



SUPERIOR COURT OF JUSTICE  
Commercial List

**COUNSEL SLIP/ENDORSEMENT**

COURT FILE NO.: CV-23-00694886-00CL DATE: February 21<sup>st</sup>, 2023

REGISTRAR: JC

NO. ON LIST: 4

TITLE OF PROCEEDING: ELA CAPITAL INC. v. 11157353 CANADA INC.

BEFORE JUSTICE: OSBORNE

**PARTICIPANT INFORMATION**

**For Plaintiff, Applicant, Moving Party, Crown:**

Name of Person Appearing	Name of Party	Contact Info
Joel Turgeon	Lawyer or the Applicant	<a href="mailto:Jturgeon@reconllp.com">Jturgeon@reconllp.com</a>
Jessica Wuthmann	Lawyer for the Applicant	<a href="mailto:jwuthmann@reconllp.ca">jwuthmann@reconllp.ca</a>

**For Defendant, Respondent, Responding Party, Defence:**

Name of Person Appearing	Name of Party	Contact Info
Sara-Ann Wilson	Lawyer for the Respondent Re Flourish Capital Limited	<a href="mailto:Sara.wilson@dentons.com">Sara.wilson@dentons.com</a>
Neelum Raja	Lawyer for the Respondent	<a href="mailto:Nraja@dsavocats.ca">Nraja@dsavocats.ca</a>
Kenneth Kraft	Lawyer for the Respondent Re Flourish Capital Limited	<a href="mailto:Kenneth.Kraft@dentons.ca">Kenneth.Kraft@dentons.ca</a>
Lindsay Amantea	Lawyer for Kanabo PLC	<a href="mailto:lamantea@dsavocats.ca">lamantea@dsavocats.ca</a>

**For Other, Self-Represented:**

Name of Person Appearing	Name of Party	Contact Info
Asim Iqbal	Lawyer for Proposed Receiver	<a href="mailto:AIQBAL@millerthomson.com">AIQBAL@millerthomson.com</a>

## **ENDORSEMENT OF JUSTICE OSBORNE:**

1. The Applicant seeks the appointment of a receiver over the property of the Respondent (other than Excluded Assets and Excluded Business), approval of a sales process including a stalking horse bid, approval of a KERP and a sealing order on limited terms in respect of the financial terms of the KERP.
2. Defined terms have the meaning given to them in the Application Record and/or the Motion Record of the Proposed Receiver unless otherwise defined in this Endorsement.
3. The Applicant is both the largest secured creditor and largest shareholder of the Respondent. The Respondent is the parent holding company of the Materia Business. It has no operations. It owns the Shares and employs the Manager of the Materia business. The Respondent also holds all of the Shares of Materia Malta (a fully licensed medical cannabinoid based-product import, manufacturing and export facility), Materia Germany (a certified MCBP import, labelling and distribution business) and Materia UK (assets but no operations).
4. The relief sought today by the Applicant is recommended by the Proposed Receiver and is not opposed by any party.
5. The Applicant is indebted to the Respondent in the amount of \$3,251,214 as at January 25, 2023 pursuant to the terms of Loan Agreements entered into between the parties. Pursuant to those Loan Agreements, the obligations of the Respondent are secured by the Security in respect of which the collateral includes the Shares. The Security has been properly registered under the PPSA.
6. The Respondent is in default under the Loan Agreements and has failed to repay principal or interest as at the Maturity Date. The Respondent is insolvent. It has consented to enforcement in accordance with section 244 of the BIA.
7. There are two other secured creditors of the Respondent, Kanabo PLC and the Germany Shares Stalking Horse Bidder ("SHB"), both of which are on notice of this Application and the relief sought today.
8. First, I am satisfied in the circumstances that it is just and convenient to appoint KSV as receiver (the "Receiver") pursuant to section 243 of the BIA and section 101 of the CJA. The Applicant is a secured creditor, the debtor is insolvent, the 10 day notice requirement under section 244 has been complied with and in all the circumstances, the appointment of the Receiver is just and convenient having regard to all the circumstances. The Receiver has consented to act in that capacity.
9. I am also satisfied that the receivership should be over the Shares but not the Excluded Assets or Excluded Business, which is not atypical in receiverships over cannabis businesses. The related Receiver's Charge and Receiver's Borrowings Charge are also unopposed and are appropriate. They are generally consistent with those approved by this Court.
10. Here, the Borrowings Charge facilitates borrowing by the Receiver up to a maximum of \$575,000, all of which is the result of significant negotiations among the relevant parties. This financing allows the businesses in Malta and Germany to continue as going concerns to preserve and maximize the value of the Shares, all of which is accretive to maximizing the outcome for stakeholders.
11. Second, I am also satisfied that the proposed sales process should be approved. It is backstopped as against the minimum outcome represented by the Stalking Horse Bid. All of this is consistent with similar processes approved by this Court and I am satisfied that in this particular case, it will maximize the

potential value for the benefit of all stakeholders, and the transparency of a court-approved sales process will further enhance the fairness and maximize the transparency of the process leading to what is hoped will be a favourable outcome (See *Danier Leather Inc. (Re)*, 2016 ONSC 1044 and *Cannapiece Group Inc. v. Carmela Marzilli*, 2022 ONSC 6379 as well as *Royal Bank of Canada v Soundair Corp.*, 1991 CanLII 2727 (ONCA)). The terms of the proposed stalking horse bid are reasonable.

12. I observe that the proposed 30 day time period is tight, but reasonable in the circumstances given the previous efforts to market the Shares and the exposure to the marketplace, all as measured against the urgency necessitated by the insolvency itself. That earlier process has been, effectively, ongoing since April 2021 which further informs the reasonableness of the 30 day process.
13. Third, the KERP is appropriate in the circumstances and as measured as against the non-exhaustive list of factors this Court has previously adopted as being relevant to a consideration as to whether a KERP should be approved (See *Grant Forest Products Inc.* 2009 CanLII 42046 (ONSC) and *Danier Leather, supra*).
14. Here, the Manager is a key employee of the Respondent and in the absence of a KERP will resign. The evidence is to the effect that his continued employment is critical to the potential success of the sales process and the maximize Asian a value for the stakeholders. Again, the senior secured creditor and the Receiver both support the relief sought and it is not opposed by any other party.
15. Fourth, I am equally satisfied that the terms of the KERP should be sealed, albeit for a limited period of time. I am satisfied that the *Sherman Estate* and *Sierra Club* tests are met here. The information sought to be kept confidential albeit on a temporary basis relates to the personal compensation of the Manager. The sealing order would be in effect only until 30 days following the conclusion of the sales process or further order of the Court with the further result that the order is proportionate and impairs the open court principle minimally and to a limited extent.
16. In sum, the relief sought is appropriate and the proposed course of action represents the only realistic or potentially available route to avoid an otherwise inevitable bankruptcy which is not in the interests of any stakeholders.
17. Order to go in the form signed by me which is effective immediately and without the necessity of issuing and entering.

Osawa, J.