

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

B E T W E E N :

ONTARIO SECURITIES COMMISSION

Applicant

- and -

GO-TO DEVELOPMENTS HOLDINGS INC., OSCAR FURTADO, FURTADO HOLDINGS INC., GO-TO DEVELOPMENTS ACQUISITIONS INC., GO-TO GLENDALE AVENUE INC., GO-TO GLENDALE AVENUE LP, GO-TO MAJOR MACKENZIE SOUTH BLOCK INC., GO-TO MAJOR MACKENZIE SOUTH BLOCK LP, GO-TO MAJOR MACKENZIE SOUTH BLOCK II INC., GO-TO MAJOR MACKENZIE SOUTH BLOCK II LP, GO-TO NIAGARA FALLS CHIPPAWA INC., GO-TO NIAGARA FALLS CHIPPAWA LP, GO-TO NIAGARA FALLS EAGLE VALLEY INC., GO-TO NIAGARA FALLS EAGLE VALLEY LP, GO-TO SPADINA ADELAIDE SQUARE INC., GO-TO SPADINA ADELAIDE SQUARE LP, GO-TO STONEY CREEK ELFRIDA INC., GO-TO STONEY CREEK ELFRIDA LP, GO-TO ST. CATHARINES BEARD INC., GO-TO ST. CATHARINES BEARD LP, GO-TO VAUGHAN ISLINGTON AVENUE INC., GO-TO VAUGHAN ISLINGTON AVENUE LP, AURORA ROAD LIMITED PARTNERSHIP and 2506039 ONTARIO LIMITED

Respondents

APPLICATION UNDER SECTIONS 126 AND 129 OF THE *SECURITIES ACT*, R.S.O. 1990, c. S.5, AS AMENDED

**AIDE-MÉMOIRE OF THE COURT-APPOINTED RECEIVER
(Case Conference Scheduling Appointment – Monday, August 14, 2023)**

1. This aide-mémoire is filed by KSV Restructuring Inc. (“**KSV**”), in its capacity as the Court-appointed receiver and manager (in such capacity, the “**Receiver**”), to assist the Court in scheduling two matters most recently raised in the [Receiver’s Seventh Report dated June 6, 2023](#) (the “**Seventh Report**”). Subject to the Court’s direction, the Receiver is of the view that these two matters may be dealt with summarily as part of one motion (or, should the Court prefer, two separate motions):

- (a) to compel Oscar Furtado, via counsel, to release approximately 11,271 identified emails (including, without limitation, any attachments thereto) to the Receiver (the “**Production Matter**”); and

- (b) to uphold the Receiver's disallowance of Mr. Furtado's claim against Go-To Stoney Creek (the "**Stoney Creek Disallowance Matter**").

2. Unless otherwise specified, all capitalized terms are defined in the Seventh Report.

3. The timing of the Seventh Report coincided with, *inter alia*, the Receiver's motion to approve the sale and vesting of the ninth and final parcel of Real Property in this proceeding (the Vaughan Transaction, now closed), which motion was heard and approved by The Honourable Mr. Justice Centa on June 15, 2023. The Seventh Report also provided status updates regarding the proceedings generally, and advised that judicial intervention may be necessary regarding the Production Matter and the Stoney Creek Disallowance Matter.

The Production Matter

4. As previously reported, the Receiver and Mr. Furtado's counsel (Miller Thomson) negotiated the Privilege Protocol, which was acknowledged and agreed by Mr. Furtado on November 9, 2022. In accordance with the Privilege Protocol: (a) the Receiver retained Epiq to host the Receivership Respondents' Data in the Repository; (b) Miller Thomson reviewed the Data in the Repository to determine whether to assert any Objections to disclosure of any Potentially Privileged Data to the Receiver; and (c) on May 19, 2023, Miller Thomson advised that it had Objections to approximately 78,000 records being released to the Receiver.

5. As noted in the Seventh Report, the Receiver does not agree that a large portion of the 78,000 records classified as privileged are in fact privileged, and, in any event, does not believe that these records are properly withheld from the Receiver.

6. At this juncture, and without prejudice to the Receiver's rights to receive additional productions from the Privilege Protocol, the Receiver is specifically interested in approximately 11,271 identified emails (including, without limitation, any attachments thereto) on which both Messrs. Furtado and Malanca (a.k.a. Palmeri) are parties (collectively, the "**Identified Emails**").

7. Mr. Furtado's counsel has Objected to the release of the Identified Emails on the sole purported basis of solicitor-client privilege.

8. The Receiver considers the continued withholding of the Identified Emails to be frivolous and without merit under the Privilege Protocol, given that: (a) Mr. Furtado was not in a solicitor-client relationship with Mr. Malanca/Palmeri (who is not a lawyer); and (b) non-privileged communications cannot be cloaked with privilege by also sending them to a lawyer. Moreover, even if privilege could somehow attach to the Identified Emails, the [*Greymac decision*](#)¹ still entitles the Receiver to waive such privilege on behalf of the Receivership Respondents for the purposes for which the Receiver was appointed, which includes investigating the alleged improper dealings between Messrs. Furtado and Malanca/Palmeri.

9. As noted in the Seventh Report, the Production Matter is relevant to determining the ASD Claim filed against Go-To Adelaide on a secured basis for approximately \$11.1 million.² In turn, the ASD Claim is an economic gating issue to resolving all remaining material matters in this receivership proceeding, including, without limitation: (a) the FAAN Claim filed against Go-To Adelaide on a secured basis for approximately \$5.2 million; and (b) additional unsecured, intercompany and investor claims against Go-To Adelaide of approximately \$32.9 million. As at the date of the Seventh Report, there was approximately \$14.7 million in Go-To Adelaide's receivership bank account.

10. The Receiver therefore requests that the Production Matter be scheduled on an expedited basis. Given that Miller Thomson has already reviewed the Data and labelled each of the Identified Emails as Objected on the sole purported basis of solicitor-client privilege, the Receiver believes that the only step required before the Production Matter is heard is the exchange of facts.

The Stoney Creek Disallowance Matter

11. As previously reported: (a) on March 28, 2023, the Receiver issued the Stoney Creek Furtado Disallowance to Mr. Furtado, which disallowed Mr. Furtado's claim against Go-To Stoney Creek in full; and (b) on April 11, 2023, Miller Thomson filed the Stoney Creek Furtado Dispute Notice, which disputes the disallowance of Mr. Furtado's claim against Go-To Stoney Creek.

¹ *Ontario (Securities Commission) v Greymac Credit Corp.*, 41 O.R. (2d) 328 [*Greymac*] at [para 60](#).

² As of May 4, 2022. Interest and costs continue to accrue on this claim.

12. Substantially all of Mr. Furtado's claim against Go-To Stoney Creek relates to fees totalling \$867,769 that he claims are owing to him for guaranteeing certain Go-To Stoney Creek Real Property mortgages. Mr. Furtado has not disputed the Receiver's disallowance of the remainder of his claim (a nominal amount of \$748) in respect of a purported shareholder loan.

13. The Receiver provides several alternative reasons in the Stoney Creek Furtado Disallowance for disallowing the claim, but the first reason is that the claim "*constitutes undisclosed, related-party agreements made by a fiduciary in breach of the fiduciary's contractual and/or common law duties.*"

14. In response, the Stoney Creek Furtado Dispute Notice does not dispute the Receiver's finding that Mr. Furtado failed to disclose the agreements. Instead, the dispute states that "*Mr. Furtado disagrees entirely with the assertion that there was any requirement or obligation on his part to disclose the entitlement to guarantee fees. In addition and more importantly, any failure to disclose the guarantee fees does not eliminate the enforceable liability for guarantee fees, which is clearly and unequivocally documented in the Guarantee Agreement.*"

15. The Receiver stated in the Seventh Report that "*If the Stoney Creek Furtado Dispute Notice is not withdrawn in the following weeks, the Receiver intends to bring a motion to Court to have the Receiver's disallowance of the claim upheld.*" The dispute has not been withdrawn.

16. Given that the Receiver cannot distribute further monies to Go-To Stoney Creek's stakeholders until the approximately \$868,000 claim filed by Mr. Furtado against Go-To Stoney Creek has been dealt with, the Receiver requests that the Stoney Creek Disallowance Matter also be heard on an expedited basis.

17. The Receiver believes that the only step required before the Stoney Creek Disallowance Matter is heard is the exchange of facts on the specific legal issue of whether Mr. Furtado was required or obligated to disclose the entitlement to guarantee fees, and whether the failure to do so prohibits him from being entitled to the fees. If the Receiver is successful on this legal issue, then Mr. Furtado's claim against Go-To Stoney Creek must fail.³

³ If Mr. Furtado is successful on this legal issue, then the alternative grounds for disallowance set-out in the Stoney Creek Furtado Disallowance Notice and disputed by Mr. Furtado would need to be addressed at a future date.

Next Steps

18. The Receiver has attempted to narrow the issues and timetable both the Production Matter and the Stoney Creek Disallowance Matter with Miller Thomson. Copies of the correspondence exchanged with Miller Thomson to-date are attached to the document brief that accompanies this aide-mémoire.

19. As noted in the Seventh Report, Miller Thomson advised months ago that Mr. Furtado was suffering from health issues which prevented him from providing instructions. However, as set out in the document brief, Mr. Furtado subsequently provided instructions to Miller Thomson, and personally authored a detailed explanation document to the Receiver, regarding the Receiver's treatment of the Receivership Respondents' intercompany claims.

20. Given that the fact-gathering exercises have concluded for both the Production Matter and the Stoney Creek Disallowance Matter, it is the Receiver's view that Mr. Furtado's current personal situation ought not to delay the exchange of legal submissions so that these two time-sensitive legal matters can be heard as quickly as possible.

21. For convenience, and in addition to the correspondence with Miller Thomson referenced above, the document brief accompanying this aide-mémoire also includes: (a) the Privilege Protocol; and (b) three tables, which list the disclosure Objections provided by Miller Thomson under the Privilege Protocol for each of the emails from, to and copying Mr. Malanca/Palmeri.

Applicant

Respondents

Court File No. CV-21-00673521-00CL

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

Proceedings commenced at Toronto

**AIDE-MÉMOIRE OF THE COURT-APPOINTED
RECEIVER
(Case Conference Scheduling Appointment – August 14, 2023)**

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