

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

RESPONDING FACTUM
(Returnable October 31, 2023)

October 25, 2023

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TO: Service List in Court File No. CV-21-00673521-00CL

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PART I - NATURE OF THIS MOTION AND OVERVIEW

1. On the application of the Ontario Securities Commission under sections 126 and 129 of the Ontario *Securities Act*, R.S.O. 1990, c. S. 5, the Ontario Superior Court of Justice (Commercial List) (the “**Court**”) issued an order dated December 10, 2021 (the “**Receivership Order**”) appointing KSV Restructuring Inc. as the receiver (in such capacity, the “**Receiver**”) of the assets, undertakings and properties of Stoney Creek Elfrida LP and Go-To Stoney Creek Elfrida Inc. (together, “**Stoney Creek**”), among other entities (collectively, the “**Receivership Respondents**”).¹
2. On April 7, 2022, the Court issued a claims procedure order (the “**Claims Procedure Order**”), which approved a process for the filing and determination of claims against the Receivership Respondents. The Claims Procedure Order provided for a claims bar date of June 2, 2022 (“**Claims Bar Date**”).²
3. In accordance with the Claims Process Order, on May 31, 2022, Oscar Furtado submitted a proof of claim against Stoney Creek in the amount of \$867,769 (the “**Stoney Creek Claim**”),³ as well as a proofs of claim against several other Receivership Respondents.
4. The Stoney Creek Claim (including the supporting documentation) as submitted to the Receiver on its face clearly establishes an enforceable contractual obligation in favour of Oscar Furtado and constitutes a provable claim.

¹ Exhibit “A” to the Affidavit of Shallon Garrafa sworn October 2, 2023 (the “**Garrafa Affidavit**”) at para 3, Tab 2A to the Responding Motion Record of Oscar Furtado dated October 2, 2023 (the “**Responding Motion Record**”).

² Claims Process Order of Justice Conway dated April 7, 2022.

³ Garrafa Affidavit at paras 11-12, Tab 2 to the Responding Motion Record.

5. However, on March 28, 2023, the Receiver issued a notice of disallowance (the “**Notice of Disallowance**”) in respect of the Stoney Creek Claim, rejecting the claim in its entirety.⁴
6. The Notice of Disallowance does not set out any principled basis for the disallowance. Furthermore, prior to the disallowing the Stoney Creek Claim, the Receiver failed to discharge its duty to properly investigate the claim and seek additional documents and other information to potentially address its objections to the claim.
7. On September 29, 2023, the Receiver served its notice of motion returnable October 31, 2023 in connection with a motion (the “**Stoney Creek Disallowance Motion**”) seeking an order upholding the Notice of Disallowance of the Stoney Creek Claim (each as defined below). On October 2, 2023, Oscar Furtado delivered a notice of motion in connection with the Stoney Creek Disallowance Motion.⁵
8. Reference is made to the Factum of the Receiver filed in connection with the Stoney Creek Disallowance Motion (“**Receiver’s Factum**”).⁶
9. This Factum is filed by Oscar Furtado in response to the Stoney Creek Disallowance Motion and the Receiver’s Factum, and in support of Mr. Furtado’s request for an Order, among other things, declaring that the Stoney Creek Claim is a valid claim and directing the Receiver to admit the Stoney Creek Claim for the purposes of the Claims Process. Mr. Furtado’s position is that the Stoney Creek Claim (including the supporting documentation) includes probative, cogent and compelling evidence that clearly

⁴ Garrafa Affidavit at para 14, Tab 2 to the Responding Motion Record.

⁵ Notice of Motion of Oscar Furtado, Tab 1 to the Responding Motion Record.

⁶ Factum of the Receiver dated October 20, 2023.

establishes a provable claim, and the Notice of Disallowance is based on incorrect facts as well as a number of legal fictions arbitrarily contrived by the Receiver to justify its pre-determined decision to disallow Mr. Furtado's claim.

10. This matter is a hearing *de novo*, and the Receiver is not entitled to deference in respect of its determination in the Notice of Disallowance.

PART II - THE FACTS

A. Background on Business Structure and Limited Partnership Agreements

11. Prior to the appointment of the Receiver, Go-To Developments Holdings Inc. ("**GTDH**") and its related entities operated a real property development business. The business was conducted through a number of limited partnerships. GTDH is the sole shareholder in respect of each of the corporate general partners in the structure.⁷
12. Each of the limited partnerships in the structure, alone or with others, owned one or more real properties in Ontario. For the purpose of acquiring and/or developing the applicable real property, each of the limited partnerships in the business structure entered into a Limited Partnership Agreement ("**LPA**") to govern the terms of the applicable partnership and the parties' respective rights and duties in relation to the partnership.⁸

⁷ Exhibit "B" to the Garrafa Affidavit, Tab 2B to the Responding Motion Record.

⁸ Exhibit "C" to the Garrafa Affidavit, Tab 2C to the Responding Motion Record.

13. Each of the LPAs in the business structure is executed by GTDH and the applicable wholly-owned entity established for the applicable general partner; the investors in Stoney Creek are also party to the LPA.⁹

B. Stoney Creek Limited Partnership Agreement

14. Go-To Stoney Creek Elfrida Inc., as a general partner of Go-To Stoney Creek Elfrida LP (in such capacity, the “**General Partner**”), and GTDH entered into a LPA dated October 20, 2017 (the “**Stoney Creek LPA**”).¹⁰
15. The Stoney Creek LPA governs the rights and responsibilities of each of the parties in furtherance of the acquisition and development of the properties located at Highland Road, Hamilton ON (PIN 17376-0025) and Upper Centennial Parkway, Hamilton, ON (PIN 17386-0111) (the “**Stoney Creek Property**”).¹¹
16. Among other terms, the Stoney Creek LPA authorizes the General Partner:¹²
 - (a) to control and have full and exclusive power, authority and responsibility for the business of the Partnership [...] and to enter into the agreements reasonably necessary to the undertaking of business on behalf of the Partnership (section 5.1);
 - (b) in relation to the purchase, ownership, management, development, sale or other disposition of the Stoney Creek Property, to enter into and perform its or the Partnership’s obligations under any agreements contemplated therein, and any

⁹ Exhibit “C” to the Garrafa Affidavit, Tab 2C to the Responding Motion Record.

¹⁰ Exhibit “C” to the Garrafa Affidavit, Tab 2C to the Responding Motion Record.

¹¹ Exhibit “C” to the Garrafa Affidavit, Tab 2C to the Responding Motion Record.

¹² Exhibit “C” to the Garrafa Affidavit, Tab 2C to the Responding Motion Record.

other agreements of purchase and sale, joint venture agreement, co-ownership agreement or management agreement that, in the opinion of the General Partner is required in connection with the ownership and development of the Stoney Creek Property (section 5.3); and

- (c) to borrow funds in the name of and on the security of the assets of the Partnership for the purpose of financing and refinancing the business and operations of the Partnership.

17. In accordance with the terms of the Stoney Creek LPA, Go-To Stoney Creek Elfrida Inc. obtained a loan in the principal amount of \$10,650,000 to finance the acquisition and development of the Stoney Creek Property (the “**Stoney Creek Loan**”).¹³

18. As a condition of the Stoney Creek Loan, the lenders, Podesta Group Inc. and LMI Management Inc. (together, the “**Lenders**”), required that Mr. Furtado execute an unlimited personal guarantee (the “**Personal Guarantee**”) in their favour.¹⁴ The Stoney Creek Loan provided for a collateral second charge on Mr. Furtado’s primary residence.¹⁵ The commitment letter specifically states that the Stoney Creek Loan is conditional upon the following, among other things:

- (a) “Oscar Furtado to provide his personal guarantee in relation to all obligations and sums secured herein in such form as may be acceptable to the Lender”;¹⁶

¹³ Garrafa Affidavit at para 6, Tab 2 to the Responding Motion Record.

¹⁴ Exhibit “F” to the Garrafa Affidavit, Tab 2F to the Responding Motion Record.

¹⁵ Commitment Letter and Amendment, Exhibit “D” to the Garrafa Affidavit, Tab 2D to the Responding Motion Record.

¹⁶ Exhibit “D” to the Garrafa Affidavit, Tab 2D to the Responding Motion Record. [NTD: Emphasis added?]

- (b) “Spouse of Oscar Furtado shall receive independent legal representation prior to execution” of the collateral charge over their primary residence;¹⁷
 - (c) a certified appraisal of Oscar Furtado’s primary residence;¹⁸ and
 - (d) that the Commitment is subject to the Lender’s standard due diligence.¹⁹
19. In consideration of Mr. Furtado’s execution of the Personal Guarantee, on December 18, 2020, Go-To Stoney Creek Elfrida LP and Oscar Furtado entered into the guarantee fee agreement (“**Guarantee Fee Agreement**”).²⁰
20. The Stoney Creek LPA authorizes the General Partner to seek financing for the business of the Partnership. The Personal Guarantee was entered into for that purpose. In accordance with the Stoney Creek LPA, and in light of the enforceable liability created by the Personal Guarantee, the Guarantee Fee Agreement explicitly acknowledges Mr. Furtado’s entitlement, as guarantor, to an annual guarantee fee equal to 5% of the total principal amount guaranteed (the “**Guarantee Fee**”).²¹

C. Stoney Creek Claim

21. The documents that were included in the Stoney Creek Claim comprise the following:²²
- (a) The completed and fully executed proof of claim form;

¹⁷ Declaration of Independent Legal Advice of Dawn Bafaro, Exhibit “G” to the Garrafa Affidavit, Tab 2G to the Motion Record; Commitment Letter and Amendment, Exhibit “D” to the Garrafa Affidavit, Tab 2D to the Responding Motion Record.

¹⁸ Exhibit “D” to the Garrafa Affidavit, Tab 2D to the Responding Motion Record.

¹⁹ Exhibit “D” to the Garrafa Affidavit, Tab 2D to the Responding Motion Record.

²⁰ Exhibit “H” to the Garrafa Affidavit, Tab 2H to the Responding Motion Record.

²¹ Exhibit “H” to the Garrafa Affidavit, Tab 2H to the Responding Motion Record.

²² Exhibit “I” to the Garrafa Affidavit, Tab 2I to the Responding Motion Record.

- (b) The Guarantee Fee Agreement;
 - (c) General Ledger for the General Partner as at December, 2021;
 - (d) Bank Statements for the General Partner; and
 - (e) Summaries and explanatory notes for each of the amounts owing to Mr. Furtado.
22. The substantial majority of the Stoney Creek Claim (*i.e.*, \$867,021) arises from guarantee fees owing under the Guarantee Fee Agreement, a copy of which was submitted to the Receiver with the Stoney Creek Claim.
23. Prior to the appointment of the Receiver, Stoney Creek's audited financial statements ("**Audited Financial Statements**") were prepared by PricewaterhouseCoopers LLP ("**PwC**").²³ The independent auditor's report for the 2019 fiscal year shows the following:
- (a) the Audited Financial Statements (including the independent auditor's report) are specifically addressed to the "Partners of Go-To Stoney Creek Elfrida LP", which are the investors in the Stoney Creek Property;²⁴
 - (b) the independent auditor's report specifically provides that (i) the accompanying financial statements present fairly, in all material aspects, the financial position of Stoney Creek, in accordance with Canadian Accounting Standards for Private Enterprises (ASPE); and (ii) the audit is conducted in accordance with Canadian generally accepted auditing standards; and²⁵

²³ Exhibit "L" to the Garrafa Affidavit, Tab 2L to the Responding Motion Record.

²⁴ Exhibit "L" to the Garrafa Affidavit, Tab 2L to the Responding Motion Record.

²⁵ Exhibit "L" to the Garrafa Affidavit, Tab 2L to the Responding Motion Record.

- (c) the auditor's responsibilities include, among other things, a duty to "...evaluate the overall presentation, structure and content of the financial statements, including the disclosures, and whether the financial statements represent the underlying transactions and events in a manner that achieve fair presentation."²⁶

D. Notice of Disallowance

24. Pursuant to the Notice of Disallowance, the Receiver disallowed the entire amount of the Stoney Creek Claim based on the following allegations:²⁷

- (a) Lack of disclosure of the Guarantee Fee Agreement and of Mr. Furtado's personal guarantee(s) to investors;
- (b) Unreasonableness of the amount of the Guarantee Fee; and
- (c) Lack of "financial wherewithal" to pay the subject guarantees if called upon.

25. Prior to issuing the Notice of Disallowance the Receiver did not request any additional information or documents from Mr. Furtado in further support of the Stoney Creek Claim.

PART III - ISSUES

26. The issues on this motion are as follows:

- (a) Does the Stoney Creek Claim establish a provable claim?
- (b) Was the Receiver correct in disallowing the Stoney Creek Claim?

²⁶ Exhibit "L" to the Garrafa Affidavit, Tab 2L to the Responding Motion Record.

²⁷ Exhibit "J" to the Garrafa Affidavit, Tab 2J to the Responding Motion Record.

PART IV - LAW & ARGUMENT

A. The Stoney Creek Claim Establishes a Provable Claim

i. Whether a Provable Claim is Established

27. A court-appointed receiver has a duty to examine every proof of claim to determine if the proof of claim is valid – *i.e.*, it whether it establishes a provable claim. The Claims Process

Order provides the following definition of a “Creditor Claim” (emphasis added):

- (i) other than an Investor Claim, any right of any Person against any of the Receivership Respondents in connection with any indebtedness, liability or obligation of any kind of any of the Receivership Respondents, whether liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, present, future, known or unknown, by guarantee, surety or otherwise and whether or not such right is executory in nature, including the right or ability of any Person to advance a claim for contribution or indemnity or otherwise with respect to any matter, action, cause or chose in action, whether existing at present or commenced in the future that could be asserted by way of set-off, counterclaim or otherwise (each such Person being a “**Creditor**”), which indebtedness, liability or obligation is based in whole or in part on facts existing on or prior to the Appointment Date or which would have been claims provable in bankruptcy had the applicable Receivership Respondent, as the case may be, become bankrupt on the Appointment Date (each, a “**Creditor Claim**” and, collectively, the “**Creditor Claims**”);

28. The *Bankruptcy and Insolvency* (the “**BIA**”) defines a “claim provable in bankruptcy, provable claim, or claim provable” as “any claim or liability provable in proceedings under this Act by a creditor”. Section 121 of the BIA elaborates on the definition of a provable claim and provides as follows:

121 (1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt’s discharge by reason of any obligation

incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.²⁸

ii. Receiver's Duties in Reviewing Claims

29. A court-appointed receiver is an officer of the court and acts in a fiduciary capacity with respect to all parties interested in the assets under the control of the receiver, including the debtor.²⁹ The standard required because of that status is one of meticulous correctness.³⁰
30. It is common for courts to import principles from bankruptcy proceedings into the receivership context, particularly in situations in which a receiver is performing duties similar to those of a trustee (*e.g.*, administering a claims process).³¹ The following principles emerge from the jurisprudence with respect to a trustee's review of a proof of claim:
- (a) Before disallowing a claim, the trustee should conduct a reasonable investigation of it;³²
 - (b) In deciding the validity of a claim, certainty is not the test. If the method used in calculating the amount of the claim is reasonable and the evidence in support of the claim is relevant and probative, the claim should be admitted;³³

²⁸ *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [s. 121](#).

²⁹ *Turbo Logistics Canada Inc. v HSBC Bank Canada*, 2009 CanLII 55292 [at para 13](#) (Ont Sup Ct [Commercial List]); *Toronto-Dominion Bank v Usarco Ltd.* (2001), 196 DLR (4th) 448, 2001 CanLII 24004 [at para 30](#) (Ont CA).

³⁰ *Toronto-Dominion Bank v Usarco Ltd.* (2001), 196 DLR (4th) 448, 2001 CanLII 24004.

³¹ *1231640 Ontario Inc., Re*, 2007 ONCA 810 [at paras 45, 46](#).

³² *Re Gavex, A Resource Corp.* (1989), 75 CBR (ns) 178, 1989 CanLII 2837 [at para 9](#) (BC SC (TD)).

³³ *Re HDYC Holdings Ltd.* (1995), 35 CBR (3d) 294, [1995 CanLII 488](#) (BC SC (TD)).

- (c) A claim against a debtor for a specific sum of money, which sum can be substantiated by evidence, cannot be valued at nil by a trustee, in particular where the trustee has not completed any proper investigation;³⁴
 - (d) If unsatisfied with the proof of claim or its supporting material, the trustee has not only a right but a corresponding duty to demand further evidence to establish the validity of the claim;³⁵ and
 - (e) If the trustee does not conduct a reasonable investigation before disallowing a claim, the trustee may be ordered to pay the costs personally if there is a successful appeal from the disallowance.³⁶
31. The court should always protect the integrity and fairness of proceedings conducted by a court-appointed officer under its supervision, and it is submitted that a receiver should be held to the same standards as a trustee in administering a claims process.
32. A creditor bears the onus of establishing its claim, and does so by providing vouchers, statements of account or other evidence to substantiate it; the creditor must provide sufficient evidence to enable the trustee to make an informed decision on the validity of the proposed claim.³⁷ The Court in *Huphman (Re)* held as follows at para 47:

“If a creditor adduces relevant and probative evidence from which a valid claim can be reasonably inferred, the test has been met and the claim is provable. In the face of that, particularly where a trustee has suspicions, the

³⁴ *Re Dunham*, 2005 NSSC 57 [at para 15](#).

³⁵ Lloyd W. Houlden & Geoffrey B. Morawetz, *Bankruptcy and Insolvency Law of Canada*, 4th ed. (Toronto: Thomson Reuters, 2023) (loose-leaf updated October 2023, release 10) p. 5-181.

³⁶ *McCrie v Gray* (1940), 22 CBR 390 (Ont SC (TD)), AOBA Tab 1.

³⁷ *Huphman (Re)*, [2019 NSSC 280](#).

obligation shifts to the trustee to investigate further. Disallowing a claim based on a hunch or suspicion is not enough.”³⁸

33. As indicated, the substantial majority of the Stoney Creek Claim (*i.e.*, \$867,021) is in respect of guarantee fees owing under the Guarantee Fee Agreement. The document package delivered to the Receiver in support of the Stoney Creek Claim included all of the agreements that gave rise to the enforceable obligation, as well as relevant financial records, calculations, and detailed explanations of each of the documents and calculations provided in connection with the claim.
34. Go-To Stoney Creek Elfrida LP’s obligation to pay the Guarantee Fee is expressly provided for in the Guarantee Fee Agreement.
35. The Personal Guarantee was executed in order for the General Partner to secure financing for development of the Stoney Creek Property. The Personal Guarantee was a condition of the applicable financing, which also provided for a collateral charge against Oscar Furtado’s personal residence.³⁹
36. There is ample evidence in the Stoney Creek Claim to establish a provable claim. The method used to calculate the amount of the claim is reasonable, and the evidence in support of the claim is relevant and probative.
37. As noted above, “certainty is not the test”, and following the submission of the Stoney Creek Claim, the onus shifted to the Receiver to make inquiries and seek further information prior to disallowing the claim. The Receiver did neither.

³⁸ *Huphman (Re)*, [2019 NSSC 280](#).

³⁹ Exhibit “E” to the Garrafa Affidavit, Tab 2 to the Responding Motion Record.

B. NO LEGITIMATE BASIS FOR DISALLOWANCE OF CLAIM

38. This matter is a hearing *de novo*.⁴⁰ The Receiver is therefore not entitled to deference in respect of its determination in the Notice of Disallowance; efficacy, expedition, and concerns over extra expense and delay or increased formality should not be permitted to trump fairness.⁴¹
39. The Receiver has not established any legitimate basis upon which to disallow the Stoney Creek Claim. The bases cited in the Notice of Disallowance are not supported by law or the facts.
40. The Receiver cites the following in the Notice of Disallowance as the three bases for its conclusion that the Stoney Creek Claim is invalid:
- (a) Lack of disclosure of the Guarantee Fee Agreement and of Mr. Furtado's personal guarantee(s) to investors;
 - (b) Unreasonableness of the amount of the Guarantee Fee; and
 - (c) An alleged lack of the "financial wherewithal" to pay the subject guarantees, "if called upon."
41. As more particularly set out below, these three bases are unsupported by the facts or the law.

⁴⁰ An appeal from a disallowance should not be heard *de novo* as a matter of right, but may be heard *de novo* where the circumstances of the case at hand are such that a hearing restricted to the record might result in an injustice; *San Juan Resources Inc. (Re)*, 2009 ABQB 55 [at para 7](#).

⁴¹ *J. J. Lacey In Re Bankruptcy & Insolvency Act*, 2008 NLTD 9 [at para 18](#).

First Basis: Lack of Disclosure

42. The Receiver's first basis for the disallowance of the fees owed under the Guarantee Fee Agreement is as follows (*emphasis added*):⁴²

it constitutes undisclosed, related-party agreements made by a fiduciary in breach of the fiduciary's contractual and/or common law duties. Without limiting the generality of the foregoing, neither Go-To Stoney Creek LP's Limited Partnership Agreement dated October 20, 2017 (the "LP Agreement") nor Go-To Stoney Creek LP's "Investment Opportunity" brochure to investors dated March 2019 (the "IO Brochure") discloses your entitlement to any guarantee fees. The IO Brochure goes even further, in that it specifically references that "The General Partner and the Builder will sign for all third party financing and provide the Banks with all personal guarantees when required," and your name is not specifically referenced. Additionally, the IO Brochure does not reference that any guarantor would be entitled to a fee for providing a guarantee. If the intention was that you personally would be entitled to a guarantee fee, such entitlement should have been explicitly disclosed in the IO Brochure and the LP Agreement. Copies of the LP Agreement and the IO Brochure are included as Appendices "B" and "C" respectively;

43. In the Receiver's Factum, the Receiver argues that Mr. Furtado breached his fiduciary duties under the *Ontario Business Corporations Act* (Ontario) (the "OBCA") by failing to disclose the Guarantee Fee Agreement.
44. However, the Receiver's reasoning is based on an incorrect factual premise: that the Guarantee Fee Agreement was undisclosed. This error is fatal to the Receiver's argument.
45. In fact, the Guarantee Fee Agreement was disclosed to investors in the Audited Financial Statements, including the independent auditor's report. Investors were aware that Stoney

⁴² Exhibit "J" to the Garrafa Affidavit, Tab 2 to the Responding Motion Record.

Creek's books and records would be audited annually, as this is set out in the Investment Opportunity Brochure referenced in the Receiver's Notice of Disallowance.

46. Importantly, the Audited Financial Statements for Stoney Creek (prepared by PwC) fully disclosed the relevant details. The financial statements are attached as Exhibit "L" to the Garrafa Affidavit, and provide the following notes:

1. "The loan is secured as a first charge against the land held by the Partnership, corporate and personal guarantees of the ultimate owners of the Class B unitholder."⁴³ The Financial Statements disclose that Oscar Furtado is the ultimate beneficial owner of the Class B unitholder.⁴⁴
2. "In addition, the Partnership has an agreement with Oscar Furtado (Guarantor), ultimate beneficial owner of the Class B unitholders, to guarantee the repayment of the indebtedness amounts outstanding. The Guarantor is entitled to an annual guarantee fee equal to 5% of the total principal amount guaranteed by the Guarantor. During the year ended December 31, 2019, \$nil (2018 – \$60,143) in guarantee fees was paid and is included in land inventory."⁴⁵

⁴³ Page 3 of Audited Financial Statements, Exhibit "L" to the Garrafa Affidavit, Tab 2 to the Responding Motion Record.

⁴⁴ Page 4 of Audited Financial Statements, Exhibit "L" to the Garrafa Affidavit, Tab 2 to the Responding Motion Record.

⁴⁵ Page 4 of Audited Financial Statements, Exhibit "L" to the Garrafa Affidavit, Tab 2 to the Responding Motion Record.

3. “During the year ended December 31, 2019, \$34,521 (2018 – \$nil) in guarantee fees was payable to the Guarantor and included in accounts payable and accrued liabilities and land inventory”.⁴⁶
47. PwC, as auditor of the financial statements, supported the validity of all of the agreements including the Guarantee Fee Agreement. Necessary disclosures of the applicable agreements and fees are provided.
48. Even if the Guarantee Fee Agreement was required to be disclosed to investors, which it was not, the manner of such disclosure was not limited to the Investment Opportunity Brochure or the LPA. Any fiduciary obligation on Mr. Furtado was satisfied through disclosure through the Audited Financial Statements. The Receiver’s Notice of Disallowance includes an arbitrary requirement that such disclosure have been made through either the Investment Opportunity Brochure or the LPA, which is a legal fiction. Curiously, despite being in possession of all of the books and records of Stoney Creek, the Receiver declined to make any mention of the Audited Financial Statements and the disclosure of the Guarantee Fee in its Notice of Disallowance.
49. The Receiver points out, in its own Notice of Disallowance, that the execution of personal guarantees was explicitly provided for in the Investment Opportunity Brochure provided to investors. The Investment Opportunity Brochure contemplates the execution of necessary personal guarantees. By their definition, a personal guarantee is executed by a person rather than a corporation or partnership. A plain reading of the Investment

⁴⁶ Page 4 of Audited Financial Statements, Exhibit “L” to the Garrafa Affidavit, Tab 2L to the Responding Motion Record.

Opportunity Brochure makes clear that a personal guarantee may be executed when required. The Receiver's arbitrary creation of a requirement that the Investment Opportunity Brochure explicitly include Oscar Furtado's name as a guarantor has no basis in law.

50. The Guarantee Fee is a valid and enforceable contractual debt based on a clear, properly executed written agreement that was disclosed including through audited financial statements. The Personal Guarantee (including the collateral charge on Oscar Furtado's personal residence) was a condition of the financing for the Stoney Creek project and constitutes valuable consideration for the execution of the Guarantee Fee Agreement.

Second Basis: Amount of Guarantee Fee was Unreasonable

51. The second basis upon which the Receiver has disallowed the claim is the Receiver's bald assertion that the Guarantee Fee is unreasonable. The Notice of Disallowance provides as follows (*emphasis added*):

*In the alternative, if disclosure of the related-party fees can somehow be inferred from the LP Agreement (which the Receiver does not believe to be the case), the fees would still breach section 5.12 of the LP Agreement, which requires such fees to be "reasonable and competitive with the cost of similar goods or services provided by an independent third party." **You have provided no evidence to the Receiver that the purported guarantee fees are reasonable and competitive with what could have been obtained from an independent third party.** In fact, the purported guarantee fees are five times higher than a similar purported guarantee fee between yourself and Go-To Niagara Falls Chippawa LP (which is an Affiliate, as defined in the LP Agreement, of Go-To Stoney Creek LP);*

52. The Guarantee Fee Agreement provides for an annual guarantee fee equal to 5% of the total principal amount guaranteed. The Receiver has proffered no evidence (nor has it requested additional information or calculations) in support of its position that the quantum

of the fee was unreasonable, or in support of any comparison to any other development project.

53. Guarantee fees reflect, among other things, the risks and potential liability associated with the issuance of a personal guarantee, including project-specific factors as well as broad market conditions, which can vary substantially from project to project. The Receiver has provided no assessment of any such factors.
54. At no point prior to the issuance of the Notice of Disallowance did the Receiver request further evidence or information regarding the reasonableness of the quantum of the fee provided for in the Guarantee Fee Agreement. Furthermore, the Receiver has not put forward any credible evidence that the Guarantee Fee was unreasonable, and instead simply offers its own unsupported opinion.
55. In the Notice of Disallowance the Receiver suggests that failure to provide “independent third party evidence” that the fee is reasonable allows the Receiver to infer and conclude that the fee is unreasonable. The Receiver’s approach in this regard has no basis at law, and is inconsistent with the Receiver’s duties and obligations in assessing a proof of claim that, on its face, establishes a provable claim.
56. In any event, Mr. Furtado’s position is that the fee provided for in the Guarantee Fee Agreement was fair, reasonable and appropriate in the circumstances. If the Receiver disagreed with that position, then the onus was squarely on the Receiver to put forward compelling and cogent evidence in support of such disagreement. It has failed to do so.

Third Basis: Alleged Lack of “Financial Wherewithal”

57. The Receiver’s third stated basis for the Notice of Disallowance in respect of the Guarantee Fee Agreement is as follows (*emphasis added*):

...in the further alternative, you have not provided any evidence to the Receiver that you had the financial wherewithal to pay the subject guarantees if called upon (in other words, that Go-To Stoney Creek LP received anything in exchange for purportedly agreeing to the guarantee fees). This is particularly noteworthy, as the subject guarantees increased from \$2.4 million as of February 27, 2018, to \$6 million as of November 19, 2019 to \$10.65 million as of December 18, 2020.

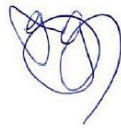
58. “Financial wherewithal” is irrelevant to the determination of whether the fee provided for under the Guarantee Fee Agreement is valid and/or enforceable. This arbitrary requirement appears to be yet another legal fiction created by the Receiver to justify its pre-determined decision to disallow Mr. Furtado’s claim.
59. In any event, any issues related to collectability under the Personal Guarantee in the Receiver’s hypothetical situation (*i.e.*, if the guarantee was called upon) is a matter of concern for the contractual counterparty to the Personal Guarantee, and not for the Receiver. The Guarantee Fee Agreement was supported by a collateral charge against Mr. Furtado’s personal residence. The Stoney Creek Loan was subject to the Lender’s own due diligence (including a satisfactory appraisal), as shown in the commitment letter. The Personal Guarantee obviously created substantial personal risk for Mr. Furtado, and the Lenders were satisfied that they were sufficiently secured to provide the financing.

PART V - CONCLUSION AND ORDER REQUESTED

60. The Receiver's Notice of Disallowance provides no principled basis for disallowing Mr. Furtado's well-documented contractual claim set out and supported by the Stoney Creek Claim and enclosed documents. Furthermore, the Receiver has failed its duties to conduct a reasonable investigation of the claim, and to seek further evidence if it was not satisfied with the claim, prior to disallowing it. In light of the foregoing, Mr. Furtado respectfully requests that this Honourable Court dismiss the Receiver's Motion and issue an Order:

- (a) declaring that the Stoney Creek Claim is a valid claim;
- (b) directing the Receiver to admit the Stoney Creek Claim for the purposes of the Claims Process;
- (c) awarding costs of this motion on a substantial indemnity basis; and
- (d) such further and other relief as this Honourable Court may deem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of October, 2023.



MILLER THOMSON LLP

Lawyers for the Respondent, Oscar Furtado

**SCHEDULE “A”
LIST OF AUTHORITIES**

Jurisprudence

1. [*Turbo Logistics Canada Inc. v HSBC Bank Canada*, 2009 CanLII 55292 \(Ont Sup Ct \[Commercial List\]\)](#)
2. [*Toronto-Dominion Bank v Usarco Ltd.* \(2001\), 196 DLR \(4th\) 448, 2001 CanLII 24004 \(Ont CA\)](#)
3. [*1231640 Ontario Inc., Re*, 2007 ONCA 810](#)
4. [*Re Gavex, A Resource Corp.* \(1989\), 75 CBR \(ns\) 178, 1989 CanLII 2837 \(BC SC \(TD\)\)](#)
5. [*Re HDYC Holdings Ltd.* \(1995\), 35 CBR \(3d\) 294, 1995 CanLII 488 \(BC SC \(TD\)\)](#)
6. [*Re Dunham*, 2005 NSSC 57](#)
7. *McCrie v Gray* (1940), 22 CBR 390 (Ont SC (TD))
8. [*Huphman \(Re\)*, 2019 NSSC 280](#)
9. [*Juan Resources Inc. \(Re\)*, 2009 ABQB 55](#)
10. [*J. J. Lacey In Re Bankruptcy & Insolvency Act*, 2008 NLTD 9](#)

Secondary Materials

1. Houlden, W. Lloyd & Morawetz, B. Geoffrey, *Bankruptcy and Insolvency Law of Canada*, 4th ed. (Toronto: Thomson Reuters, 2023) (loose-leaf updated October 2023, release 10)

**SCHEDULE “B”
RELEVANT STATUTES**

Bankruptcy and Insolvency Act, RSC 1985, c B-3

121 (1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

ONTARIO SECURITIES COMMISSION
Applicant

and

**GO-TO DEVELOPMENTS HOLDINGS
INC., et al.**
Respondents

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

ONTARIO
**SUPERIOR COURT OF JUSTICE -
COMMERCIAL LIST**

Proceeding commenced at TORONTO

RESPONDING FACTUM
(Returnable October 31, 2023)

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