



SUPERIOR COURT OF JUSTICE

**COUNSEL/ENDORSEMENT SLIP**

COURT FILE NO.: CV-24-00714760-00CL

DATE: Friday, Feb. 23, 2024

NO. ON LIST: 3 @ 10am

TITLE OF PROCEEDING: BANK OF MONTREAL v AVIDA 2015 INC.

BEFORE: JUSTICE STEELE

**PARTICIPANT INFORMATION**

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

Name of Person Appearing	Name of Party	Contact Info
Christopher J. Staples	BANK OF MONTREAL	chris@chaitons.com

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

Name of Person Appearing	Name of Party	Contact Info

**For Other, Self-Represented:**

Name of Person Appearing	Name of Party	Contact Info

## **ENDORSEMENT OF JUSTICE STEELE:**

- [1] The Bank of Montreal seeks an order confirming the appointment by BMO of msi Spergel Inc. as receiver of the assets of Avida 2015 Inc., directing Avida to transfer to Spergel all of Avida's assets and information, and directing payment to BMO of certain funds held in an Avida bank account with CIBC.
- [2] No party opposed the order sought by BMO, despite notice having been provided of these proceedings.
- [3] The sole director and officer, and principal, of Avida is David Reale. As the company has vacated its premises, BMO served Mr. Reale via email at his personal email address. Personal service was also attempted on Mr. Reale at his residence. The process server left the documents at Mr. Reale's residence after three attempts to serve him personally. Counsel for BMO confirmed that as late as yesterday Mr. Reale had contacted the Receiver from his personal email address and that he had provided the Zoom coordinates for today's appearance by email to Mr. Reale yesterday.

### **Background**

- [4] BMO provided an operating line and term loan to Avida. The operating line was initially for \$3.5 million. It was subsequently increased to \$4.5 million for a specific time after which it was to reduce back to \$3.5 million.
- [5] Security for Avida's indebtedness to BMO includes a general security agreement against all its property and assets registered in accordance with the *Personal Property Security Act* ("PPSA").
- [6] The GSA provides that upon default, BMO may enforce its rights by appointment of a receiver.
- [7] In August 2023 BMO advised Mr. Reale that due to the failure to provide certain financial information required under the terms of the credit facility, among other things, the temporary bulge to the operating line of credit would not be extended and it would revert to \$3.5 million.
- [8] As of September 1, 2023, the operating line was in an unauthorized excess of approximately \$1 million. This unauthorized excess, in addition to certain other breaches, resulted in the operating loan being in default.
- [9] BMO and Avida tried to restructure the loans. However, an amended agreement was not reached.
- [10] By letter dated November 3, 2023, the Bank made demand on Avida for payment of the indebtedness under the credit facilities. BMO also delivered a notice of intention to enforce security pursuant to section 244(1) of the *Bankruptcy and Insolvency Act*.
- [11] There were subsequent attempts to negotiate a forbearance agreement.
- [12] On December 21, 2023 BMO appointed Spergel as receiver of Avida's assets under the GSA.

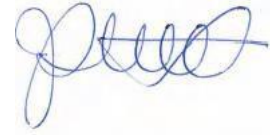
- [13] An application for a bankruptcy order against Avida was issued on January 11, 2024 with a return date of March 6, 2024.
- [14] BMO is the second registered secured creditor of Aviva under the PPSA behind Nissan Canada Inc., which is secured against a vehicle. Aviva does not have any other registered security holders.
- [15] The Receiver has been trying to obtain certain information and documents from Avida and Reale but has not been able to do so.
- [16] The Receiver has also been trying to investigate Avida's accounts receivable, but has not been able to obtain the necessary information.
- [17] Avida's corporate address has been vacated.
- [18] Avida has an account with CIBC with a balance of approximately \$15,000, which is property of Avida secured by BMO's GSA.

### **Analysis**

- [19] BMO asks the Court to confirm the appointment of Spergel. The Court has made such confirmations in other cases where a receiver was first privately appointed: *STN Labs Inc. v. Saffron Rouge Inc.*, 2010 ONSC 3042.
- [20] The Court's authority is derived from sections 60 and 67 of the PPSA. Under s. 60(2) of the PPSA the Court may "make any order with respect to the receiver or receiver and manager that it thinks fit in the exercise of its general jurisdiction over a receiver or receiver and manager."
- [21] The Court will confirm the appointment where the appointment would be appropriate under either section 243 of the *Bankruptcy and Insolvency Act* or section 101 of the *Courts of Justice Act*. For the Court to appoint a receiver it must be "just or convenient" to do so. In making this determination, the Court must have regard to all of the circumstances, including the nature of the property and the rights and interests of all parties: *Bank of Nova Scotia v. Freure Village of Clair Creek*, 1996 CanLII 8258 (ON SC).
- [22] Further, the appointment of a receiver is not regarded as extraordinary where the relevant security documents permit the appointment of a receiver, as is the case here: *Elleway Acquisitions Limited v. The Cruse Professionals Limited*, 2013 ONSC 686, at para. 27.
- [23] I agree with BMO that it is just and convenient to confirm the appointment of the Receiver and grant the powers sought in the draft order for the following reasons:
- a. Avida is in breach of its loan agreements with BMO;
  - b. Avida's financial situation has deteriorated and it has no means to repay the loans;
  - c. Avida has failed to provide BMO or the Receiver with financial information that has been requested;

- d. BMO's security, which largely consists of accounts receivable, cannot be properly addressed by the Receiver owing to the failure of Avida and Mr. Reale to provide access to Avida's books and records. BMO is concerned that the security is in jeopardy.

[24] Order attached.

A handwritten signature in blue ink, appearing to be "J. Reale", is located in the upper right quadrant of the page. The signature is written in a cursive style with a horizontal line extending to the right.