

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

BETWEEN

**ATRIUM MORTGAGE INVESTMENT CORPORATION AND DORR CAPITAL
CORPORATION**

Plaintiffs

- and -

**STATEVIEW HOMES (NAO TOWNS II) INC., DINO TAURASI, and CARLO
TAURASI**

Defendants

**FACTUM OF THE RECEIVER
(NAO II SALE APPROVAL, INITIAL DISTRIBUTION AND ANCILLARY RELIEF)**

February 9, 2024

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TO: THE SERVICE LIST

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PART I. NATURE OF THIS MOTION

1. This is a motion for an approval and vesting order (“**AVO**”) and an order for various relief ancillary to the proposed AVO (the “**Ancillary Relief Order**”).
2. On May 2, 2023, this Court made an Order (the “**Receivership Order**”) appointing KSV Restructuring Inc. (“**KSV**”) as receiver and manager (the “**Receiver**”) of the property, assets and undertakings of Stateview Homes (Nao Towns II) Inc. (the “**Debtor**”).¹ The Receivership Order was made pursuant to an action commenced by Atrium Mortgage Corporation (“**Atrium**”) and Dorr Capital Corporation (“**Dorr**” and together with Atrium, the “**Lenders**”).

¹ Seventh Report of KSV Restructuring Inc. dated February 7, 2024 (the “**Seventh Report**”) at section 1.

3. At the same time, this Court made separate orders appointing KSV as receiver and manager of other entities in the Stateview Group of Companies (the “**Stateview Group**”).²
4. The Debtor is a single-purpose real estate development company that owns real property municipally known as 7810, 7822, 7834, and 7846 McCowan Road, Markham, Ontario (the “**Nao II Real Property**”).³
5. On June 5, 2023, this Court made an order (the “**Sale Process Order**”) to, among other things: (i) approve a sale process in respect of the property of the Stateview Group companies in receivership, including the Debtor (the “**Sale Process**”), and (ii) authorize the Receiver to conduct the Sale Process.⁴
6. After marketing the Nao II Real Property for sale and entering into a prior agreement of purchase and sale that did not close, the Receiver selected an offer from 1000707996 Ontario Inc. (the “**Purchaser**”) as the successful bidder.⁵
7. The Receiver and the Purchaser entered into an Agreement of Purchase and Sale as of November 29, 2023, which was subsequently finalized pursuant to an amendment dated January 17, 2024 (the “**APS**”).⁶
8. The Receiver now seeks the following orders from this Court:
 - (a) an AVO:

² Seventh Report at section 1.

³ Seventh Report at section 2.0(2).

⁴ Seventh Report at section 1.0(4).

⁵ Seventh Report at section 6.0.

⁶ Seventh Report at section 6.1(6).

- (i) approving the transaction for the sale of the Purchased Assets (as defined in the APS) to the Purchaser (the “**Transaction**”); and
 - (ii) following the Receiver’s delivery of the Receiver’s Certificate substantially in the form attached as Schedule “A” to the proposed AVO, transferring and vesting all of the Debtor’s right, title and interest in and to the Purchased Assets in the Purchaser, free and clear of all liens, charges, security interests and encumbrances other than permitted encumbrances; and
- (b) an **Ancillary Relief Order**:
- (i) approving the Seventh Report of the Receiver dated February 7, 2024 (the “**Seventh Report**”) and the Receiver’s activities described therein;
 - (ii) approving the fees and disbursements of the Receiver and its counsel (the “**Professional Fees**”), as detailed in the Seventh Report, the Affidavit of Robert Kofman sworn February 7, 2024 and the Affidavit of Beatrice Loschiavo sworn February 5, 2024 (together, the “**Fee Affidavits**”);
 - (iii) authorizing the Receiver to make certain payments and distributions and maintain certain reserves from the proceeds of the Transaction (the “**Nao II Purchase Proceeds**”) as recommended in the Seventh Report;
 - (iv) authorizing the Receiver to terminate and disclaim any or all agreements of purchase and sale entered into between the Debtor (or any other parties related to the Debtor) and any third party in respect of any residential homes built or to be built on the Nao II Real Property; and

- (v) sealing the Confidential Appendices (as defined below) to the Seventh Report pending the completion of the Transaction.

9. The Receiver respectfully submits that the orders sought are appropriate and that the *Soundair* test is met.

PART II. SUMMARY OF FACTS

A. Nao II Sale Process and the Transaction

- 10. The Receiver retained Cushman & Wakefield ULC (“**Cushman**”) to list the Nao II Real Property for sale.⁷
- 11. Cushman canvassed the market broadly for the Nao II Real Property. Among other things, on June 15, 2023, Cushman distributed an investment summary to its data base of approximately 8,500 potential purchasers and directly solicited specific parties that it believed would have an interest in the Nao II Real Property.⁸
- 12. In total, 44 parties executed a non-disclosure agreement to perform due diligence, including access to a virtual data room containing information about the Nao II Real Property.⁹
- 13. The Receiver set an initial bid deadline of July 25, 2023 (the “**Initial Bid Deadline**”). After that date, the Receiver invited all bidders who had submitted offers by the Initial Bid Deadline to submit improved offers by August 25, 2023.¹⁰ The Receiver received several

⁷ Seventh Report at section 6.0(2).

⁸ Seventh Report at section 6.0(3).

⁹ Seventh Report at section 6.0(3)-(4), 6.1(2).

¹⁰ Seventh Report at section 6.0(7), 6.1(3).

bids by the August 25, 2023 deadline, including from certain parties which had not submitted offers by the Initial Bid Deadline.

14. Cushman summarized its activities in marketing the Nao II Real Property in its report to the Receiver dated February 1, 2023 (the “**Cushman Report**”).¹¹
15. The Receiver ultimately determined that the APS was the best offer received and provides the best recovery available for the stakeholders of the Debtor.¹²
16. The APS and the proposed Transaction are summarized in more detail in the Seventh Report and in the Confidential Appendices thereto.

1. Termination of Pre-Sale Purchase Agreements

17. One material feature of the APS is that the Purchaser is unwilling to assume any of the existing pre-sale purchase agreements (the “**Pre-Sale Purchase Agreements**”) entered into by Nao II (or its affiliates) and various prospective purchasers (the “**Pre-Sale Purchasers**”) in respect of to-be-built homes on the Nao II Real Property.¹³
18. The Receiver understands that 76 Pre-Sale Purchasers made deposits to Nao II (the “**Homebuyer Deposits**”) totalling approximately \$7.617 million. Due to the Purchaser’s unwillingness to assume the Pre-Sale Purchase Agreements, the Receiver seeks an order permitting it to disclaim these agreements.¹⁴

¹¹ Seventh Report at section 6.1(1).

¹² Seventh Report at section 6.1(6).

¹³ Seventh Report at section 7.3.

¹⁴ Seventh Report at section 7.3(3).

19. The Receiver understands that disclaiming the Pre-Sale Purchase Agreements will enable the Pre-Sale Purchasers to make claims for the refund of their deposits from Tarion Warranty Corporation.¹⁵

B. Secured creditors

1. The Lenders

20. The Lenders are the senior secured creditors of Nao II. As of the date of the Receivership Order, the Lenders were collectively owed approximately \$24.4 million plus interest and costs which have accrued since that date (the “**Lenders’ Indebtedness**”).¹⁶
21. The Lenders’ security consists of, among other things, (i) a general security agreement dated April 19, 2022 (the “**GSA**”); and (ii) the Lenders’ mortgage, being a mortgage/charge (the “**Lenders’ Mortgage**”) which was registered on title on May 20, 2022 (jointly with the GSA, the “**Lenders’ Security**”).¹⁷
22. Receiver’s counsel provided an opinion that, subject to the standard assumptions and qualifications contained therein, the Lenders’ Security, as registered on title to the Nao II Reap Property and under the Ontario *Personal Property Security Act*, creates valid and enforceable charges in first position on the Nao II Real Property and the Debtor’s personal property.

2. Other Secured Creditors

23. Bergo Investment Limited, MCO Management Inc., and Tony Karamitsos (the “**Bergo Parties**”) registered a \$28.5 million charge against the Nao II Real Property on December

¹⁵ Seventh Report at section 7.3(5).

¹⁶ Seventh Report at section 3.0(1).

¹⁷ Seventh Report at section 3.0(2).

16, 2022. The Toronto-Dominion Bank (“**TD**”) registered a charge against the Nao II Real Property on April 6, 2023 in the amount of \$37,134,091.¹⁸

24. As the purchase price under the Transaction is not sufficient to make any distributions to the Bergo Parties or TD, the Receiver has not reviewed their respective charges or sought an opinion with respect to the validity or priority of such charges.¹⁹

C. Lien Claimant

25. GEI Consultants Ltd. (“**GEI**”) registered a lien in the amount of \$68,368 against the Nao II Real Property on May 5, 2023 (the “**GEI Lien**”) and delivered a certificate of action on June 30, 2023.²⁰ The GEI Lien alleges that services or materials were supplied to the Debtor between April 6, 2022 and March 29, 2023 for which payment was not made.²¹

26. On May 10, 2023, the Receiver’s counsel wrote to GEI’s counsel to ask for general information about the GEI Lien, including details of the alleged contract and amounts claimed. No response has been provided by GEI or its counsel.²² GEI will be served with this motion.

D. Tarion and Class Action Claims

27. Tarion Warranty Corporation (“**Tarion**”) brought a motion to secure the Homebuyer Deposits (and similar deposits in connection with sales of units across the Stateview Group)

¹⁸ Seventh Report at section 3.0(4).

¹⁹ Seventh Report at section 3.0(4).

²⁰ Seventh Report at section 4.0(1)

²¹ Seventh Report at section 4.0(5)

²² Seventh Report at section 4.0(3)

seeking the imposition of certain trusts and priority charges over the property of certain entities of the Stateview Group, including the Debtor (the “**Tarion Motion**”).²³

28. The Tarion Motion – which was opposed by the Receiver along with various secured creditors and claimants of the Stateview Group – was dismissed by the Honourable Madam Justice Steele on December 22, 2023 (the “**Tarion Decision**”).²⁴
29. On September 29, 2023, the Receiver received a copy of a Statement of Claim issued on behalf of a proposed class of Pre-Sale Purchasers commencing a proposed class action against certain entities within the Stateview Group, including the Debtor (the “**Proposed Class Action**”).²⁵
30. The relief sought in the Proposed Class Action includes the imposition of the same trusts and/or charges that were denied in the Tarion Motion, plus a trust claim under the *Condominium Act, 1998* (the “**Condominium Act**”) that was not sought in the Tarion Motion (the “**Condominium Act Claim**”).²⁶
31. The Condominium Act Claim alleges, among other things, that a portion of the purchase price for the freehold units related to common elements in a condominium and, as such, ought to have been held in trust under the *Condominium Act*.²⁷
32. The Receiver disagrees with this position for the reasons set out in submissions below.

²³ Seventh Report at section 5.0(1)

²⁴ Seventh Report at section 5.0(2)

²⁵ Seventh Report at section 5.0(3)

²⁶ Seventh Report at section 5.0(5)

²⁷ Seventh Report at section 5.0(6)

E. Payments, distributions and reserves

33. The Lenders are the principal secured creditor of the Debtor. The Receiver seeks authorization to distribute to the Lenders the balance of the Nao II Purchase Proceeds subject to:
- (a) paying all of the Professional Fees as described in the Seventh Report and particularized in the Fee Affidavits; and
 - (b) reserving \$100,000 as a holdback for estimated ongoing professional fees and costs to complete the administration of these proceedings (the “**Professional Fee Holdback**”).²⁸

F. The Confidential Appendices

34. On this motion, the Receiver seeks an order sealing the offer summaries (the “**Offer Summaries**”) prepared by Cushman and unredacted APS (Confidential Appendices “1” and “2” to the Seventh Report) pending the closing of the Transaction.
35. The Confidential Appendices contain sensitive information that could impact the marketability of the Purchased Assets if the Transaction does not close.²⁹

PART III. STATEMENT OF ISSUES, LAW & AUTHORITIES

36. The issues on this motion are:
- (a) whether this Court should grant the AVO;

²⁸ Seventh Report at section 8.0.

²⁹ Seventh Report at section 7.5.

- (b) whether this Court should grant the Ancillary Relief Order; and
- (c) whether this Court should approve the sealing of the Confidential Appendices pending the closing of the transaction.

A. *The AVO should be granted*

1. The APS and the Transaction should be approved

37. It is well established that Courts in Ontario consider the following criteria set out in *Soundair* when assessing whether to approve a transaction in the context of a receivership:

- (a) whether the receiver has made a sufficient effort to obtain the best price and has not acted improvidently;
- (b) the interests of all parties;
- (c) the efficacy and integrity of the process by which offers have been obtained; and
- (d) whether there has been unfairness in the working out of the process.³⁰

38. The *Soundair* test is met in this case. The Receiver has acted in a fair and reasonable manner and has appropriately conducted the Sale Process in accordance with its terms.³¹ The Receiver broadly canvassed the market and undertook significant efforts to obtain the highest and best offer for the Nao II Real Property.³² There is no reason to believe that any better price or result could have been obtained for the benefit of the stakeholders.³³ In

³⁰ *Royal Bank of Canada v. Soundair Corp.*, 1991 CanLII 2727 (ON CA) at [para 16](#) [*Soundair*].

³¹ Seventh Report at section 7.4(7)(a).

³² Seventh Report at section 7.4(7)(c).

³³ Seventh Report at section 7.4(7)(d).

addition, the interests of all parties have been considered and furthered in the context of the Transaction, including the interests of the Lenders as the primary secured creditors.³⁴

39. The Court should accept the Receiver's recommendation and approve the APS and the proposed Transaction.

B. The Ancillary Relief Order should be granted

1. The distributions and reserves are appropriate

40. The Receiver is seeking authorization and direction to make the proposed payments and distributions, and to establish and maintain the proposed reserves from the Nao II Purchase Proceeds described in the Seventh Report and set out above.
41. This Court routinely authorizes distributions with a reserve in insolvency proceedings, including receiverships.³⁵ The proposed distributions and reserves are consistent with recent orders of this Court in related Stateview Group receiverships.³⁶
42. In another example, in *GE Canada Real Estate Financing Business Property Co v. 1262354 Ontario Inc.*, this Court approved an interim distribution by a receiver, subject to the receiver maintaining sufficient reserves to complete the administration of the receivership, to maximize efficiency and avoid the need for further appearances.³⁷

³⁴ Seventh Report at section 7.4(7)(e).

³⁵ *Re Windsor Machine & Stamping Ltd.*, 2009 CanLII 39772 (ONSC) at [paras 8, 13](#); *Abitibowater Inc. (Re)*, 2009 QCCS 6461 at [paras 70-75](#) [*Abitibowater*].

³⁶ *Kingsett Mortgage Corporation and Dorr Capital Corporation v Stateview Homes (Minu Towns) Inc, Stateview Homes (Nao Towns) Inc, Stateview Homes (On the Mark) Inc, TLSFD Taurasi Holdings Corp and Stateview Homes (High Crown Estates) Inc*, (September 14, 2023), ONSC (Commercial List), Court File No. CV-23-00698576-00CL ([Distribution Order](#)).

³⁷ 2014 ONSC 1173 at [para 53](#) [*GE Canada Real Estate*].

43. In this case, the proposed reserves are necessary to ensure the Receiver will, among other things, have sufficient liquidity to fund the remainder of the Debtor's receivership proceedings. The reserves are fair and reasonable because they reflect an estimate of the maximum amounts that may be owed or become owing in priority to the security interest held by the Lenders.

2. The Proposed Class Action should not delay the distributions

44. The Receiver is of the view that there is no basis to delay the proposed distributions on account of the trust claims asserted in the Proposed Class Action.

45. Those trust claims are meritless and, at their highest, are materially identical to the claims asserted by Tarion in the motion before Justice Steele, who declined to grant any priority to the trust claimants despite finding a valid trust.

(a) *The Homebuyer Deposits do not relate to any Common Interest in the Condominium*

46. The trust claims under the *Condominium Act* cannot succeed because each of the Pre-Sale Purchase Agreements provides that (i) only \$2 of the purchase price for each unit applies to the common interest in the condominium (the balance related to the freehold unit that was being acquired) and (ii) in any case, *none* of the Homebuyer Deposits relate to the common interest in the condominium.³⁸

47. This matters because under the *Condominium Act*, the statutory trust obligations under s. 81 do not apply to common interest condominium corporations except in relation to funds

³⁸ Seventh Report, section 5.0(7), and see sample Pre-Sale Purchase Agreement at Appendix D to the Seventh Report.

received on account of the common interest in the corporation – not the entire condominium unit.³⁹

48. As such, the statutory trust obligations never arose in this case, since the funds at issue are solely deposit funds that were expressly allocated to the non-common interests in the condominium units.

(b) Justice Steele’s Decision Disposes of any Priority Argument

49. Even if there were valid trust claims under the *Condominium Act*, the following key findings of the Tarion Decision are dispositive of any possible priority claim by the proposed class.
50. Justice Steele accepted that the agreements relied on by Tarion did create an express trust over certain of the funds at issue.⁴⁰ She also found that the debtor entities breached the express (and other) trusts for failing to properly set the trust funds aside.
51. However, her Honour still declined to grant a constructive trust that would give Tarion priority in respect of those funds. Her Honour noted that a constructive trust in this context is “used only in the most extraordinary cases” and “cannot be imposed by the court for the purpose of altering the priority scheme under the BIA” even where there would not otherwise be funds available for the victims of the breach of trust.⁴¹

³⁹ See *Condominium Act*, s. 138(4)(a) which, in the case of common element condominium corporations, deems all references in s. 81 to a “unit” to refer only to “a common interest” and therefore limits the operation of s. 81 in relation to common element condominium corporations.

⁴⁰ Tarion Decision, at e.g. para. 32 (“I am satisfied that there was an express trust in respect of the contracts containing the early termination provisions.”), Appendix B to the Seventh Report.

⁴¹ Tarion Decision at paras. 71, 75.

52. This reasoning is wholly applicable to the trust claims asserted in the Proposed Class Action given that the alleged basis to apply a constructive trust in the Proposed Class Action arise under circumstances identical to those considered by Justice Steele in the Tarion Motion.
53. Through correspondence, class counsel has attempted to distinguish the Tarion Decision solely on the basis that the Tarion decision “was based on an express trust created by contract” and that it “did not deal with a statutory trust” (under the *Condominium Act*).⁴²
54. The Receiver submits that there is no difference in law between an express trust arising out of contract or out of statute; rather, the key consideration is the language of the trust and the scope of its application.⁴³ Accordingly, the Tarion Decision cannot be distinguished on this basis.
55. Moreover, the statutory trust under the *Condominium Act* simply creates trust obligations – it is not a “deemed trust” which can attract special treatment under the *Bankruptcy and Insolvency Act*. Justice Steele explained this point in the Tarion Decision:

Parliament sets out a statutory scheme of priorities in bankruptcy. That priority scheme recognizes super priorities for certain statutory deemed trusts. There is no statutory deemed trust in respect of the deposit funds.⁴⁴

56. This finding is wholly applicable to the claims asserted under the *Condominium Act*. There is no deemed trust under the *Condominium Act* and, in any event, the priority scheme set

⁴² See letter from counsel at Appendix F to the Seventh Report.

⁴³ See generally *The Guarantee Company of North America v. Royal Bank of Canada*, [2019 ONCA 9](#) at paras. 42, 47 (“it is the substance of the interest created by the provincial law that is relevant for the purpose of applying the Bankruptcy Act” and “provinces can create trusts by statute that will survive bankruptcy by legislating the requirements for a trust under the general principles of trust law”)

⁴⁴ Tarion Decision, para. 5.

out in the *BIA* recognizes no special treatment for trusts arising under the *Condominium Act*. As such, Justice Steele's decision is on all fours with the claims asserted in the Proposed Class Action.

3. The Court should approve the Seventh Report and the Receiver's activities described therein

57. The activities of the Receiver described in the Seventh Report were all necessary and undertaken in good faith pursuant to the Receiver's duties and powers set out in the Receivership Order and Sale Process Order and were, in each case, in the best interest of the Debtor's stakeholders generally.⁴⁵

58. The Receiver therefore respectfully submits that the Seventh Report and the activities described therein should be approved.

4. The Court should approve the fees and disbursements of the Receiver and its Counsel

59. The Receiver is seeking approval of the professional fees and disbursements incurred by it and its legal counsel from the commencement of the receivership up to and including January 31, 2024 as described in the Fee Affidavits attached to the Seventh Report.

60. The Receivership Order provides that the Receiver and its counsel shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges unless otherwise ordered by the Court on the passing of accounts.⁴⁶

61. In determining whether to approve the accounts of a Court-appointed receiver and its counsel, the Court will consider the overall value contributed, taking into account (a) the

⁴⁵ Seventh Report at section 9.0.

⁴⁶ Receivership Order, Seventh Report at section 1.0(6), Appendix "A".

nature, extent and value of the assets, (b) the complications encountered, (c) the degree of assistance provided by the debtor, (d) the time spent, (e) the receiver's knowledge, experience and skill, (f) the diligence and thoroughness displayed, (g) the responsibilities assumed, (h) the results of the receiver's efforts and (i) the cost of comparable services when performed in a prudent and economical manner.⁴⁷

62. The fees and disbursements are fair and reasonable and have been properly incurred. The hourly rates charged by the Receiver and its counsel are consistent with comparable firms practicing in the area of insolvency in the Toronto market.⁴⁸
63. The Receiver respectfully submits that it is appropriate to approve the fees and disbursements of the Receiver and its counsel in the circumstances.

5. This Court should authorize the Receiver to terminate and disclaim the Pre-Sale Purchase Agreements

64. The Court's jurisdiction to direct a receiver to disclaim pre-sale purchase agreements in the context of receivership sales of real property developments is well established.⁴⁹ Disclaimers are a valuable tool by which a receiver can maximize the value of the assets of the estate for the benefit of the stakeholders.⁵⁰

⁴⁷ *Bank of Nova Scotia v Diemer*, 2014 ONCA 851 at [paras 33](#) and [44-45](#).

⁴⁸ Seventh Report at section 10.0(7).

⁴⁹ *Forjay Management Ltd v 0981478 BC Ltd*, [2018 BCSC 527](#) at [paras 131-132](#) [*Forjay Management*]; *Peoples Trust Company v Censorio Group (Hastings & Carleton) Holdings Ltd*, [2020 BCSC 1013](#) at [para 57](#) [*Peoples Trust*]; *Firm Capital Mortgage Fund Inc v 2012241 Ontario Ltd*, [2012 ONSC 4816](#) at [paras 31-38](#) [*Firm Capital Mortgage Fund*]; *bcIMC Construction Fund Corp. v Chandler Home Street Ventures Ltd*, [2008 BCSC 897](#) at [paras 54-58](#) [*bcIMC Construction*]; *bcIMC Construction Fund Corporation et al v The Clover on Yonge Inc. et al*, (September 15, 2020), ONSC (Commercial List) Court File No. CV-20-00637301-00CL ([Approval and Vesting Order](#)) at para 8; see also, *Bankruptcy and Insolvency Act*, [RSC 1985, c B-3](#), s [243\(1\)\(c\)](#).

⁵⁰ *Forjay Management* at [para 36](#); *Peoples Trust* at [para 25](#).

65. The considerations for determining whether a Court should authorize a receiver to disclaim pre-sale purchase agreements were set out by Justice Fitzpatrick of the Supreme Court of British Columbia in *Forjay Management*:
- (a) the respective legal priority positions as between the competing interests;
 - (b) whether a disclaimer would enhance the value of the assets, and, if so, whether a failure to disclaim would amount to a preference in favour of one party; and
 - (c) if a preference would arise, whether the party seeking to avoid a disclaimer has established that the equities support that result.⁵¹
66. On August 18, 2023 and on September 14, 2023, this Court authorized the Receiver to disclaim pre-sale purchase agreements relating to two other entities within the Stateview Group, Stateview Homes (Hampton Heights) Inc. and On the Mark, respectively.⁵² The circumstances and factors in those receivership proceedings are analogous to this motion, namely: (i) the entities were single-purpose real estate development companies that owned an incomplete project; (ii) the entities had entered into pre-sale purchase agreements for freehold homes that had not closed; (iii) the disclaimer was necessary to facilitate the transaction identified as the value maximizing transaction; and (iv) no potential transaction or offer existed that provided for the assumption of the entity's obligations under the pre-sale purchase agreements.⁵³

⁵¹ *Forjay Management* at [paras 41-44](#).

⁵² *Firm Capital Mortgage Fund Inc v Stateview Homes (Hampton Heights) Inc et al*, (August 18, 2023), ONSC (Commercial List) Court File No. CV23-00700356-00CL ([Ancillary Relief Order](#)) at para 7; *KingSett Mortgage Corporation and Dorr Capital Corporation v Stateview Homes (Minu Towns) Inc, Stateview Homes (Nao Towns) Inc, Stateview Homes (On the Mark) Inc, TLSFD Taurasi Holdings Corp and Stateview Homes (High Crown Estates) Inc*, (September 14, 2023), ONSC (Commercial List), Court File No. CV-23-00698576-00CL ([Sale Approval Order](#)) at para 9.

⁵³ *Firm Capital Mortgage Fund Inc v Stateview Homes (Hampton Heights) Inc et al*, (August 18, 2023), ONSC (Commercial List) Court File No. CV23-00700356-00CL ([Endorsement](#)) at para 6; *KingSett Mortgage Corporation and Dorr Capital Corporation v Stateview Homes (Minu Towns) Inc, Stateview Homes (Nao Towns) Inc, Stateview Homes (On the Mark) Inc, TLSFD Taurasi Holdings Corp and Stateview Homes*

67. The Pre-Sale Purchase Agreements contain express acknowledgments that (i) the Pre-Sale Purchase Agreement confers a personal right only and not an interest in the Nao II Real Property and (ii) the Pre-Sale Purchase subordinates and postpones their Pre-Sale Purchase Agreement to any mortgages of the Debtor, as applicable, and any advances under such mortgage. In addition, none of the Pre-Sale Purchase Agreements are registered on title to the applicable Nao II Real Property.
68. For these reasons, the holders of proprietary and/or proprietary interests in the Nao II Real Property, including the Lenders, clearly have priority to the Pre-Sale Purchasers' rights pursuant to the Pre-Sale Purchase Agreements.
69. Authorizing the Receiver to terminate and disclaim the Pre-Sale Purchase Agreements, as applicable, is necessary to facilitate the completion of the Transaction.⁵⁴
70. Significantly, the Pre-Sale Purchasers themselves also stand to benefit from a disclaimer. As set out in the Seventh Report, termination of the Pre-Sale Purchase Agreements is necessary to enable the Pre-Sale Purchasers to make claims to Tarion Warranty Corporation for deposit refunds. A number of Pre-Sale Purchasers have already corresponded with the Receiver and expressed a strong desire to move forward with the Tarion claim process.

(High Crown Estates) Inc., (September 14, 2023), ONSC (Commercial List), Court File No. CV-23-00698576-00CL ([Endorsement](#)).

⁵⁴ Seventh Report at section 7.3

6. This Court should Seal the Confidential Appendices

71. As noted above, the Receiver seeks an Order sealing the Confidential Appendices pending the closing of the Transaction. The Confidential Appendices consist of the Offer Summaries and unredacted APS. The proposed sealing order would seal the Confidential Appendices pending further order of the Court or the closing of the Transaction.
72. In *Sierra Club of Canada v. Canada (Minister of Finance)*, the Supreme Court of Canada held that courts should exercise their discretion to grant sealing orders where (i) the order is necessary to prevent a serious risk to an important interest, including a commercial interest; and (ii) the salutary effects of the order outweigh its deleterious effects.⁵⁵
73. In *Sherman Estate v. Donovan*, the Supreme Court of Canada held that a party requesting that a court exercise its discretion in a way that limits the ‘open court’ presumption must establish that: (i) the openness poses a risk to an important interest to the public; (ii) the request sought is necessary to prevent the risk to the identified interest as reasonable alternative measures will not prevent said risk; and (iii) the benefits of the request outweigh the negatives as a matter of proportionality.⁵⁶
74. In the insolvency context, when assets are being sold pursuant to a court process, it is common to seal bids and other commercially sensitive material, such as sale price and details of competing offers, in the event that a further listing is required should the contemplated proposed transaction not close.⁵⁷

⁵⁵ [2002 SCC 41](#) at [para. 53](#) [*Sierra Club*].

⁵⁶ 2021 SCC 25 at [para. 38](#) [*Sherman Estate*].

⁵⁷ *Romspen Investment Corporation v Hargate Properties Inc*, 2012 ABQB 412 at [paras 2, 11](#) and [13](#).

75. In this case, the disclosure of commercially sensitive information set out in the Confidential Appendices would likely have a detrimental impact on any future sale efforts of the Receiver, in the event that the Transaction does not close. The Receiver submits that there is no other reasonable way to preserve and ensure the viability and integrity of any future remarketing and sale process. The benefits of the protective order outweigh any deleterious impact on the “open court” principle.⁵⁸ No stakeholder will be materially prejudiced by the proposed sealing order.
76. Finally, the proposed sealing order embodies the principle of proportionality. The Receiver seeks to protect only the material terms of the APS, namely the purchase price and the quantum of deposits, and the details of any competing offers submitted in the Sale Process and not selected as the value maximizing transaction.
77. Sealing these materials is necessary to ensure that the Receiver can maximize value for the Purchased Assets if the contemplated Transaction does not close and the Receiver (or someone else) must market the Purchased Assets for sale again.⁵⁹

PART IV. ORDER REQUESTED

78. For the reasons stated herein, the Receiver respectfully requests that the Court grant: the (i) AVO and (ii) Ancillary Relief Order, and approve the relief set out herein.



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⁵⁸ Seventh Report at section 7.5.

⁵⁹ *GE Canada Real Estate* at [paras. 32-34](#).

LIST OF AUTHORITIES

1. *Royal Bank of Canada v. Soundair Corp.*, [1991 CanLII 2727 \(ON CA\)](#)
2. *Re Windsor Machine & Stamping Ltd.*, [2009 CanLII 39772 \(ONSC\)](#)
3. *GE Canada Real Estate Financing Business Property Company v. 1262354 Ontario Inc.*, [2014 ONSC 1173](#)
4. *Bank of Nova Scotia v Diemer*, [2014 ONCA 851](#)
5. *Forjay Management Ltd v 0981478 BC Ltd*, [2018 BCSC 527](#)
6. *Peoples Trust Company v Censorio Group (Hastings & Carleton) Holdings Ltd*, [2020 BCSC 1013](#)
7. *Firm Capital Mortgage Fund Inc v 2012241 Ontario Ltd*, [2012 ONSC 4816](#)
8. *bcIMC Construction Fund Corp. v Chandler Home Street Ventures Ltd*, [2008 BCSC 897](#)
9. *bcIMC Construction Fund Corporation et al v The Clover on Yonge Inc. et al*, (September 15, 2020), ONSC (Commercial List) Court File No. CV-20-00637301-00CL ([Approval and Vesting Order](#))
10. *Firm Capital Mortgage Fund Inc v Stateview Homes (Hampton Heights) Inc et al*, (August 18, 2023), ONSC (Commercial List) Court File No. CV23-00700356-00CL ([Ancillary Relief Order](#))
11. *KingSett Mortgage Corporation and Dorr Capital Corporation v Stateview Homes (Minu Towns) Inc, Stateview Homes (Nao Towns) Inc, Stateview Homes (On the Mark) Inc, TLSFD Taurasi Holdings Corp and Stateview Homes (High Crown Estates) Inc*, (September 14, 2023), ONSC (Commercial List), Court File No. CV-23-00698576-00CL ([Distribution Order](#)).
12. *KingSett Mortgage Corporation and Dorr Capital Corporation v Stateview Homes (Minu Towns) Inc, Stateview Homes (Nao Towns) Inc, Stateview Homes (On the Mark) Inc, TLSFD Taurasi Holdings Corp and Stateview Homes (High Crown Estates) Inc*, (September 14, 2023), ONSC (Commercial List), Court File No. CV-23-00698576-00CL ([Sale Approval Order](#))
13. *Firm Capital Mortgage Fund Inc v Stateview Homes (Hampton Heights) Inc et al*, (August 18, 2023), ONSC (Commercial List) Court File No. CV23-00700356-00CL ([Endorsement](#))
14. *KingSett Mortgage Corporation and Dorr Capital Corporation v Stateview Homes (Minu Towns) Inc, Stateview Homes (Nao Towns) Inc, Stateview Homes (On the Mark) Inc, TLSFD Taurasi Holdings Corp and Stateview Homes (High Crown Estates) Inc*, (September 14, 2023), ONSC (Commercial List), Court File No. CV-23-00698576-00CL ([Endorsement](#)).

15. *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002 SCC 41](#)

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

Bankruptcy and Insolvency Act, R.S.C. 1985, c C-36

Court may appoint receiver

243 (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

- (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
- (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
- (c) take any other action that the court considers advisable.

Restriction on appointment of receiver

(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

- (a) the insolvent person consents to an earlier enforcement under subsection 244(2); or
- (b) the court considers it appropriate to appoint a receiver before then.

...

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.

Terms

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

...

Condominium Act, 1998, S.O. 1998, c. 19

Money held in trust

81 (1) A declarant shall ensure that a trustee of a prescribed class or the declarant's solicitor receives and holds in trust all money, together with interest earned on it, as soon as a person makes a payment,

- (a) with respect to reserving a right to enter into an agreement of purchase and sale for the purchase of a proposed unit;
- (b) on account of an agreement of purchase and sale of a proposed unit; or
- (c) on account of a sale of a proposed unit.

...

138 (4) Subject to this Part and the regulations, Parts I to IX, XI and XIV apply with necessary modifications to a common elements condominium corporation, except that,

- (a) references to a unit or a proposed unit shall be deemed to be references to a common interest in the corporation or a proposed common interest in the corporation, respectively;

ATRIUM MORTGAGE INVESTMENT CORP et al.
Applicant

STATEVIEW HOMES (NAO TOWNS II) INC. et al.

Defendants

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT
TORONTO

FACTUM OF THE RECEIVER

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