum, Mr. Baum and Mr. Green respectively, as beneficial owners and assignees, all of First Swiss' right, title and interest as mortgagee in the subject mortgages in which they had respectively invested.<sup>12</sup>
- (d) Each time the mortgages they invested in were purported to be discharged, Ms. Baum, Mr. Baum and Mr. Green would either direct First Swiss to use the proceeds for reinvestment into new mortgages or be paid the principal amount under the mortgage.<sup>13</sup>
- (e) Ms. Baum currently has 11 active mortgages with First Swiss. Mr. Baum has 1 active mortgage with First Swiss. Mr. Green has 2 active mortgages with First Swiss.<sup>14</sup>

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<sup>10</sup> Affidavit of Daniel Baum, affirmed on March 15, 2023 (“**Daniel Affidavit**”), Tab 4 of the Application Record at para. 11; Affidavit of Rose Baum, affirmed on March 15, 2023 (“**Rose Affidavit**”), Tab 3 of the Application Record at para. 6; Affidavit of Jared Green, affirmed on March 15, 2023 (“**Green Affidavit**”), Tab 5 of the Application Record at para. 7.

<sup>11</sup> Rose Affidavit at para. 7; Daniel Affidavit at paras. 11-18; Green Affidavit at paras. 7-10.

<sup>12</sup> Rose Affidavit at para. 7; Daniel Affidavit at paras. 12,15; Green Affidavit at para. 7-10.

<sup>13</sup> Rose Affidavit at para. 8; Daniel Affidavit at para. 17; Green Affidavit at paras. 6-10.

<sup>14</sup> Rose Affidavit at para. 10; Daniel Affidavit at para. 22; Green Affidavit at paras. 8,10.

- (f) In February 2023, none of these investors received the required monthly interest payment from First Swiss in relation to any of their active mortgages.<sup>15</sup>
- (g) Ms. Baum, Mr. Baum and Mr. Green have recently discovered that certain mortgages were never registered against the subject properties.<sup>16</sup>
- (h) Ms. Baum, Mr. Baum and Mr. Green have also discovered that several of their respective active mortgage investments have been discharged without their knowledge.<sup>17</sup>

## **Dancap**

13. A representative of Dancap Private Equity Inc. (“**Dancap**”) has sworn an affidavit indicating, among other things, as follows:

- (a) Dancap had a relationship with First Swiss as a mortgage investor dating back to 2013. Since that time, Dancap has funded approximately 85 residential second mortgages with First Swiss.<sup>18</sup>
- (b) As at December 31, 2022, Dancap has 36 mortgage investments in Ontario and 24 mortgage investments in British Columbia through First Swiss as broker and administrator, for a total principal amount of approximately \$6.7 million.<sup>19</sup>

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<sup>15</sup> Rose Affidavit at para. 11; Daniel Affidavit at paras. 25, 26; Green Affidavit at paras. 15, 16.

<sup>16</sup> Rose Affidavit at paras. 15-17; Daniel Affidavit at paras. 32, 33; Green Affidavit at paras. 17, 18.

<sup>17</sup> Rose Affidavit at paras. 18-21; Daniel Affidavit at paras. 27-30; Green Affidavit at paras. 19-21.

<sup>18</sup> Affidavit of Elias Toby affirmed March 15, 2023 (“**Toby Affidavit**”), Tab 6 of the Application Record, at para. 4.

<sup>19</sup> Toby Affidavit at para. 5.

- (c) Dancap has not received a distribution for its December 20, 2022 statement or any later periods, but had previously received payments for all monthly statements.<sup>20</sup>
- (d) Dancap made several enquiries regarding the status of the outstanding payments. In response to those enquiries, First Swiss indicated that it was experiencing “banking issues” and ultimately, on March 7, 2023, indicated that payments would be halted due to a “potential restructuring process”.<sup>21</sup>
- (e) Dancap obtained real property searches for various properties over which it was led to believe it held mortgages. As a result of those searches, Dancap learned that:
  - i. of the 36 Ontario mortgages, 8 were actively registered, 6 were never registered and the remaining 22 had been discharged between September 2017 and August 2022; and
  - ii. of the 24 British Columbia mortgages, 2 were actively registered, 5 were never registered, 11 were “cancelled” between July of 2018 and November of 2022, and the status could not be determined on 6 mortgages.<sup>22</sup>

## **Cessation of Operations**

14. First Swiss has notified investors and the public generally that it has ceased operations.<sup>23</sup>

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<sup>20</sup> Toby Affidavit at para. 6.

<sup>21</sup> Toby Affidavit at paras. 8-11.

<sup>22</sup> Toby Affidavit at para. 17.

<sup>23</sup> Rose Affidavit at para. 22, Exhibit “K” to the Rose Affidavit.; Daniel Affidavit at para. 5, Exhibit “K” to the Daniel Affidavit; Green Affidavit at para. 22, Exhibit “I” to the Green Affidavit; Toby Affidavit at para. 15, Exhibit “D” to the Toby Affidavit.



15. On March 15, 2023, First Swiss made an assignment in bankruptcy, and delivered a sworn statement of affairs that fails to account for investors' funds.<sup>24</sup>
16. The trustee in bankruptcy has confirmed that it is not opposing this application.

#### IV – LAW AND ARGUMENT

##### Section 37 of the MBLAA

17. Subsection 37(1) of the MBLAA permits FSRA to apply to the court for an order appointing a receiver of property that is in the possession or under the control of a licensee or entity that FSRA believes, on reasonable grounds, is or was required to have a license.<sup>25</sup>
18. Subsection 37(2) of the MBLAA authorizes the court to make the appointment on conditions it considers appropriate, where the court is satisfied the appointment is in the public interest.<sup>26</sup>
19. First Swiss is licensed as a mortgage brokerage and a mortgage under the MBLAA.<sup>27</sup>

##### Section 101 of the CJA

20. Pursuant to section 101 of the CJA, the Court may appoint a receiver or receiver and manager where it is just or convenient to do so.

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<sup>24</sup> Clarke Affidavit at para. 30; Exhibit “O” to the Clarke Affidavit.

<sup>25</sup> *Mortgage Brokerages, Lenders and Administrators Act, 2006*, S.O. 2006, c. 29 (“**MBLAA**”), [s. 37\(1\)](#).

<sup>26</sup> *MBLAA*, [s. 37\(2\)](#).

<sup>27</sup> Clarke Affidavit at paras. 3-4.

**The Appointment of a Receiver is in the Public Interest, and is Just and Convenient**

21. The allegations against First Swiss, supported by evidence as contained in the Application Record filed by FSRA, discloses (among other things) that First Swiss:

- (a) under-reported the value of mortgages under administration in filings with FSRA;
- (b) discharged mortgages represented to have been held in trust for individual investors, without notice to these investors and without funds being repaid to them;
- (c) failed to ever register on title certain mortgages represented by First Swiss to have been entered into on behalf of investors;
- (d) has ceased operations without accounting to investors for their funds; and
- (e) has declared itself to be insolvent and delivered a sworn statement of affairs in a bankruptcy filing that fails to account for investors' funds.

22. The immediate appointment of a receiver with the powers and on terms set out in the draft order submitted by FSRA is clearly necessary for the protection of First Swiss' property and in the best interests of its investors and other stakeholders.

**No Stay Under the BIA**

23. Under section 69.3 of the BIA, "on the bankruptcy of any debtor, no creditor has any remedy against the debtor or the debtor's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy."<sup>28</sup>

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<sup>28</sup> *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 ("BIA"), [s. 69.3](#).

24. FSRA is not a creditor of First Swiss, and this proceeding does not involve the recovery of a claim provable in bankruptcy.

**If the Stay Applies, It Should be Lifted**

25. In any event, if section 69.3 of the BIA did apply, it would be appropriate that the stay be lifted pursuant to section 69.4 to allow this application to proceed.

26. Under section 69.4 of the BIA, the court may make a declaration that a stay under sections 69 to 69.31 no longer applies if it is satisfied that (a) “the creditor is likely to be materially prejudiced by its continued operation”, or (b) “that it is equitable on other grounds to make such a declaration.”<sup>29</sup>

27. Investors stand to be materially prejudiced by any delay in investigating the affairs of First Swiss. A receiver with the powers proposed by FSRA ought to be immediately appointed. It is contemplated that the proposed receiver will file a report with the Court within 15 days to provide its findings and recommendations for the benefit of all interested parties, at which time a subsequent hearing would take place to deal with any relevant issues based on a more complete factual record with respect to the affairs of First Swiss.

**V – RELIEF SOUGHT**

28. For the reasons set out above, FSRA respectfully requests that KSV Restructuring Inc. be appointed as receiver on the terms of the proposed order being sought.

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<sup>29</sup> BIA, [s. 69.4](#).

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 16<sup>th</sup> day of March, 2023.

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**CHAITONS LLP**

**Lawyers for the Applicant**

**SCHEDULE “A”**  
**LIST OF AUTHORITIES**

Nil.

## SCHEDULE “B”

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

#### ***Mortgage Brokerages, Lenders and Administrators Act, 2006, S.O. 2006, c. 29***

Appointment of receiver, etc.

37 (1) The Chief Executive Officer may apply to the Superior Court of Justice for an order appointing a receiver, receiver and manager, trustee or liquidator of property that is in the possession or under the control of a licensee or person or entity who the Chief Executive Officer believes, on reasonable grounds, is or was required to have a licence (the “designated person”). 2006, c. 29, s. 37 (1); 2018, c. 8, Sched. 17, s. 2.

#### *Order*

(2) If the court is satisfied that the appointment is in the public interest, the court may make the appointment and may impose such conditions as the court considers appropriate. 2006, c. 29, s. 37 (2).

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

Injunctions and receivers

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

#### *Terms*

(2) An order under subsection (1) may include such terms as are considered just.

#### ***Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3***

Stays of proceedings — bankruptcies

69.3 (1) Subject to subsections (1.1) and (2) and sections 69.4 and 69.5, on the bankruptcy of any debtor, no creditor has any remedy against the debtor or the debtor’s property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy.

End of stay

(1.1) Subsection (1) ceases to apply in respect of a creditor on the day on which the trustee is discharged.

## Secured creditors

(2) Subject to sections 79 and 127 to 135 and subsection 248(1), the bankruptcy of a debtor does not prevent a secured creditor from realizing or otherwise dealing with his or her security in the same manner as he or she would have been entitled to realize or deal with it if this section had not been passed, unless the court otherwise orders, but in so ordering the court shall not postpone the right of the secured creditor to realize or otherwise deal with his or her security, except as follows:

- (a) in the case of a security for a debt that is due at the date the bankrupt became bankrupt or that becomes due not later than six months thereafter, that right shall not be postponed for more than six months from that date; and
- (b) in the case of a security for a debt that does not become due until more than six months after the date the bankrupt became bankrupt, that right shall not be postponed for more than six months from that date, unless all instalments of interest that are more than six months in arrears are paid and all other defaults of more than six months standing are cured, and then only so long as no instalment of interest remains in arrears or defaults remain uncured for more than six months, but, in any event, not beyond the date at which the debt secured by the security becomes payable under the instrument or law creating the security.

## Exception

(2.1) No order may be made under subsection (2) if the order would have the effect of preventing a secured creditor from realizing or otherwise dealing with financial collateral.

## Court may declare that stays, etc., cease

69.4 A creditor who is affected by the operation of sections 69 to 69.31 or any other person affected by the operation of section 69.31 may apply to the court for a declaration that those sections no longer operate in respect of that creditor or person, and the court may make such a declaration, subject to any qualifications that the court considers proper, if it is satisfied

- (a) that the creditor or person is likely to be materially prejudiced by the continued operation of those sections; or
- (b) that it is equitable on other grounds to make such a declaration.

**CHIEF EXECUTIVE OFFICER OF THE FINANCIAL  
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Applicant

-and-

**FIRST SWISS MORTGAGE CORP.**

Respondent

Court File No. CV-23-00696362-00CL

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