

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

BETWEEN:

**KINGSETT MORTGAGE CORPORATION AND DORR CAPITAL CORPORATION**

Applicants

- and -

**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.**

Respondents

**IN THE MATTER OF AN APPLICATION UNDER SUBSECTION 243(1) OF THE  
*BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED, AND  
SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED**

**FACTUM OF KINGSETT MORTGAGE CORPORATION  
(Returnable September 14, 2023)**

September 7, 2023

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Lawyers for KingSett Mortgage Corporation

## FACTUM OF KINGSETT MORTGAGE CORPORATION

### PART I: INTRODUCTION

1. This factum is filed by KingSett Mortgage Corporation ("**KingSett**") in support of a motion seeking an order (the "**OTM Bankruptcy Order**"), among other things:

- (a) authorizing and directing the Receiver (as defined below) to assign Stateview Homes (On the Mark) Inc. ("**On the Mark**") into bankruptcy;
- (b) authorizing and directing KSV (as defined below) to act as trustee in bankruptcy of On the Mark (in such capacity, the "**Trustee**"); and
- (c) authorizing and empowering the Receiver to fund the costs of administering the bankruptcy estate of On the Mark, including the fees and the disbursements of the Trustee and its counsel, from the Property (as defined in the Receivership Order (as defined below)) of On the Mark.

2. It is just and appropriate that the order sought be granted. Absent the requested relief, the recovery of On the Mark's senior secured lender, KingSett, will be further materially impaired and irrevocably prejudiced.

### PART II: FACTS

3. The facts underlying these proceedings and this motion are more fully set out in the Affidavit of Daniel Pollack sworn September 5, 2023 (the "**Pollack Affidavit**") and the Third Report of KSV Restructuring Inc. ("**KSV**") in its capacity as receiver and manager (in such capacity, the "**Receiver**") of the Debtors (as defined below) dated September 7, 2023 (the "**Third**

**Report**").<sup>1</sup> All capitalized terms used but not defined herein have the meanings ascribed to them in the Third Report or the Pollack Affidavit, as the case may be.

## **A. Background**

4. On May 2, 2023, pursuant to an order of the Court (the "**Receivership Order**"), KSV was appointed the Receiver of the property, assets and undertakings, including the real property, owned by Stateview Homes (Minu Towns) Inc. ("**Minu**"), Stateview Homes (Nao Towns) Inc. ("**Nao**"), On the Mark, Stateview Homes (High Crown Estates) Inc. ("**High Crown**") and TLSFD Taurasi Holdings Corp. ("**Taurasi Holdings**", and together with Minu, Nao, On the Mark and High Crown, the "**Debtors**").<sup>2</sup>

5. Pursuant to three additional orders granted by the Court on May 2, 2023 and an order granted by the Court on May 18, 2023, KSV was also appointed receiver of certain other companies within the Stateview Homes group of companies (the "**Stateview Group**").<sup>3</sup>

6. On June 5, 2023, pursuant to a series of orders issued by the Court, the Receiver was authorized to conduct a sale process for the properties of each of the entities in the Stateview Group subject to the receivership orders, with the exception of On the Mark.<sup>4</sup>

7. On July 19, 2023, the Court granted an order (the "**OTM Sale Process Order**"), among other things:

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<sup>1</sup> The Affidavit of Daniel Pollack sworn September 5, 2023 [*Pollack Affidavit* ]; the Third Report of the Receiver dated September 7, 2023 [*Third Report*].

<sup>2</sup> *Pollack Affidavit*, *ibid* at para 4.

<sup>3</sup> *Pollack Affidavit*, *ibid* at para 5.

<sup>4</sup> *Pollack Affidavit*, *ibid* at para 6.

- (a) authorizing and empowering the Receiver, *nunc pro tunc*, to enter into the asset purchase agreement between the Receiver and 2077060 Ontario Inc. (the "**Stalking Horse Purchaser**") dated June 30, 2023 (the "**Stalking Horse Purchase Agreement**"); and
- (b) approving a sale process (the "**OTM Sale Process**") in respect of On the Mark's right, title and interest, in and to the property and assets of On the Mark located at or related to or used in connection with or arising from or out of the On the Mark Real Property (as defined in the Stalking Horse Purchase Agreement) (collectively, the "**OTM Property**").<sup>5</sup>

**(ii) On the Mark Indebtedness to KingSett**

8. On the Mark is indebted to KingSett pursuant to the On the Mark First Mortgage Commitment Letter and the On the Mark Second Mortgage Commitment Letter (together, the "**On the Mark Commitment Letters**"). As at August 31, 2023, KingSett was owed approximately \$19.6 million, plus accruing interest and costs (the "**On the Mark Indebtedness**").<sup>6</sup>

9. The On the Mark Commitment Letters and underlying On the Mark Indebtedness are secured by, among other things: (i) general security agreements delivered by On the Mark to KingSett (granting a security interest and lien against On the Mark's personal property associated with the business and assets on the On the Mark real property) (collectively, the "**KingSett On the Mark Security Agreements**"); and (ii) mortgages/charges (collectively, the "**KingSett Charges**") and general assignment of rents and leases (collectively, the "**KingSett GARLs**" and together with

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<sup>5</sup> Pollack Affidavit, *ibid* at para 7.

<sup>6</sup> Pollack Affidavit, *ibid* at para 9.

the KingSett On the Mark Security Agreements and the KingSett Charges, the "**On the Mark Security**").<sup>7</sup>

10. Counsel to the Receiver, Cassels Brock & Blackwell LLP, has reviewed the On the Mark Security and has confirmed, subject to customary qualifications, that KingSett has valid security over the OTM Property.<sup>8</sup>

**(ii) OTM Sale Process**

11. As noted above, the OTM Sale Process Order also approved the Stalking Horse Purchase Agreement solely for the purpose of acting as the stalking horse bid. Given that no Qualified Bids were received by the Bid Deadline, the Stalking Horse Purchase Agreement was declared as the Successful Bid at the conclusion of the OTM Sale Process.<sup>9</sup>

12. The net proceeds to be paid pursuant to the Stalking Horse Purchase Agreement will be insufficient to repay KingSett in full in respect of the On the Mark Indebtedness. To that end, KingSett's shortfall is poised to be somewhere between \$2.5 million and \$3.5 million.<sup>10</sup>

**(iii) On the Mark's Indebtedness to the CRA**

13. On the Mark is indebted to the Canadian Revenue Agency (the "**CRA**") in the amount of approximately \$4 million in respect of unremitted HST on the sales of the first 38 homes sold by

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<sup>7</sup> Pollack Affidavit, *ibid* at para 10; *Third Report, supra* note 1 at section 4.1 at para 1.

<sup>8</sup> Pollack Affidavit, *ibid* at para 11; *Third Report, ibid* at section 4.1 at para 2.

<sup>9</sup> Pollack Affidavit, *ibid* at para 13.

<sup>10</sup> Pollack Affidavit, *ibid* at para 14.

On the Mark. If the HST were to be paid by the Receiver, it would materially further impair KingSett's recovery.<sup>11</sup>

### **PART III: ISSUES**

14. The sole issue to be determined on this motion is whether this Court should authorize and direct the Receiver to assign On the Mark into bankruptcy.

### **PART IV: LAW AND ARGUMENT**

15. The relevant authorities are clear that the Court may authorize and direct a receiver to make a voluntary assignment into bankruptcy.<sup>12</sup> As was held by this Court in *Royal Bank v. Sun Squeeze Juices Inc.*, there is no dispute that the Court has the power to authorize the Court-appointed receiver and manager to file an assignment in bankruptcy.<sup>13</sup> It is well-settled that the Court may do so,<sup>14</sup> particularly in circumstances such as the present case where the bankruptcy is required to invoke the comprehensive and exhaustive distribution mechanism provided for by Parliament under the *Bankruptcy and Insolvency Act* (Canada) ("**BIA**").<sup>15</sup>

16. The law is consistent and unambiguous that utilizing the BIA to alter priorities in a manner provided for under the BIA is a legitimate reason for an assignment in bankruptcy. It is appropriate

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<sup>11</sup> *Pollack Affidavit*, *ibid* at para 16.

<sup>12</sup> *Royal Bank v Sun Squeeze Juices Inc.*, (1994) CarswellOnt 266 (Ont Sup Ct (Commercial List)) ("*Sun Squeeze*"), at paras 6-10, Book of Authorities of KingSett Mortgage Corporation dated September 5, 2023 [*BOA*] at Tab 1, affirmed, *Royal Bank v. Sun Squeeze Juices Inc.*, 1994 ONCA 8771, *BOA* at Tab 2; *First Treasury Financial Inc. v. Congo Petroleum Inc.*, 1991 ONSC 8338, at para 43, *BOA* at Tab 3.

<sup>13</sup> *Sun Squeeze*, *ibid* at paras 6-10, *BOA* at Tab 1.

<sup>14</sup> *Bank of Montreal v Owen Sound Golf & Country Club Ltd.*, 2012 ONSC 557, at para 7, *BOA* at Tab 4.

<sup>15</sup> *Pollack Affidavit*, *supra* note 1 at para 18.

and indeed common for a creditor to seek to invoke the distribution mechanism provided for under the BIA to alter priorities in its favour.<sup>16</sup>

17. Applying these well-established principles, in *2403177 Ontario Inc. v Bending Lake Iron Group Ltd.*, the Court granted a bankruptcy application, fully recognizing that the effect of the bankruptcy would be to nullify the existing deemed trust in favour of the Crown with respect to a claim by the CRA for HST. The Court held that it is permitted and proper for a creditor to file a bankruptcy application to invoke the BIA priority scheme.<sup>17</sup>

18. More recently, this Court in *American General Life Insurance Company et al v Victoria Avenue North Holdings Inc* held that a bankruptcy order may be sought with the express purpose of affecting priorities.<sup>18</sup>To that end, this Court has routinely granted Orders providing for relief similar to that sought in the proposed OTM Bankruptcy Order.<sup>19</sup>

19. The fact that KingSett is seeking to alter certain priorities by invoking the BIA priority scheme is an appropriate and legitimate purpose in seeking use of the BIA. The Receiver is supportive of the relief being sought in the proposed OTM Bankruptcy Order.<sup>20</sup>

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<sup>16</sup> *2403177 Ontario Inc. v Bending Lake Iron Group Ltd.*, 2016 ONSC 199 ("*2403177 Ontario Inc.*") at paras 117-122, *BOA* at Tab 5, leave to appeal refused, *2403177 Ontario Inc. v Bending Lake Iron Group Limited*, 2016 ONCA 485, *BOA* at Tab 6, citing *Grant Forest Products Inc. v. The Toronto-Dominion Bank*, 2015 ONCA 570 at para 118, *BOA* at Tab 7; *Ivaco Inc., Re*, 2006 ONCA 34551 at para 76, *BOA* at Tab 8; *Bank of Nova Scotia v. Huronia Precision Plastics Inc.*, 2009 ONSC 2319 at paras 13, 19 and 20, *BOA* at Tab 9.

<sup>17</sup> *2403177 Ontario Inc.*, *ibid* at paras 117-122, *BOA* at Tab 5.

<sup>18</sup> *American General Life Insurance Company et al. v Victoria Avenue North Holdings Inc. et al.*, 2023 ONSC 3322 at para 17, *BOA* at Tab 10.

<sup>19</sup> North American Milling Company Limited and Woodbine Holdings Ontario Inc., Ancillary Administration Order, Court File No. CV-17-588420-00CL, May 18, 2018, *BOA* at Tab 11; *Erwin Hymer Group North America, Inc., Order (Bankruptcy Application and Interim Distribution)*, Court File No. CV-19-614593-00CL, June 25, 2019, *BOA* at Tab 12; *Virk Hospitality Corp., Order (Authorization to Bankrupt Virk Hospitality Corp.)*, Court File No. CV-18-00604099-00CL, April, 23, 2020, *BOA* at Tab 13; *TheRedPin.Com Realty Inc., Order (Assignment in Bankruptcy)*, Court File No. CV-18-599644-00CL, May 14, 2020, *BOA* at Tab 14; and *3174026 Canada Inc., Order*, Court File No. CV-21-00674530-00CL, May 27, 2022, *BOA* at Tab 15.

<sup>20</sup> *Third Report*, *supra* note 1 at section 7.0 at para 3.

20. Notice of the proposed OTM Bankruptcy Order has been provided to the CRA and the Department of Justice.

21. The Receivership Order expressly provides that "nothing in this Order shall prevent the Receiver from acting as a trustee in bankruptcy of the Debtors".<sup>21</sup>

22. KingSett will already suffer a material loss despite its ranking as On the Mark's senior secured lender.<sup>22</sup> KingSett had no involvement in On the Mark's decision not to remit HST and did not benefit from that decision.<sup>23</sup> It is not just or appropriate for KingSett to suffer a further loss as a result.

**PART V: RELIEF REQUESTED**

23. KingSett respectfully requests that this Court grant the proposed form of OTM Bankruptcy Order.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

*Bennett Jones LLP*

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September 7, 2023

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<sup>21</sup> *Pollack Affidavit, supra* note 1 at para 19.

<sup>22</sup> *Pollack Affidavit, ibid* at para 14; *Third Report, supra* note 1 at section 6.2 at para 5(e).

<sup>23</sup> *Pollack Affidavit, ibid* at para 17.



## SCHEDULE A – LIST OF AUTHORITIES

### *Cases Cited*

1. *Royal Bank v Sun Squeeze Juices Inc.*, (1994) CarswellOnt 266 (Ont Sup Ct (Commercial List))
2. [\*Royal Bank v. Sun Squeeze Juices Inc.\*](#), 1994 ONCA 8771
3. [\*First Treasury Financial Inc. v. Congo Petroleums Inc.\*](#), 1991 ONSC 8338
4. [\*Bank of Montreal v Owen Sound Golf & Country Club Ltd.\*](#), 2012 ONSC 557
5. [\*2403177 Ontario Inc. v Bending Lake Iron Group Ltd.\*](#), 2016 ONSC 199
6. [\*2403177 Ontario Inc. v. Bending Lake Iron Group Limited\*](#), 2016 ONCA 485
7. [\*Grant Forest Products Inc. v. The Toronto-Dominion Bank\*](#), 2015 ONCA 570
8. [\*Ivaco Inc., Re\*](#), 2006 ONCA 34551
9. [\*Bank of Nova Scotia v. Huronia Precision Plastics Inc.\*](#), 2009 ONSC 2319
10. [\*American General Life Insurance Company et al. v Victoria Avenue North Holdings Inc. et al.\*](#), 2023 ONSC 3322

### *Other Sources*

1. North American Milling Company Limited and Woodbine Holdings Ontario Inc., Ancillary Administration Order, Court File No. CV-17-588420-00CL, May 18, 2018
2. [\*Erwin Hymer Group North America, Inc., Order \(Bankruptcy Application and Interim Distribution\)\*](#), Court File No. CV-19-614593-00CL, June 25, 2019
3. [\*Virk Hospitality Corp., Order \(Authorization to Bankrupt Virk Hospitality Corp.\)\*](#), Court File No. CV-18-00604099-00CL, April, 23, 2020
4. [\*TheRedPin.Com Realty Inc., Order \(Assignment in Bankruptcy\)\*](#), Court File No. CV-18-599644-00CL, May 14, 2020
5. [\*3174026 Canada Inc., Order\*](#), Court File No. CV-21-00674530-00CL, May 27, 2022

## **SCHEDULE B – STATUTES RELIED ON**

### **Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3**

#### **Assignment for general benefit of creditors**

49 (1) An insolvent person or, if deceased, the executor or administrator of their estate or the liquidator of the succession, with the leave of the court, may make an assignment of all the insolvent person's property for the general benefit of the insolvent person's creditors.

#### **Sworn statement**

(2) The assignment must be accompanied by a sworn statement in the prescribed form showing the debtor's property that is divisible among his or her creditors, the names and addresses of all his or her creditors and the amounts of their respective claims.

#### **Filing of assignment**

(3) The assignment made under subsection (1) shall be offered to the official receiver in the locality of the debtor, and it is inoperative until filed with that official receiver, who shall refuse to file the assignment unless it is in the prescribed form or to the like effect and accompanied by the sworn statement required by subsection (2).

#### **Appointment of trustee**

(4) Where the official receiver files the assignment made under subsection (1), he shall appoint as trustee a licensed trustee whom he shall, as far as possible, select by reference to the wishes of the most interested creditors if ascertainable at the time, and the official receiver shall complete the assignment by inserting therein as grantee the name of the trustee.

#### **Cancellation of assignment**

(5) Where the official receiver is unable to find a licensed trustee who is willing to act, the official receiver shall, after giving the bankrupt five days notice, cancel the assignment.

#### **Procedure in small estates**

(6) Where the bankrupt is not a corporation and in the opinion of the official receiver the realizable assets of the bankrupt, after the claims of secured creditors are deducted, will not exceed five thousand dollars or such other amount as is prescribed, the provisions of this Act relating to the summary administration of estates shall apply.

### **Future property not to be considered**

(7) In the determination of the realizable assets of a bankrupt for the purposes of subsection (6), no regard shall be had to any property that may be acquired by the bankrupt or devolve on the bankrupt before the bankrupt's discharge.

### **Where subsection (6) ceases to apply**

(8) The official receiver may direct that subsection (6) shall cease to apply in respect of the bankrupt where the official receiver determines that

(a) the realizable assets of the bankrupt, after the claims of secured creditors are deducted, exceed five thousand dollars or the amount prescribed, as the case may be, or

(b) the costs of realization of the assets of the bankrupt are a significant proportion of the realizable value of the assets,

and the official receiver considers that such a direction is appropriate.

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Proceedings commenced in Toronto

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