Court File No. CV-23-00699432-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

MARSHALLZEHRGROUP INC.

Applicant

and

2557386 ONTARIO INC. and 2363823 ONTARIO INC. O/A MARIMAN HOMES

Respondents

MOVING PARTIES' FACTUM

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TO: **The Service List**

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TABLE OF CONTENTS

Page No.

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FACTUM OF THE RESPONDENTS (MOVING PARTIES)

PART I - INTRODUCTION

1. This motion is for an order varying the Distribution and Discharge Order of Justice Black dated October 1, 2024 (the "**DDO**") and the Approval and Vesting Order of Justice Black dated October 1, 2024 (the "**AVO**") to extend the time to close a refinancing transaction in respect of the development project located in Haldimand, ON (the "**York Estates Project**") to December 30, 2024, along with other necessary deadlines in the DDO and the AVO.

2. Mike Bettiol ("**Mike**") is the principal of the Respondents. After years of tireless work, Mike has found a way to save the York Estates Project and has found an ideal partner to assist him in doing so. All he asks the Court for is a little more time to redeem the mortgage (the "**MZ Mortgage**") that the Applicant has against the property that is the subject of the AVO (the "**Property**").

3. If the deal contemplated in the Commitment Letter from DBNC Group Inc. (the "**Proposed Refinancing Transaction**") is completed it will result in a better outcome for the stakeholders of the York Estates Project than the sale via the AVO to 1000961999 Ontario Inc. (the "**Proposed Purchaser**").

PART II - SUMMARY OF FACTS

The Administration of the MZ Loan

4. After aggressively pursuing a business relationship with the Respondents, MZ and 255 entered into a commitment letter dated June 4, 2022 (the "**MZ Commitment Letter**") in connection with the financing of the York Estates Project. The three credit facilities provided under the terms of the Commitment Letter (the "**Credit Facilities**") were intended to provide financing for the York Estates Project through to its completion.

> **Reference:** Affidavit of Mike Bettiol sworn November 10, 2024 (the "**Bettiol Affidavit**") at paras 3-9 and Exhibit B thereto; Moving Parties' Motion Record at pp. 11 and 53 (Exhibit B).

5. The transaction in respect of the MZ Commitment Letter closed on or about June 30, 2022. On closing, MZ received a Lender Fee of $775,000.00 and took an interest reserve of $907,000.00 to secure the obligations of 255 to pay interest due under the Credit Facilities until March 1, 2023. When the initial advances were made, the full amount of Facility 2B was advanced and a total of $11,276,000 was advanced under Facility 2A. A subsequent advance in the amount of $491,500.50 under Facility 2A was approved and advanced in August, 2022. As such, as at the end of August, 2022, the remaining amount available under Facility 2A was $4,057,499.50.

> **Reference:** Bettiol Affidavit at paras 12-16 and Exhibit C thereto; MPMR at pp. 14-15 and 114 (Exhibit C).

6. At all material times, MZ and 255 agreed (and it was a term of the MZ Mortgage) that any payments of interest under the Credit Facilities during the pre-construction phase of the project would require that an advance was made from the remaining amount of funds available under Facility 2A.

Reference: Bettiol Affidavit at para 15; MPMR at para 15.

7. In December of 2022, MZ raised issues with respect to a variety of litigation proceedings that involved 2363823 Ontario Inc. and Mike (the "**Proceedings**"), who were only guarantors under the terms of the Credit Facilities. All of the concerns raised by MZ were addressed by the Respondents and their counsel at or around the time they were raised. None of the Proceedings had any connection with the York Estates Project or 255 and the vast majority of the Proceedings had been resolved. Put another way, there was no possible way that the Proceedings could have had a material adverse effect on the York Estates Project.

Reference: Bettiol Affidavit at paras 22-26 and Exhibits E and F thereto; MPMR at pp. 16-17 and 137 (Exhibit E) and 146 (Exhibit F).

8. A second advance request under Facility 2A was made in late 2022 and early 2023 (the "**Second Advance**"). The Respondents satisfied all of the documentation requests required by MZ in connection with the Second Advance. MZ did not advise that there was any problem with the request or documentation provided in support of the Second Advance.

Reference: Bettiol Affidavit at paras 27-28 and Exhibit G thereto; MPMR at pp. 17 and 155 (Exhibit G).

9. Instead of providing the Second Advance, as it was required to under the terms of the MZ Commitment Letter, MZ sent Mike an invoice for interest that was due on March 1, 2023 under the terms of the Credit Facilities. In response, Mike confirmed that in order to pay the interest that

was due on March 1, 2023, that an advance under Credit Facility 2A would need to be completed. Rather than facilitate the Second Advance, Mr. Hayes, the President of MZ, called Mike and said that his "investors" did not like the Proceedings and would not advance any more funds under the terms of the Credit Facilities. MZ then proceeded to send Mike a notice of default dated March 6, 2023 for failure to pay the interest due under the Credit Facilities (the "**Purported Notice of Default**"). Demands for Payment and a notice of intention to enforce security were provided thirty (30) days later on April 6, 2023 (the **"Purported Demands**").

> **Reference:** Bettiol Affidavit at paras 27-34 and Exhibits H and I thereto; MPMR at pp. 17-18 and 164 (Exhibit H) and 168 (Exhibit I).

10. Subsequent to the issuance of the Purported Demands, MZ and the Respondents entered into a forbearance agreement dated June 5, 2023 (the "**Forbearance Agreement**") which expired on October 30, 2023. To keep the York Estates Project alive, Mike had no other choice other than to sign the Forbearance Agreement. In connection with the Forbearance Agreement, MZ received a $150,000 forbearance fee and a $500,000 payment toward the indebtedness owing as of April 4, 2023.

> **Reference:** Bettiol Affidavit at paras 35-40 and Exhibit J I thereto; MPMR at pp. 19 and 177 (Exhibit J).

11. During the remainder of 2023 Mike tirelessly tried to find refinancing for the York Estates Project but the lending environment during 2023 was not favourable to borrowers, especially for large-scale construction projects. After the expiration of the Forbearance Agreement, Mike reached out to Mr. Hayes in December 2023 and proposed another pathway forward that would save the York Estates Project. MZ refused to accept my proposal and appointed a receiver pursuant to the Order of Justice Osborne dated January 16, 2024 (the "**Receivership Order**").

Reference: Bettiol Affidavit at paras 41-45 and Exhibits K and L thereto; MPMR at pp. 19-20 and 187 (Exhibit K) and 190 (Exhibit L).

Continued Efforts to Secure Refinancing

12. Notwithstanding the Receivership Order, Mike continued to try and obtain refinancing for the York Estates Project. In furtherance of same, Co-Capital Ltd. ("**Co-Capital**") provided him with a letter of intend dated January 21, 2024. On April 26, 2024, Mike paid Co-Capital a "standby fee" of $100,000 and it provided Mike with a commitment letter dated July 24, 2024 that would have provided take-out financing for the York Estates Project in the amount of $25,000,000 (the "**July 24 Commitment**"). The July 24 Commitment was conditional on Mike securing an agreement with a Tarion/HCRA certified builder and the drafting of an acceptable form of construction management agreement (the "**CMA**") (collectively, the "**Co-Capital Conditions**").

Reference: Bettiol Affidavit at paras 47-53 and Exhibits M and N thereto; MPMR at pp. 20-21 and 211 (Exhibit M) and 217 (Exhibit N).

13. The principals of Co-Capital, Oliver Houghting and Felicia Bruni, advised Mike that they were in constant communication with David Marshall and Greg Zehr regarding the proposed refinancing and that through MZ, they were working with the Receiver to address any concerns regarding the proposed refinancing transaction.

Reference: Bettiol Affidavit at paras 54-55; MPMR at pp. 21.

14. After the motion record for the sale approval motion that was heard on October 1, 2024 (the "**Sale Approval Motion**") was served on September 24, 2024, Co-Capital refreshed the July 24 Commitment and confirmed that they were ready to close the transaction as soon as they were able to transfer $137 million that was in Gowling WLG's trust account to their new counsel, Miller Thomson. In addition, during this period, Mr. Houghting advised Mike that he was in constant communication with Mr. Marshall and that he had discussions with Mr. Marshall about agreeing

to extend the time to close the proposed refinancing transaction. He also advised that he was involved in numerous deals with MZ for other projects.

> **Reference:** Bettiol Affidavit at paras 56-59 and Exhibit O thereto; MPMR at pp. 22 and 230 (Exhibit O).

15. By mid to late October, 2024, 255 had satisfied all of the Co-Capital Conditions and notice of same was provided to Mr. Houghting and Ms. Bruni. After being provided with the documents satisfying the conditions, Mr. Houghting advised Mike's counsel that they would be waiving the conditions and would close the transaction as soon as the funds were available on October 25, 2024 or the following Monday. The fact is, Co-Capital failed to close the proposed refinancing transaction and likely defrauded Mike out of $100,000.00.

> **Reference:** Bettiol Affidavit at paras 60-64 and Exhibits P and Q thereto; MPMR at pp. 22-23 and 243 (Exhibit P) and 245 (Exhibit Q).

Mike's New Deal

16. As of October 25, 2024, Mike began earnestly searching for another refinancing option to save the York Estates Project. On October 30, 2024, while discussing business matters with Francis D'Atri ("**Mr. D'Atri**"), Mr. D'Atri indicated his interest in providing take-out financing for the York Estates Project and also participating in its construction. DBNC provided 255 with a Commitment Letter dated November 8, 2024 (the "**DBNC Commitment**") that would provide take-out financing for the York Estates Project and result in a substantially better outcome for all of the stakeholders in this proceeding (the "**Proposed Refinancing Transaction**"). In addition, to allay the concerns of the Receiver and MZ that he did not have the means to close, a package was provided to the Receiver and MZ which was intended to give comfort the Proposed Refinancing Transaction would close by the deadline provided by DBNC and that any concerns of the Home Construction Regulatory Authority (the "**HCRA**") would be addressed.

Reference: Bettiol Affidavit at paras 65-72 and Exhibits R,S,T and U thereto; MPMR at pp. 23-25 and 249 (Exhibit R), 252 (Exhibit S), 272 (Exhibit T) and 305 (Exhibit U).

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

17. The only issue before the Court on this motion is whether to provide more time to the Respondents to close the Proposed Refinancing Transaction and vary the AVO and DDO accordingly.

18. At the core of the within motion, the Respondents are seeking an extension of time to complete the Proposed Refinancing Transaction. In the DDO, the Respondents were given until 5:00 pm on November 12, 2024 to satisfy all amounts properly due to MZ and the Receiver in order to redeem the Mortgage prior to the AVO going into effect on November 13, 2024.

19. Rules 1.04, 2.03 and 3.02 of the Rules of Civil Procedure read as follows:

> **Interpretation**
> ***General Principle***
> **1.04 (1)** These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.
>
> **Court May Dispense with Compliance**
> **2.03** The court may, only where and as necessary in the interest of justice, dispense with compliance with any rule at any time.
>
> **3.02 Extension or Abridgment**
> ***General Powers of Court***
> **3.02(1)** Subject to subrule (3), the court may by order extend or abridge any time prescribed by these rules **or an order, on such terms as are just.[Emphasis added]**
>
> **Reference**: *Rules of Civil Procedure,* RRO 1990, Reg. 194 at Rules 1.04, 2.03 and 3.02.

20. In *MacMaster v. Labombards Chatham Ltd.*, 1985 CarswellOnt 387, 2 CPC (2d) 155 (CA) the Ontario High Court of Justice (as it then was) considered the nature of Rules 2.03 and 3.02 and

determined that these Rules are operative and empowering in nature to give the Court discretion to preclude the overly rigid application of the Rules, or in this case, an Order.

Reference: *MacMaster v. Labombards Chatham Ltd.*, 1985 CarswellOnt 387, 2 CPC (2d) 155 (CA) at paras 19-22

21. In applying Rule 3.02, the Court will look to the following factors:

(a) The nature of the motion;

(b) The purpose and consequences of the originating Rule or Rules (or in this case the AVO and the DDO);

(c) The actions of the moving party; and

(d) The rights of the responding party.

Reference: *Macmaster* at para 24.

The Nature of the Motion

22. In this case, the nature of the motion, at its core, is to extend the time for the Respondents to close the Proposed Refinancing Transaction. Apart from the request for an extension of time to close the Proposed Refinancing Transaction (which would also extend certain other operative aspects of the DDO and the AVO), there are no other proposed amendments to the DDO and the AVO.

The Purposes and Consequences of the DDO and the AVO

23. The purpose of the DDO was to provide the Respondents with time to redeem the MZ Mortgage and avoid the deluge of prejudice that would befall the Applicant, the purchasers, Van

Rooyen Earth Moving Ltd. ("**VRE**") and the Respondents if it was not redeemed. That deluge of prejudice may be avoided if the relief requested on the within motion is granted.

24. It is also important for the Court to examine the purpose of the AVO in the context of this motion as the DDO and the AVO are inextricably intertwined. It is the DDO that determines the date of operation of the AVO.

25. The purpose of the AVO was to provide finality to the sales process that was run by the Receiver in the within proceeding and allow the land that is the subject of the AVO to be vested in the Proposed Purchaser free and clear of all encumbrances.

26. The consequence of the AVO going into effect on November 13, 2024, will be that all of the interested parties to the within proceeding, with the sole exception of the Proposed Purchaser (which purchaser is controlled by the principals of MZ), will suffer prejudice in the following ways:

(a) The purchasers will lose a substantial portion of their deposits;

(b) The Applicant will experience a shortfall in the amounts due to it under the MZ Mortgage; and

(c) VRE will not be paid all amounts necessary to discharge the lien registered on title to the Property.

27. The AVO was granted under Section 100 of the *Courts of Justice Act* and Section 243 of the *Bankruptcy and Insolvency Act*. The jurisdiction of the Court to grant the AVO is not in dispute. However, the Court should be mindful of the observations regarding vesting orders as articulated

by the Ontario Court of Appeal in *Third Eye Capital Corporation v. Dianor Resources Inc.*, 2018 ONCA 253.

> [109] The leading text -- Houlden, *Bankruptcy and Insolvency Law of Canada*, at Part XI, L21 notes:
>
> A vesting order should only be granted if the facts are not in dispute **and there is no other available or reasonably convenient remedy**; **or in exceptional circumstances where compliance with the regular and recognized procedure for sale of real estate would result in an injustice**. In a receivership, the sale of the real estate should first be approved by the court. The application for approval should be served upon the registered owner and all interested parties. If the sale is approved, the receiver may subsequently apply for a vesting order, but a vesting order should not be made until the rights of all interested parties have either been relinquished or been extinguished by due process. **[Emphasis Added]**
>
> (b) *The equities*
>
> [119] **Courts have also considered the "equities" in determining whether to issue a vesting order. Although the term, "equities", is an ambiguous word, the vesting order cases have tended to use it to describe their work in establishing priorities among interests**. See, for example, *Meridian Credit Union Ltd. v. 984 Bay Street Inc.*, [2005] O.J. No. 3707 (S.C.J.), revd [2006] O.J. No. 1726 (C.A.) and [2006] O.J. No. 3169, 150 A.C.W.S. (3d) 622 (S.C.J.). See, also, *Romspen Investment Corp. v. Woods Property Development Inc.*, [2011] O.J. No. 1163, 2011 ONSC 3648, 75 C.B.R. (5th) 109 (S.C.J.), revd [2011] O.J. No. 5871, 2011 ONCA 817, 286 O.A.C. 189; and *Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Ltd.*, [2012] O.J. No. 4095, 2012 ONSC 4816, 99 C.B.R. (5th) 120 (S.C.J.). **[Emphasis Added]**
>
> **Reference:** *Third Eye Capital Corporation v. Dianor Resources Inc.*, 2018 ONCA 253 at paras 109 and 119.

28. On the within motion, the Moving Parties are seeking a delay to the coming into force of the AVO by seeking an extension of the time that was granted to redeem the MZ Mortgage pursuant to the terms of the DDO. They are proposing a reasonably convenient remedy as an alternative to the AVO so that the sales process that was run for the Property does not result in an injustice.

29. With respect to the equities, the only consideration that is relevant for the Court to consider is the equities that inhere or are applicable in the **request for more time**. The Moving Parties are not seeking to set aside the AVO or the DDO. Rather, they are only seeking to extend the time that will delay the coming into force of the AVO.

30. There is no prejudice to any party in extending the time to complete the Proposed Refinancing Transaction, and no evidence of same has been proffered on the within motion by any party.

31. The Moving Parties do not suggest that the AVO was granted without a fair process. Rather, the Moving Parties note that in the case at bar, compliance with the procedure that was adopted would result in an avoidable injustice and cause significantly more prejudice than simply granting a brief (non-prejudicial) extension of time so that the Proposed Financing Transaction can close.

Prejudice to the Stakeholders and the Rights of the Parties

32. The uncontroverted evidence before the Court is that if the AVO is allowed to go into force on November 13, 2024, all interested parties will suffer significant and unmitigable prejudice.

Reference: Bettiol Affidavit at paras 76-90; MPMR at pp. 27.

33. It is important to note that there is no evidence of any prejudice to the Applicant or the Proposed Purchaser in the record on the within motion and no such prejudice has been articulated by the Receiver in the Receiver's Aide Memoire. As such, the Court should come to the conclusion that there is no prejudice to either the Proposed Purchaser or the Applicant if another brief extension of time is granted to the Moving Parties and the proposed lender.

34. To the extent that more costs are incurred by the parties as a result of the extension of time, any reasonable costs will be paid as part of the discharge of the MZ Mortgage and the Receiver.

35. It is also important for the Court to note that if the Proposed Purchaser was an arms-length party, one would reasonably expect that MZ would have been excited to welcome Mr. D'Atri and DBNC to the table and accept the $500,000 non-refundable extension fee that was offered so that it could be paid all of the amounts due to it under the terms of the MZ Mortgage. Instead, for reasons unknown to the Respondents, the Applicant and the Receiver, in opposing the relief sought on this motion, are agreeing to accept a significant loss to the Applicant and effect an "unfortunate" outcome for the purchasers. Such an "unfortunate outcome" is clearly avoidable in the case at bar.

Reference: Factum of the Receiver dated September 27, 2024 at paras 3 and 37.

Actions of the Moving Parties

36. The Moving Parties have respected the terms of the AVO and the DDO and made every reasonable commercial effort to try and save the York Estates Project. Mike was the victim of an unfortunate fraud involving Co-Capital and its principals, who, after repeatedly advising that they would be in funds to close the refinancing transaction in late September, 2024, failed to fund the refinancing transaction after the Co-Capital Conditions had been satisfied.

Reference: Bettiol Affidavit at paras 56-62 and Exhibits O,P and Q thereto; MPMR at pp. 22-23

37. For reasons unknown to Mike, since at least the Summer of 2024, Mr. Houghting has apparently been in constant communication with David Marshall, a principal of MZ and the Proposed Purchaser. The fact that various communications took place between Mr. Houghting and Mr. Marshall has never been denied by MZ or the Receiver.

Reference: Bettiol Affidavit at paras 54-55; MPMR at p. 21.

38. After Co-Capital failed to close the proposed transaction, Mike continued to work to save the York Estates Project. He met Mr. D'Atri who provided the DBNC Commitment Letter. In turn, in addition to the Lender's Package, Mr. D'Atri and his counsel assured the Receiver and MZ that he would provide any further comfort necessary so that the Proposed Refinancing Transaction could close.

Reference: Affidavit of Francis D'Atri sworn November 11, 2024 at paras 8-16.

39. In short, Mike has acted with good faith and diligence during this process and should be afforded the grace of this Court.

Varying the DDO and AVO under Rule 59.06

40. While the Moving Parties believe there is jurisdiction to extend the time to redeem the MZ Mortgage exists under Rule 3.02 of the *Rules of Civil Procedure*, there is also jurisdiction under Rule 59.06(2) of the *Rules of Civil Procedure*. Rule 59.06 reads as follows:

> **Setting Aside or Varying**
>
> **59.06** (2) A party who seeks to,
>
> (a) have an order set aside or varied on the ground of fraud or of facts arising or discovered after it was made;
>
> (b) suspend the operation of an order;
>
> (c) carry an order into operation; or
>
> (d) obtain other relief than that originally awarded,
>
> may make a motion in the proceeding for the relief claimed.

41. The principles germane on a motion to vary an order under Rule 59.06(a) were set out in re International Corona Resources Ltd. v. LAC Minerals Ltd., [1988] O.J. No. 3118 (Ont. H.C.) at para. 53:

> 1. The fraud alleged must be proved on a reasonable balance of probability. The more serious the fraud, the more cogent the evidence required;
> 2. The fraud must be material, going to the foundation of the case;
> 3. The evidence of fraud must not have been known at the time of trial by the party seeking to rely on it;
> 4. The unsuccessful trial party is exposed to a test of due or reasonable diligence;
> 5. The tests are more stringent if the fraud is of a non-party and the successful party at trial is not connected with the fraud alleged;
> 6. The due diligence test is objective. The questions are what the party knew, and what the party ought to have known;
> 7. Delay will defeat a motion to set aside a trial judgment under rule 59.06;
> 8. Relief under rule 59.06 is discretionary. The conduct of the moving party is relevant;
> 9. The central question is as stated in *Wentworth v. Rogers (No. 5)*, at 538: "... it must be shown, by the party asserting that a judgment was procured by fraud, that there has been a new discovery of something material, in the sense that fresh facts have been found which, by themselves or in combination with previously known facts, would provide a reason for setting aside the judgment." [my emphasis]
>
> **Reference:** *International Corona Resources Ltd. v. LAC Minerals Ltd.*, [1988] O.J. No. 3118 (Ont. H.C.) at para. 53

42. At this point, it is almost certain that Mike was a victim of a fraud perpetrated by the principals of Co-Capital, and possibly others. Mr. Houghting and Ms. Bruni made repeated representations to Mike that they would be in funds to close the transaction as soon as the Co-Capital Conditions had been satisfied and that funds could be moved to Miller Thomson's trust account from Gowlings. These representations were made just prior to the Sale Approval Motion (given the short service of the record in respect of same) as well as after the Co-Capital Conditions were waived.

> **Reference:** Bettiol Affidavit at para 57; MPMR at p. 22

43. The fraud went to the heart of the nature of the DDO and AVO and determined the position that the Moving Parties negotiated with the Receiver and MZ prior to the Sale Approval Motion. At the time of the Sale Approval Motion, Mike verily believed that Co-Capital had the funds to close the proposed transaction. The evidence that Co-Capital did not have the funds to close the transaction is based on an inference that it did not have the means to close the transaction as it failed to do so after the Co-Capital Conditions were waived.

44. Mike acted with reasonable diligence throughout the process of confirming Co-Capital's ability to close the proposed transaction. It was not until late September, 2024, when Co-Capital confirmed that it intended to proceed with the transaction and issued the Amended and Restated Commitment Letter just prior to the sale approval motion.

45. As the Moving Parties were preparing to close the proposed transaction, through counsel and directly, Mike repeatedly requested that proof of funds were provided and when they were not, he immediately set out to find an alternative refinancing option.

> **Reference:** Bettiol Affidavit at paras 56-58 and Exhibit O thereto; MPMR at pp. 22 and 230 (Exhibit O).

46. Had the Moving Parties known that Mr. Houghting and Ms. Bruni were misrepresenting their ability to close the proposed refinancing transaction, Mike would have asked for more time to arrange take out financing or potentially obtained a commitment letter from another lender. As the financing environment has been improving throughout 2024, this would have certainly been a possibility.

47. Mike acted very quickly in bringing this motion and only did so when he had confirmed that another viable option in the form of the Proposed Refinancing Transaction was available for

the Court to consider. He acted practically and with haste in bringing this motion as soon as he was aware it was appropriate to do so.

48. In light of the foregoing, to the extent that the Court is of the view that Rule 59.06(a) of the *Rules of Civil Procedure* is applicable on the within motion, the Moving Parties have satisfied the applicable principles and the Court should exercise its discretion to grant the relief sought.

Responses to the Aide Memoire of the Receiver and HCRA

49. The Aide Memoire of HCRA suggests that there is a "scheme" to circumvent licensing requirements in advancing the York Estates Project through the construction phase. So that it is abundantly clear for the Court, there is no "scheme" at play here at all.

50. While the Moving Parties respect the concerns expressed by the HCRA, the evidence on this motion is that almost no activity will take place on site for the next several months. When sales and construction activity does commence, either Mr. D'Atri will have obtained an HCRA Vendor/Builder License, or another HCRA builder will be involved in the process to allay any concerns of the HCRA. In any case, Mr. D'Atri and Mike intend to work cooperatively with the HCRA throughout the next phase of this process.

Reference: See. D'Atri Affidavit at paras 17-21.

51. In any case, the proposed CMA clearly notes that the Ontario New Home Warranties Act would not apply to the relationship:

> 15. ***Ontario New Home Warranties Plan Act*:** The Owner-Builder acknowledges that the Contractor is not acting as a "builder" or "vendor" as defined by the *Ontario New Home Warranties Plan Act* and consequentially the warranties thereunder **do not apply** to the Work or the Property. The Owner-Builder acknowledges the Work is to be completed by the Owner-Builder in the capacity

of an "Owner-Builder" as defined in the *New Home Construction Licensing Act* in that they are completing construction on a residential dwelling for their own person use and occupation.

Reference: Bettiol Affidavit at Exhibit U (CMA); MPMR at p. 317.

52. The Aide Memoire of the Receiver and the logic contained therein is flawed for the following reasons:

(a) The fact that Mariman and Mr. Bettiol do not currently have an HCRA Builder/Vendor License[1] is not fatal to the continued and further advancement of the York Estates Project. It is a challenge and a problem that is being addressed by Mike and Mr. D'Atri in cooperation with HCRA;

(b) The Receiver notes that no explanation was provided regarding the failure of the Co-Capital refinancing transaction to close. To the contrary, the evidence is that Mike was defrauded and that the transaction did not close because Co-Capital did not fund the transaction after the Co-Capital Conditions were waived.[2]

(c) The Receiver (nor any other party) has offered any evidence of any prejudice that would be suffered by if the extension of time is granted;

(d) As a first reason to oppose the motion and bring about the deluge of prejudice discussed above, the Receiver has stated that the Proposed Financing Transaction is "highly conditional".[3] This is not accurate. The conditions for the Proposed Financing Transaction are set out in the DBNC Commitment Letter and the only material condition is the closing of the refinancing transaction for 85 Executive

[1] See Aide Memoire of the Receiver at para 5.
[2] See Aide Memoire of the Receiver at para 7.
[3] See Aide Memoire of the Receiver at para 9.

Court. The Receiver never asked Mr. D'Atri for any other comfort regarding the means that DBNC has at its disposal in the event that the 85 Executive Court refinancing is not completed in time;

(e) As a second reason to oppose this motion the Receiver has stated that "the proposed method of arranging for construction appears to be different from what had been promised to homebuyers and would be prejudicial to them".[4] This is also not accurate. Mr. D'Atri and Mike intend to ensure that the Builder/Vendor for the York Estates Project has a valid HCRA license and intend to work cooperatively with the HCRA in all respects.

(f) As a last reason to oppose this transaction, the Receiver notes that MZ does not support this transaction. The Court should be skeptical of this. MZ has led no evidence of any prejudice (or any evidence at all) on this motion and its principals, Mr. Marshall and Mr. Zehr are the principals of the Proposed Purchaser. This may well be the first time in the history of an insolvency proceeding that the secured creditor appears happy to suffer a loss in excess of $3 million when it is possible that no loss would be suffered if a short extension of time is granted.

PART IV - ORDER REQUESTED

53. The Moving Parties request that the relief requested in the Notice of Motion dated November 10, 2024 is granted, with the final form of order to be agreed to by counsel for MZ, the

[4] See Receiver's Aide Memoire at para 9.

Receiver and the Respondents, acting reasonably, or otherwise as included at Tab 3 to the Moving Parties' Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of November, 2024.

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SCHEDULE "A"

LIST OF AUTHORITIES

1. *MacMaster v. Labombards Chatham Ltd.*, 1985 CarswellOnt 387, 2 CPC (2d) 155 (CA)

2. *Third Eye Capital Corporation v. Dianor Resources Inc.*, 2018 ONCA 253

3. International Corona Resources Ltd. v. LAC Minerals Ltd., [1988] O.J. No. 3118 (Ont. H.C.)

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

***Rules of Civil Procedure*, RRO 1990 Reg. 194**

Interpretation
General Principle
1.04 (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

Court May Dispense with Compliance
2.03 The court may, only where and as necessary in the interest of justice, dispense with compliance with any rule at any time.

3.02 Extension or Abridgment
General Powers of Court
3.02(1) Subject to subrule (3), the court may by order extend or abridge any time prescribed by these rules **or an order, on such terms as are just.[Emphasis added]**

Setting Aside or Varying

59.06 (2) A party who seeks to,

> (a) have an order set aside or varied on the ground of fraud or of facts arising or discovered after it was made;
>
> (b) suspend the operation of an order;
>
> (c) carry an order into operation; or
>
> (d) obtain other relief than that originally awarded,
>
> may make a motion in the proceeding for the relief claimed.

MARSHALLZEHRGROUP INC.
Applicant

-and-

2557386 ONTARIO INC. et al.
Respondents

Court File No. CV-23-00699432-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

MOVING PARTIES' FACTUM

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File Number: