

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

DUCA FINANCIAL SERVICES CREDIT UNION LTD.

Applicant

and

2460467 ONTARIO INC.

Respondent

IN THE MATTER OF SECTION 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 THE RECEIVER, KSV RESTRUCTURING INC.

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TO: SERVICE LIST

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MOVING PARTIES

PART I - INTRODUCTION

1. KSV Restructuring Inc., in its capacity as Court-appointed receiver and manager (the “**Receiver**”) of the assets, property and undertakings of the Respondent, 2460467 Ontario Inc. (the “**Debtor**”) moves for the following relief:

- (a) An order:
 - (i) abridging the time for service of this motion or, alternatively, dispensing with service;
 - (ii) approving the terms of a Completion Agreement dated April 30, 2025 (the “**Completion Agreement**”) and CCDC 5B Construction Management Contract dated April 30, 2025 (the “**New CCDC 5B Contract**”) between the Receiver and Fusioncorp;
 - (iii) authorizing and directing the Receiver to enter into and perform the Completion Agreement and the New CCDC 5B Contract and permitting the Receiver to take such steps and execute and deliver such additional documents as may be necessary or desirable to give effect to the Completion Agreement and the New CCDC 5B Contract;
 - (iv) increasing the borrowing powers of the Receiver from \$1,000,000 to \$14 million;

- (v) approving the Receiver's Second Report dated April 30, 2025 and the Supplement thereto dated May 2, 2024 (collectively, the "**Second Report**"), and the activities and proposed activities of the Receiver described therein; and
- (vi) approving the Receiver's Interim Statement of Receipts and Disbursements for the period August 12, 2024 to April 29, 2025; and
- (vii) such further and other relief as to this Honourable Court may seem just.

PART II - SUMMARY OF FACTS

A. Background

2. The Receiver was appointed on the application of Duca Financial Services Credit Union Ltd. ("**Duca**") pursuant to the Order of the Honourable Justice Kershman dated August 12, 2024 (the "**Appointment Order**").¹

3. Prior to the date of the Receiver's appointment, the Debtor was building a 62 unit stacked townhouse development project known municipally as 240 Yeomans Street, Belleville, Ontario (the "**Project**").²

¹ Appointment Order, Appendix "A", Second Report of KSV Restructuring Inc. ("**Second Report**"), Motion Record of KSV Restructuring Inc. ("**MR**"), Tab 2, p. 24.

² Second Report at para. 2, MR, Tab 2, p. 12.

4. At the date of the Appointment Order, the Debtor had sold 61 units in the Project, construction of the Project had not yet been completed, and each phase was at varying stages of completion.³

5. The outside occupancy date in the pre-sale purchase agreements between the Debtor and purchasers is May 1, 2026 (the “**Outside Occupancy Date**”). Given the Project’s current status, it is imperative that construction on the Project recommence immediately to meet this deadline.⁴

6. In accordance with paragraph 3(c) of the Appointment Order, the Receiver intends to disclaim the Original CCDCs.⁵

B. Construction Manager Selection

7. On January 27, 2025, the Receiver sent a Request for Proposal (“**RFP**”) to 59 Project Management Inc. (“**59 PM**”) and Fusioncorp to submit proposals to act as construction manager for the purpose of completing the Project. The deadline for submitting a proposal was February 10, 2025.⁶

8. The Receiver, in consultation with Duca and Tarion, selected Fusioncorp as the construction manager based on its:⁷

- (a) familiarity with the Project given its pre-receivership role;
- (b) experience working with trades in the Belleville, Ontario area;
- (c) acceptability to Tarion;

³ Second Report at paras. 1 and 2, Section 2.0, MR, Tab 2, p. 14.

⁴ Second Report at para. 7, Section 2.0, MR, Tab 2, p. 15.

⁵ Second Report at para. 2, Section 4.0, MR, Tab 2, p. 17.

⁶ Second Report at para. 1, Section 3.0, MR, Tab 2, p. 16.

⁷ Second Report at para. 3, Section 3.0, MR, Tab 2, p. 16.

- (d) stated ability to complete the Project by April 30, 2026; and
 - (e) its fees and construction schedule are acceptable to Duca.
9. The Receiver advised Fusioncorp on April 1, 2025 that its proposal was accepted, subject to Court approval.⁸

C. Completion Agreement

10. Below is a summary of the essential terms of the Completion Agreement:

- (a) Construction Manager shall attain *Substantial Performance of the Work* on or before April 30, 2026;⁹
- (b) the Construction Manager's fee shall be \$439,793 (the “**Completion Fee**”) based on four percent (4%) of the remaining *Cost of the Work*, and the costs of its employees and services provided to the Project;¹⁰
- (c) if the Construction Manager attains *Substantial Performance of the Work* and occupancy permits for all units, on or before April 30, 2026, then, the Receiver shall also pay to the Construction Manager the amount of \$270,000;¹¹
- (d) Fusioncorp shall release and/or discharge its Claim for Lien, registered on title to the Project on June 4, 2024 in the amount of \$878,720;¹²

⁸ Second Report at para. 4, Section 3.0, MR, Tab 2, pg. 16.

⁹ Second Report at para. 3(c)(ii)(A), Section 4.0, MR, Tab 2, pg. 18.

¹⁰ Second Report at paras. 3(c)(ii)(B) and 3(c)(iii), Section 4.0, MR, Tab 2, pg. 18.

¹¹ Second Report at para. 3(d), Section 4.0, MR, Tab 2, pg. 18.

¹² Second Report at para. 3(f), Section 4.0, MR, Tab 2, pg. 18.

- (e) Fusioncorp shall insure the Project as a project cost and/or the Receiver shall insure the Project;¹³and
- (f) the Receiver shall have no personal liability under the Completion Agreement.¹⁴

D. CCDC 5B Contract

11. Below is a summary of the key terms of the New CCDC 5B:

- (a) The Construction Manager shall provide services for each of the following phases: preconstruction (including pre-design, schematic design, design development, construction development and construction procurement), construction (including general services and cost control/accounting); and post-construction.¹⁵
- (b) The estimated cost to complete the Project is \$11 million. This amount does not include the construction manager's fee, the Receiver's fees, financing costs or contingencies. The estimated total funding required from Duca to complete the Project is approximately \$14 million.¹⁶
- (c) Construction is to start in May 2025 and to be completed by April 30, 2026.¹⁷
- (d) Fusioncorp is to pay each subcontractor directly.¹⁸

¹³ Second Report at para. 3(g), Section 4.0, MR, Tab 2, pg. 19.

¹⁴ Second Report at para. 3(h), Section 4.0, MR, Tab 2, pg. 19.

¹⁵ Second Report at para. 4(b), Section 4.0, MR, Tab 2, pg. 19.

¹⁶ Second Report at para. 4(c), Section 4.0, MR, Tab 2, pg. 19.

¹⁷ Second Report at para. 4(d), Section 4.0, MR, Tab 2, pg. 19.

¹⁸ Second Report at para. 4(e), Section 4.0, MR, Tab 2, pg. 20.

- (e) The Receiver is entering into the New CCDC 5B and the Completion Agreement solely in its capacity as Receiver and not in its personal or corporate capacity.¹⁹
- (f) Fusioncorp is responsible for all site safety and fulfills the role of “constructor” under the Occupational Health and Safety Act (Ontario).²⁰

E. Receiver’s Recommendation

12. The Receiver recommends that the Court issue an Order approving the Completion Agreement and the New CCDC 5B and authorizing the Receiver to take such steps and execute and deliver such additional documentation as may be necessary or desirable to give effect to the Completion Agreement and the New CCDC 5B for the following reasons:

- (a) if the Completion Agreement the new CCDC 5B are not approved, the Receiver will be required to either (i) negotiate a new construction management contract with another party, which would significantly delay completion of the Project (likely past the Outside Completion Date) and result in additional professional fees and other carrying costs; or (ii) consider other options for the Project, including selling the Project in its current state, which would be to the financial prejudice of Duca and would delay occupancy of the homes for Purchasers;
- (b) the fees and costs of the Completion Agreement and the New CCDC 5B were lower than 59 PM’s proposal and include an incentive for delivering occupancy to the Purchasers before the Outside Completion Date;

¹⁹ Second Report at para. 4(f), Section 4.0, MR, Tab 2, pg. 20.

²⁰ Second Report at para. 4(i), Section 4.0, MR, Tab 2, pg. 20.

- (c) Fusioncorp has agreed to release and discharge its lien claim registered against the Real Property;
- (d) completing the Project is intended to maximize value for Duca and other stakeholders and to eliminate claims against Westmount Guarantee Services Inc. (which provides insurance coverage for Purchaser deposits) and/or Taron in respect of their deposit refund exposure; and
- (e) Duca supports the retention of Fusioncorp pursuant to the terms of the Completion Agreement and the New CCDC 5B.

F. Project Funding

- 13. By order dated December 11, 2024, the Court increased the Receiver's maximum borrowing limit under the Appointment Order to \$1 million.²¹
- 14. In order to protect the construction that had been performed at the site, the Receiver retained a construction manager, 59 PM to winterize the Project.²²
- 15. The Receiver has borrowed \$784,000 from Duca and expects the balance of the funding available under the Receiver's existing borrowing powers to be drawn imminently.²³

²¹ Second Report at para. 1, Section 5.0, MR, Tab 2, pg. 21.

²² Second Report at para. 1, Section 2.2, MR, Tab 2, pg. 15.

²³ Second Report at para. 1, Section 5.0, MR, Tab 2, pg. 21.

16. The Receiver, after consultation with Duca and other consultants, is of the view that the estimated costs of completion of the Project are reasonable and are intended to maximize realizations upon the Debtor's assets for the benefit of its creditors.²⁴

17. The increase in the Receiver's borrowing limit is required to fund completion of the Project.²⁵

18. Duca has agreed to advance additional funding to the Receiver secured by the Receiver's Borrowing Charge (as defined in the Appointment Order) to a maximum of \$14 million.²⁶

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

19. The essential issues before this Honourable Court are whether:

- (a) the terms of the Completion Agreement and the New CCDC 5B Contract between the Receiver and Fusioncorp should be approved;
- (b) the Receiver should be authorized and directed to enter into and perform the Completion Agreement and the New CCDC 5B contract and permitted to take such steps and execute and deliver such additional documents as may be necessary or desirable to give effect to the Complete Agreement and the New CCDC 5B Contract;

²⁴ Second Report at para. 3, Section 5.0, MR, Tab 2, pg. 21.

²⁵ Second Report at para. 2, Section 5.0, MR, Tab 2, pg. 21.

²⁶ Second Report at para. 2, Section 5.0, MR, Tab 2, pg. 21.

- (c) the Receiver's borrowing powers should be increased from \$1,000,000 to \$14,000,000;
- (d) the Second Report and the activities and proposed activities of the Receiver described therein should be approved; and
- (e) the Receiver's interim Statement of Receipts and Disbursements for the period of August 12, 2024 to April 29, 2025 should be approved.

A. The Terms of the Completion Agreement and the New CCDC 5B Contract Should Be Approved and the Receiver Should Be Authorized and Directed to Enter Into and Perform Same

20. The Receiver respectfully submits that this Honourable Court should show deference to the Receiver's recommendation and business judgment.

21. Justice Galligan of the Ontario Court of Appeal, in *Royal Bank of Canada v. Soundair Corp.*²⁷, made the following observations with respect to the court's deference to its receiver:

... When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. Therefore, the court must place a great deal of confidence in the actions taken and in the opinions formed by the receiver. It should also assume that the receiver is acting properly unless the contrary is clearly shown. The second observation is that the court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver. The third observation which I wish to make is that the conduct of the receiver should be viewed in the light of the specific mandate given to him by the court.

²⁷ 1991 CanLII 2727 (ON CA)

22. When considering whether to approve a transaction recommended by a receiver, Justice Ground stated as follows:²⁸

Third, I am satisfied from the material before the court that, overall, the Receiver has complied with its obligation to canvass the market in a reasonable and efficacious manner and has not acted improvidently. Accordingly, this is not a situation where the court should vary from the general principle that the court will be loathe to interfere with the business judgment of a Receiver and refuse to approve a transaction recommended by the Receiver acting properly in the fulfillment of its obligations as an officer of the court.

23. In *KEB Hana as Trustee v. Mizrahi Commercial (THE ONE) LP et al.*²⁹, Osborne J. granted an order similar to that sought in the case at bar and stated as follows:

I am satisfied that the engagement of SKYGRiD by the Receiver should be approved. The Receivership Order made earlier at paragraph 4(e) gives the Receiver authority to retain a construction manager. The statutory basis for court approval is found in s. 243(1)(c) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, as amended (“the *BIA*”).

Given the fundamental importance of the role to be performed by SKYGRiD if this receivership is to be successful, however, the Receiver seeks specific authority to retain SKYGRiD on the terms set out in the SKYGRiD Engagement Letter which is attached to the First Report.

The circumstances leading to the negotiation and execution of the SKYGRiD Engagement Letter are fully set out in the First Report. The Receiver solicited proposals on a confidential basis from two construction managers to manage the Project, including for an interim period until the completion of the SISP.

SKYGRiD was selected as the successful candidate. I observe that it was willing to accept an engagement for only an interim period up and until the completion of the SISP with the understanding that the ultimate owner of the Project could decide whether or not to continue its retention.

The Receiver is satisfied that its fees are competitive with prevailing market rates and are lower than the fees that the Former Developer asserts are payable to it in respect of project management. Finally, the RFCA Lender consented to the retention of SKYGRiD (as is required according to the terms of the RFCA).

²⁸ *Morganite Canada Corp. v. Wolfhollow Properties Inc.*, 2003 CanLII 7759 (ON SC), 47 CBR (4th) 89 at para. 7.

²⁹ 2024 ONSC 1678 at paras. 20 – 25.

The engagement of SKYGRiD on the terms set out in the SKYGRiD Engagement Letter is approved. The Receiver is authorized to enter into the SKYGRiD Construction Agreement.

24. For reasons similar to those set out by Osborne J., the Receiver respectfully requests that this Honourable Court should approve the terms of the Completion Agreement and the New CCDC 5B Contract and authorize and direct the Receiver to enter into and perform same.

B. The Receiver's Borrowing Powers Should be Increased

25. Paragraph 21 of the Appointment Order, as amended, empowers the Receiver to borrow such monies from time to time as it may consider necessary or desirable, provided that the outstanding amount does not exceed \$1,000,000, for the purpose of funding the exercise of its powers and duties.³⁰

26. Paragraph 21 further provides that the Receiver's borrowing limit may be increased with the authorization of the Court.³¹

27. The Receiver respectfully submits that the increase in its borrowing limit to \$14,000,000 is necessary to complete the construction of the Project and avoid further delays to the detriment of the Project's stakeholders. Similar relief has been granted already in this proceeding and in other non-contested motions by Receivers.³²

C. The Second Report and the Activities of the Receiver Should be Approved

28. In response to a challenge to the Court's jurisdiction to approve the activities of a court –

³⁰ Appointment Order, Appendix "A", MR, Tab 2, pg. 34.

³¹ Appointment Order, Appendix "A", MR, Tab 2, pg. 34.

³² *Kingsett Mortgage Corporation et al v Vandyk et al*, CV-23-00709180-00CL ([Endorsement of Steele J. dated December 21, 2023](#)); *BCIMC Construction Fund Corporation v. 33 Yorkville Residences Inc.*, CV-20-00637297-00CL ([Endorsement of Conway J. dated October 9, 2020](#)).

appointed receiver, Justice Farley stated as follows:³³

It does not seem to me that approval of the activities of the receiver, a court appointee and therefore an officer of the court, requires specific words of authorization in the original order. To the extent that certain approval activities are mentioned in that order, I would regard these references as merely examples of what may take place. In my view this court has the inherent jurisdiction to review and either approve or disapprove of the activities of a court appointed receiver. I note here that in this instance the activities were well summarized in the two reports; however, such approval (if given) would be to the extent that the reports accurately summarized the material activities of the receiver. As to inherent jurisdiction, see *80 Wellesley Street East Ltd. v. Fundy Bay Builders Ltd.* (1972), 25 D.L.R. (3d) 386 (Ont. C.A.), at pp. 389-390.

I pause to note that it would be unusual and illogical that the receiver could come to court for prior approval but not post approval. If that were the case, one might well expect the courts to be inundated with prior approval requests for virtually any activity.

It seems to me that a receiver should be able to come to court and bare its breast. Having done so, it has exposed itself to the sword of any interested party which may feel aggrieved of any action by that receiver. However, if the court feels that the receiver has met the objective test required of it, then the court may bestow a shield to the receiver for that reviewed and approved activity. If the activity is disapproved, then the receiver is in the unenviable position of watching itself.

29. The Receiver's activities in these proceedings have been undertaken in furtherance of the Receiver's duties and are consistent with the Receiver's powers as set out in the Receivership Order. The Receiver has acted reasonably and in the best interests of the defendants' stakeholders and the Court has the inherent jurisdiction to approve such activities.³⁴

30. All of the Receiver's activities were conducted within the ambit of its powers granted by the Receivership Order and each of the activities were necessary to discharge the Receiver's

³³ *Bank of America Canada v Willann Investments Ltd.*, 1993 CarswellOnt 216, O.J. No. 1647 at paras 3-4.

³⁴ *Bank of America Canada v Willann Investments Ltd.*, 1993 CarswellOnt 216, O.J. No. 1647 at paras 3-4.

mandate in a manner that is orderly, effective, and fair to all stakeholders.

31. The Receiver therefore respectfully submits that the Second Report, and its activities to date and proposed activities as set out therein, should be approved by this Court.

D. The Interim Statement of Receipts and Disbursements Should be Approved

32. The Receiver's Interim Statement of Receipts and Disbursements for the period ending April 29, 2025 is appended to the Second Report is reasonable. The Receiver respectfully requests that such receipts and disbursements be approved by this Honourable Court.

PART IV - ORDER REQUESTED

33. For the reasons set out above, the Receiver respectfully requests that the Court:

- (a) approve the terms of the Completion Agreement and New CCDC 5B contract;
- (b) authorize and direct the Receiver to enter into and perform the Completion Agreement and the New CCDC 5B Contract and permit the Receiver to take such steps and execute and deliver such additional documents as may be necessary or desirable to give effect to the Completion Agreement and the New CCDC 5B Contract;
- (c) increase the borrowing powers of the Receiver from \$1,000,000 to \$14,000,000;
- (d) approve the Second Report and the activities and propose activities of the Receiver described therein; and

- (e) approve the Receiver's interim statement of Receipts and Disbursements for the period August 12, 2024 to April 29, 2024.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2nd day of May, 2025.



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Lawyers for the Receiver

SCHEDULE “A”

LIST OF AUTHORITIES

1. *Royal Bank of Canada v. Soundair Corp.*, 1991 CanLII 2727 (ON CA), 4 OR (3d) 1
2. *Morganite Canada Corp. v. Wolfhollow Properties Inc.*, 2003 CanLII 7759 (ON SC), 47 CBR (4th) 89
3. *KEB Hana as Trustee v. Mizrahi Commercial (THE ONE) LP et al.*, 2024 ONSC 1678
4. *Kingsett Mortgage Corporation et al v Vandyk et al*, CV-23-00709180-00CL ([Endorsement of Steele J. dated December 21, 2023](#))
5. *BCIMC Construction Fund Corporation v. 33 Yorkville Residences Inc.*, CV-20-00637297-00CL ([Endorsement of Conway J. dated October 9, 2020](#))
6. *Bank of America Canada v Willann Investments Ltd.*, 1993 CarswellOnt 216, O.J. No. 1647

I certify that I am satisfied as to the authenticity of every authority.

Note: Under the Rules of Civil Procedure, an authority or other document or record that is published on a government website or otherwise by a government printer, in a scholarly journal or by a commercial publisher of research on the subject of the report is presumed to be authentic, absent evidence to the contrary (rule 4.06.1(2.2)).

Date _____

Signature

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY - LAWS

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

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.

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Court File No. CV-24-00096502-0000

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