

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N :

DUCA FINANCIAL SERVICES CREDIT LTD.

Applicant

- and -

2203824 ONTARIO INC.

Respondent

**FACTUM
OF THE RECEIVER, MSI SPERGEL INC.**

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FACTUM OF THE RECEIVER

PART I: OVERVIEW

1. msi Spergel Inc. (“Receiver”), in its capacity as the court-appointed receiver over all the assets, etc, of 2203284 Ontario Inc. (the “Debtor”), seeks an order and directions as follows:

- (a) authorizing the Receiver to transfer the funds, remaining after the completion of repayment of deposits made for the purchase of condominium units, to the general receivership trust account for the benefit of the estate;
- (b) authorizing the Receiver to proceed with payment of the fees and expenses of Guarantee Company of North America (“Guarantee Co.”) as claimed to date as well as any reasonable subsequent claims to be determined in accordance with the relevant security;
- (c) approving a collateral cash order to permit the Tarion Bond, described below, to be terminated;
- (d) authorizing the Receiver to proceed as follows:
 - i. to conduct an expeditious claims process in respect of unsecured creditors which would require the Receiver to review and to make recommendations to the court, on notice to all known creditors, as to the disposition of claims and any other matters which remain outstanding in the receivership;
 - ii. failing a tolling agreement, to authorize the Receiver to commence an action so as to protect against the expiry of any limitation period in respect of the unaccounted for net transfer of approximately \$3.5 million to Santerra Asset Management and Development Inc. (“Santerra”), a

corporation which appears “owned” by the spouse of the “owner” of the Debtor;

- (e) directing, if necessary, the principals of the Debtor to provide any other documents and information necessary for the Receiver to bring the receivership to a timely conclusion;
- (f) any further directions and authorization to give effect to the foregoing;
- (g) approving the activities and conduct of the Receiver;
- (h) approving the Receiver’s Interim Statement of Receipts and Disbursements; and
- (i) approving and authorizing payment of the fees and disbursements of the Receiver and its counsel.

2. The Receiver recommends that no distributions, other than to Guarantee Co. and as part of the cash collateral referenced above, be made until the unsecured claims process has been completed.

3. The Receiver seeks to deal with all remaining issues in the receivership in as timely a manner as possible in order to bring the receivership to a conclusion.

4. As set out below, the matter is complicated by the effectively unexplained net transfer of approximately \$3.5 million to Santerra, something which may not matter if all creditors and tax liabilities can be paid.

PART II: THE FACTS

Receipts and disbursements to date

5. The Receiver’s Interim Statement of Receipts and Disbursements as at April 8, 2019, indicate total receipts of \$15,154,075, total disbursements of \$12,832,035 and total funds on hand of \$2,322,039, to which the Receiver would propose transfer excess deposit funds of approximately \$200,000, something which would leave approximately \$2,500,000 for distribution and payment as outlined below.

Motion Record, p. 17 (Third Report of the Receiver, p. 13, para. 37) and p.167 (Appendix “J”, Interim Statement of Receipts and Disbursements).

6. In respect of the foregoing, the Receiver successfully negotiated a reduction in prior years’ property tax assessments, recovered \$106,396 from the City of Hamilton with

respect to the assessments for the years 2015 and 2016, and the estate benefitted from reduced assessments for subsequent years.

Motion Record, p. 17 (Third Report of the Receiver, p. 13, para. 38).

The overall projection of funds, etc

7. The following summarizes the Receiver's current projection of funds available for distribution assuming, as more fully described below, that the Tarion Bond is discharged by June 30, 2019, that a Tarion Reserve in the form of cash collateral of \$200,000 for a certain period is approved, and before consideration of any payments to related parties, including the Debtor's principal and his spouse:

Funds on Hand at April 8, 2019	\$ 2,322,039 ¹
Estimated Corporate Tax Liability	(435,000) ²
Estimated final costs of GCNA	(166,000)
Estimated reserve for Tarion Bond	(200,000)
Estimated Potential Unsecured Creditors ³	(540,000)
Estimated professional fees for completion	(100,000)
	<u>(1,441,000)</u>
Estimated funds available for further distribution	<u>\$ 881,039</u>

Supplementary Motion Record, p. 9 (Supplementary Third Report of the Receiver, p. 9, para. 27).

8. Ms. Santaguida, who is the spouse of the Debtor's principal (more about this below), has submitted mortgage discharge statements, as at January 31, 2019, for \$1,520,723.95 and for \$974,882.53 (although the latter seems to be for a related corporation), plus per diem interest.

Motion Record, pp. 21- 22 (Third Report of the Receiver, pp. 17 -19, para. 52).

9. Should Ms. Santaguida and Santerra repay the \$3.5 million, referenced above and more fully explained below, there would likely be sufficient funds to pay all creditors and tax liabilities.

¹ To which approximately \$200,000 may be added if the court orders the transfer of excess deposit trust funds to the general benefit of the estate.

² As indicated above, the taxes will have to be refiled, and this figure will change.

³ This amount includes, in addition to what is set out in the Third Report, an estimate of \$75,000 for potential unsecured claim for Tarion set out at paragraph 60 of the Third Report as well as the potential claim of CORfinancial Corp. described at paragraph 62 of the same document.

10. Should the funds not be repaid and Ms. Santaguida is paid in accordance with one or both of the discharge statements, there will likely to be insufficient funds to pay other creditors and tax liabilities.

Should the tax liability not dramatically change,⁴ the amount of unsecured claimants not exceed or be less than what is set in paragraph 6, above, and should there be no need to incur much more in the way of expense, there will likely be funds to distribute to Ms. Santaguida and/or the Debtor; in such a case, the \$3.5 million transfer to Santerra becomes irrelevant.

Background and sale of the Debtor's principal asset

11. The receivership was commenced by way of an order made on June 22, 2017 (the "Receivership Order").

Motion Record, p. 9 (Third Report of the Receiver, p. 5, para. 1) and p. 31 (Appendix "A", Receivership Order).

12. The Debtor appears to be a single-purpose entity, with no employees, incorporated for the purpose of developing a condominium project at 98 James Street South, Hamilton, (the "Property").

Motion Record, p. 9 (Third Report of the Receiver, p. 5, para. 3).

13. Luigi Santaguida is the sole owner, office and director of the Debtor.

Responding Motion Record, p. 4 (affidavit of Luigi Santaguida, sworn May 27, 2019, p 1, paras 1-2) and p. 21 (Exhibit "A", records relating to the debtor).

14. MaryLou Santaguida is Mr. Santaguida's spouse.

Responding Motion Record, p. 4 (affidavit of Luigi Santaguida, sworn May 27, 2019, p. 1, para 2).

15. Ms. Santaguida is Santerra's sole director and is described by Mr. Santaguida as Santerra's owner.

Motion Record, p. 61 (Appendix "B", First Report of Receiver, May 4, 2018, p. 12, para. 25).

Responding Motion Record, p. 4 (affidavit of Luigi Santaguida, sworn May 27, 2019, p. 1, para 2) and p. 22 (Exhibit "A", records relating to the debtor).

⁴ As set out below, returns are going to have to be corrected.

16. The Debtor acquired the Property on June 4, 2013, at which time it consisted of a historical church which, with the exception of its façade, was demolished, the City of Hamilton giving conditional site-plan approval to construct a 30-storey residential condominium project of 259 units, known as *The Connolly* (the “Project”). Construction of the Project did not commence.

Motion Record, p. 9 (Third Report of the Receiver, p. 5, para. 5).

17. The sale of units in the Project commenced in November 2014.

Motion Record, p. 10 (Third Report of the Receiver, p. 6, para. 6).

18. The Debtor’s records indicate that 185 of the units were sold pursuant to Agreements of Purchase and Sale (the “Prebuild Agreements”), and that deposits were paid (the “Deposits”) by the unit purchasers (the “Unit Purchasers”).

Motion Record, p. 10 (Third Report of the Receiver, p. 6, para. 6).

19. It took quite some time, including more than one aborted sale before the Receiver had entered into a conditional agreement of purchase and sale for the Property for which it was in a position to seek court approval.

Motion Record, pp. 65-68 (Appendix “B”, First Report of Receiver, May 4, 2018, pp 16 -19).

20. In this respect, on May 16, 2018, the court issued an Approval and Vesting Order (“Vesting Order”), approving the sale of the Property to Hue Developments & Investments Canada Inc. (“Hue”) in accordance with an agreement of purchase and sale entered into on February 12, 2018 (the “Hue Transaction”).

Motion Record, p. 10 (Third Report of the Receiver, p. 6, para. 8) and p. 91 (Appendix “C”, Approval and Vesting Order, May 16, 2018).

21. The Hue Transaction was scheduled to close on June 5, 2018; however, Hue was unable to close on time. The Receiver agreed to three successive extensions to the closing date upon receipt of further non-refundable deposits and extension-fee penalties totalling \$45,000.

Motion Record, p. 11 (Third Report of the Receiver, p. 7, para.10).

22. On October 5, 2018, the sale of the Property closed.

Motion Record, p. (Third Report of the Receiver, p. 7, para. 10)

23. DUCA, the first mortgagee was paid, as authorized by the court, out of the proceeds of sale.

Motion Record, p. 11 (Third Report of the Receiver, p. 7, para. 11).

The return of deposits

24. On May 16, 2018, the court issued an order (the “Deposit Claims Procedure Order”) establishing a process for the return of Deposits (“Deposit Claims Procedure”), to be effective on the closing of the Hue Transaction.

Motion Record, p. 11 (Third Report of the Receiver, p. 7, para. 12).

25. As a result of the delays in the closing of the Hue Transaction and the 2018 Canada Post labour disruption, the Receiver returned to court on three occasions to report on the status of the matter and to obtain necessary modifications to the Deposit Claims Procedure Order (There are several, amended orders, essentially modifying deadlines, including the claims bar date. For simplicity, they are collectively referred to as one order, the operational one being the Further Fresh as Amended Deposit Claims Procedure Order, November 26, 2019).

Motion Record, pp. 11 -23 (Third Report of the Receiver, pp. 7 -8 , paras 12 - 17) and p. 118 (Appendix F, Further Fresh as Amended Deposit Claims Procedure, November 26, 2019).

26. In accordance with the Deposit Claims Procedure Order, the firm holding the Deposits delivered them to the Receiver along with related books and records.

Motion Record, p. 14 (Third Report of the Receiver, p.10, para.19).

27. The Receiver also did the following:

- (a) on October 16, 2018, sent a Deposit Claims package to each of the 185 known Unit Purchasers;
- (b) advertised the Deposit Claims Procedure in both the *Toronto Star* and *The Hamilton Spectator*;
- (c) posted the Deposit Claims package and the Deposit Claims Procedure Orders, as they were amended, on its website;
- (d) wrote to 79 Unit Purchasers who, according to the records from the firm holding the Deposits, had entered into Prebuild Agreements and paid Deposits, but had not yet filed a Deposit Claim with the Receiver;
- (e) sent further letters to 147 Unit Purchasers who had proven their Deposit Claims (“Proven Deposit Claims”) to keep them updated, advise them of the acceptance of their Deposit Claims, the extension of the Claims Bar Date, etc;
- (f) on November 30, 2018, the Receiver also issued 38 letters to Unit Purchasers who had not yet submitted a Proven Deposit Claim to advise them of developments;

- (g) advertised again the Deposit Claims process in the *Toronto Star* and *The Hamilton Spectator* and during the month of January 2019, the Receiver worked to contact all Unit Purchasers who had not yet filed or proven their Deposit Claims;
- (h) received and processed 173 Proven Deposit Claims totaling \$6,207,640.66 (the “Proven Deposit Claims”) by the Claims Bar Date of January 31, 2019, admitted 173 Proven Deposit Claims totaling \$6,207,640.66 (the “Proven Deposit Claimants”), none of which it disputed, all issues having been resolved by the claims bar date;
- (i) received executed consents from Guarantee Co. authorizing the Receiver to pay each of the Proven Deposit Claims;
- (j) delivered a Sufficient Funds Certificate on February 6 of this year, indicating that there were sufficient funds to pay all of the accepted claims;
- (k) provided Tarion Warranty Corporation (“Tarion”) with electronic copies of all documentation in its possession regarding the Prebuild Agreements and the Deposit Claims, as well as its Claim Determination Summary and listing of Deposit Claims which were not submitted by the Claims Bar Date;
- (l) on February 13, 2019, commenced issuing payments to the Proven Deposit Claimants;
- (m) completed the initial issuance and mailing of all payments for Proven Deposit Claims on March 13, 2019;
- (n) issued Receiver’s Certificates to Tarion; and
- (o) on a regular basis provided Tarion and Guarantee Co. with a ledger of Proven Deposit Claims paid and unpaid.

Motion Record, pp. 14 -16 (Third Report of the Receiver, pp. 10 - 12 , paras 19 - 30), p. 157 (Appendix “G”, Claims Determination Summary), p 162 (Appendix :H”, Claims Barred Summary), and p. 164 (Appendix “I”, Sufficient Claims Certificate).

28. At the end of the process, there were 12 unclaimed deposits of \$1,000 each.

Motion Record, p. 17 (Third Report of the Receiver, p. 13, para. 35), p. 157 (Appendix G, Claims Determination Summary), p 162 (Appendix G, Claims Barred Summary).

29. Upon the clearing of all Deposit Claim payments, the Receiver anticipates a remaining balance of approximately \$200,000 (the “Remaining Deposit Trust Funds”), consisting of interest and the \$12,000 in unclaimed deposits referred to above.

Motion Record, p. 17 (Third Report of the Receiver, p. 13, para. 35), p. 157 (Appendix "G", Claims Determination Summary), p. 162 (Appendix "H", Claims Barred Summary).

30. The Receiver proposes that the Remaining Deposit Trust Funds be transferred into the general receivership trust account for the benefit of the estate.

Motion Record, p.13 (Third Report of the Receiver, p. 9, para. 18).

Tax liability

31. The sale of the Property created a tax liability.

Supplementary Motion Record, p. 7 (Supplementary Third Report of the Receiver, p. 7, paras. 17 -18) .

32. The Receiver has recently filed tax returns, indicating that the tax payable is approximately \$435,000, something Mr. Santaguida sets out in his affidavit should be paid.

Supplementary Motion Record, p. 7 (Supplementary Receiver's Third Report, p. 7, paras 17 - 18). p. 12 (Appendix "A", tax return for 2017), p. (Appendix "B", tax return for 2018), and p. 94 (Appendix "C", tax return for 2018).

Responding Motion Record, p 19 (affidavit of Luigi Santaguida, sworn May 27, 2019, p. 16, para. 52).

33. The Debtor filed the returns on the basis that Ms. Santaguida was its owner; the Receiver continued that practice.

Second Supplementary Motion Record, p. 6 (Second Supplementary Third Report of the Receiver, p. 6, para.11).

34. In the affidavit which he swore on May 27, Mr. Santaguida states that the Debtor's practice in this regard was in error, producing documents which indicate that he is the sole shareholder.

Responding Motion Record, p. 4 (affidavit of Luigi Santaguida, sworn May 27, 2019, p 1, paras 1-2) and p. 21 (Exhibit "A", records relating to the debtor).

35. As a result, the tax returns will have to be re-filed, and the tax liability will likely change.

Second Supplementary Motion Record, p. 6 (Second Supplementary Third Report of the Receiver, p. 6, para. 11).

36. In that respect, the Receiver has asked for further information from the accountant which the Santaguidas have retained for the purpose of re-filing the tax returns.

Second Supplementary Motion Record, p. 6 (Second Supplementary Third Report of the Receiver, p. 6, para.11).

Secured creditors, Guarantee Co., Tarion and secured creditors other than Ms. Santaguida

37. At the beginning of the receivership, the following creditors had registered security in respect of the Property:

Position	Creditor	Date	Amount
1	DUCA	08-Jul-15	\$ 5,000,000
2	Guarantee Co.	30-Oct-15	5,180,000
3	Diversified Capital Inc.	12-Aug-16	3,000,000
4	Mary Lou Santaguida	13-Jun-13 and amended 10-April- 15	1,500,000 and increased to \$4,000,000
5	Marylou Santaguida	11-April-16	701,583
Total			\$ 15,381,583

Motion Record, p. 18 (Third Report of the Receiver, p. 14, para. 40).

38. DUCA was paid in full after the closing of the sale of the Property as was authorized by the court.

Motion Record, p. 18 (Third Report of the Receiver, p. 14, para. 41).

39. Diversified Capital Inc.'s security registration was cross-collateralized with other property. It has been paid out of the proceeds of the sale of the other property and seeks no payment from the sale of the Property in the present matter.

Motion Record, p. 18 (Third Report of the Receiver, p. 14, para. 43).

40. In light of the payment to DUCA and Diversified's position, Guarantee Co. has the next ranking security.

Motion Record, p. 18 (Third Report of the Receiver, p. 14, para. 40).

41. Its security registration was in support of the Tarion Bond as well as its own expenses which will eventually be extinguished as a result of the completion of the Deposit Payment Protocol and the termination of the bond.

Motion Record, p. 18 (Third Report of the Receiver, p. 14, para. 40) and p. 168 (Appendix "K", the opinion of DSF, which includes a copy of the relevant charge as well as the agreements referred in it).

42. To date, expenses claimed pursuant to Guarantee Co.'s security to are as follows:

Legal counsel	\$ 33,536
Administrative expense	\$ 21,810
Tarion Bond Premiums	<u>\$ 103,600 (unpaid to date and to June 30, 2019)</u>
Total	\$155, 709

Supplementary Motion Record, p. 6 (Supplementary Third Report of the Receiver, p. 6, para. 13).

43. Guarantee Co. has advised that it may incur an additional \$10,000 in expenses to bring the matter to a conclusion.

Supplementary Motion Record, p. 6 (Supplementary Third Report of the Receiver, p. 6, para. 14).

44. The Receiver has reviewed Guarantee Co's claim and supporting documentation, believes them fair and reasonable, and recommends payment as well as reasonable final costs to be submitted in this matter.

Supplementary Motion Record, p. 6 (Supplementary Third Report of the Receiver, p. 6, para. 14).

Tarion reserve

45. The Tarion Bond was issued by Guarantee Co. on September 22, 2014 in the amount of \$5,180,000 based, as the Receiver understands it, on \$20,000 of coverage per unit for 259 potential units at an annual cost of \$38,850.

Supplementary Motion Record, p. 4 (Supplementary Third Report of the Receiver, p. 4, para. 4).

46. In accordance with the Deposit Claims Procedure Order, Tarion is entitled to a reserve.

Motion Record, p. 118 (Appendix "F", Further Fresh as Amended Deposit Claims Procedure Order, November 29, 2018)

Supplementary Motion Record, p. 4 (Supplementary Third Report of the Receiver, p. 4, para. 5).

47. Tarion has advised the Receiver that Tarion would hold a Reserve for a period ending approximately one year after the latest known outside occupancy date found in the Agreements of Purchase and Sale. The Receiver notes that the latest outside occupancy date found in the 185 agreements which it reviewed was February 28, 2022.

Supplementary Motion Record, p. 5 (Supplementary Third Report of the Receiver, p. 5, para. 9).

48. In lieu of continuing the Tarion Bond, Tarion has indicated that it is prepared to accept cash collateral of \$200,000 to be held by it until March, 2023, in consideration of the termination of the bond, something that will eliminate ongoing premium payments.

Supplementary Motion Record, p. 5 (Supplementary Third Report of the Receiver, p. 5, para. 10).

49. The Receiver recommends that Tarion be authorized to receive and hold the cash collateral until March 1, 2023 (the “Reserve Termination Date”) in order to avoid annual premium charges and hold up the administration and discharge of the Receiver, if the Receiver is otherwise able to be discharged.

Supplementary Motion Record, pp. 5-6 (Supplementary Third Report of the Receiver, pp. 5-6, para. 11).

50. Furthermore, should the Receiver be discharged prior to Reserve Termination Date, the Receiver recommends that any remaining Reserve should be paid to the Debtor, or as the court otherwise directs, immediately following the Reserve Termination Date.

Supplementary Motion Record, p. 6 (Supplementary Third Report of the Receiver, p.6, para. 12).

Unsecured creditors

51. According to the Debtor’s records, there are unsecured creditors’ claims in the amount of \$608,022.45.

Motion Record, p. 26 (Third Report of the Receiver, p. 22, para. 60) and p. 437 (Appendix “Z”, list of unsecured creditors).

52. According to information recently provided by the Debtor and the Santaguidas, the total amount of unsecured creditors may be less than 15 with, subject to what is further set out below and actually hearing from the creditors, total claims in the sum of \$172,818.24.

Motion Record, p. 26 (Third Report of the Receiver, p. 22, para. 60).

53. That said, Mr. Santaguida has seems to indicate that the Debtor’s record keeping was informal and in comes cases erroneous.

Responding Motion Record, p. 14 (affidavit of Luigi Santaguida, sworn May 27, 2019, p. 11, para. 34) p. 15 (affidavit of Luigi Santaguida, sworn May 27, 2019, p. 12, para. 37).

54. In addition to what is set out above, Tarion has indicated that it will have an unsecured claim for its costs, estimated to be \$75,000.

Motion Record, p. 26 (Third Report of the Receiver, p. 22, para. 60).

55. CORfinancial Corp. (“CORfinancial”) has advised the Receiver that it claims \$291,724.32 with respect to a bridge loan facility that it maintains it had arranged in 2016, something which is not reflected in the Debtor’s records and which the Debtor’s lawyer has advised is disputed.

Motion Record, pp. 26-27 (Third Report of the Receiver, pp. 22-23, para. 62) and p. 440 (Appendix “AA”, letter of the June 17, 2017, from CORfinancial).

56. Given the limited number of unsecured creditors and the amount of unsecured claims, the Receiver is of the opinion that it could complete a relatively quick and efficient unsecured claims procedure.

Motion Record, p. 27 (Third Report of the Receiver, p. 23, para. 63).

The registrations of Ms. Santaguida and the unaccounted for \$3.5 million

57. As set out above and at pages 16 to 18 of the Third Report of the Receiver, there were two mortgages in favour of Ms. Santaguida which were registered on title to the Property.

Motion Record, pp. 20 - 22 (Third Report of the Receiver, pp. 16-18, paras. 48- 52).

58. Ms. Santaguida has now provided evidence of \$1,115,500 of advances which, according to a discharge statement provided on her behalf as at January 31, 2019, \$1,520,723.95 with a per diem rate of \$244.49.

Motion Record, p. 22 (Third Report of the Receiver, p. 18, para. 52).

59. That said, the following is also the case

- (a) there were no mortgage liabilities to Ms. Santaguida reflected in the financial records provided by the Debtor to the Receiver on July 25, 2017, or on the March 31, 2015, Balance Sheet of Debtor which was issued and approved by Mr. Santaguida in his capacity as the sole Director of the Debtor;
- (b) the Debtor’s financial records appear to indicate that any amounts due to Mrs. Santaguida are unsecured shareholder loans.

Motion Record, p. 25 (Third Report of the Receiver, p. 21, para. 56) and p. 433 (Appendix “Y”. Debtor financial records).

60. Further, Ms. Santaguida appears as the sole director and the owner of Santerra, an entity to which \$3,457,025.19 has inexplicably been transferred and in respect of which there may exist a recovery action. In this respect, it may be necessary, for limitation purposes, to commence an action within the next few weeks.

Motion Record, p. 25 (Third Report of the Receiver, p. 21, para. 56).

61. As set out in Mr. Santaguida's affidavit, DUCA advanced \$5 million to the Debtor for what he states is the following: to finance an equity take out with the funds to be used for development of the Project; for a one-year interest reserve; and to pay lender's costs.

Responding Motion Record, p. 8 (affidavit of Luigi Santaguida, sworn May 27, 2019, p. 5, para. 5).

62. The Debtor immediately transferred \$2,581,543.11 to Santerra.

Motion Record, p. 20 (Third Report of the Receiver, p. 16, para. 48) and p. 212 (Exhibit "L" general ledger account).

63. There were several other transfers involving Santerra.

Motion Record, p. 20 (Third Report of the Receiver, p. 16, para. 48) and p. 212 (Exhibit "L", general ledger account).

64. These transfers appear on the ledger, obtained from the Debtor, which is attached as a Schedule "1" to the present factum

Motion Record, p. 20 (Third Report of the Receiver, p. 16, para. 48) and p. 212 (Exhibit "L", general ledger account).

65. The net payments to Santerra totalled \$3,457,025.19.

Motion Record, p. 20 (Third Report of the Receiver, p. 16, para. 48) and p. 212 (Exhibit "L", general ledger account).

66. One of the transfers from the Debtor to Santerra is recorded by the Debtor in its records (it was not recorded by the Receiver as Mr. Santaguida suggests) as relating to a loan to Ms. Santaguida.

Motion Record, p. 21 (Third Report of the Receiver, p. 21, para. 21) and p. 212 (Exhibit "L", general ledger account).

67. If the \$3,457,025.19 were to be repaid, it appears that all creditors, including unsecured creditors, could be paid.

Motion Record, p. 27 (Third Report of the Receiver, p. 23, para. 63).

68. The Santaguidas appear, through their lawyer, to concede that any “monies owing by [the Debtor] to [Mrs. Santaguida] would be reduced from any monies owing to 220 by Santerra”.

Motion Record, p. 23 (Third Report of the Receiver, p. 19, para. 52) and p. 224 (Appendix “P”, letter from Brett Moldaver, January 29, 2019, p. 3).

69. In spite of requests made since August, 2017, and a court order on May 16, 2018, Santerra, the Debtor and the Santaguidas have not provided an accounting for the net transfer of the sum of \$3,457,025.19; they have also not made arrangements to repay the sum to the estate.

Motion Record, p. 20 (Third Report of the Receiver, p. 16, para. 49), p. 214 (Appendix “M”, letter of August 4, 2017), p. 216 (Appendix “N”, letter of October 26, 2017) and p. 218 (Appendix “O”, letter of April 23, 2018).

Supplementary Motion Record, p. 8 (Supplementary Third Report of the Receiver, p. 8, para. 23), p. 140 (Appendix “E”, letter of January 31, 2019), p. 143 (Appendix “F”, letter of February 6, 2013) and p. 145 (Appendix “G”, letter for February 13, 2019).

Other background about the receivership

70. The Receiver was appointed on June 22, 2017.

Motion Record, p. 9, (Third Report of Receiver, p. 5, para.1) and p. 32 (Appendix “A”, Receivership Order of June 22, 2017).

71. At the time, it could not obtain cooperation from the Santaguidas and others with respect to accessing the Debtor’s premises and records.

Motion Record, pp. 9 -10, (Third Report of Receiver, p. 5, para. 4), and pp. 58 - 59 (Appendix “B”, First Report of the Receiver, May 4, 2018, pp. 9-10).

72. A motion was necessary and, on July 21, 2017, the court ordered Mr. Santaguida and others to cooperate and to pay costs.

Motion Record, p. 59, (Appendix “B”, First Report of the Receiver, May 4, 2018, p. 10, para. 21).

73. On July 25, 2017, the Debtor’s bookkeeper contacted the Receiver and provided certain accounting information consisting of Quick books, bank reconciliations and financial statements.

Motion Record, p. 60, (Appendix “B”, First Report of the Receiver, May 4, 2018, p. 11, para. 20).

74. No supporting documentation for any of the financial transactions was provided nor made available, nor was any information relating to the development of the Project.

Motion Record, p. 60, (Appendix "B", First Report of the Receiver, May 4, 2018, p. 11, para. 20).

75. The Receiver had no information relating to the status of the site plan approval, the designs relating to the building or any other reports.

Motion Record, p. 60, (Appendix "B", First Report of the Receiver, May 4, 2018, p. 11, para. 20).

76. The Receiver obtained reports and documents relating to site plan approval directly from the City of Hamilton.

Motion Record, pp. 63-64, (Appendix "B", First Report of the Receiver, May 4, 2018, pp. 14-15, para. 37).

77. The Receiver also reviewed the Debtor's financial records to ascertain potential leads as to which companies had done work on the project with the hope of being able to obtain copies of reports that had previously been prepared for the Debtor. The Receiver was successful in doing so.

Motion Record, p. 64, (Appendix "B", First Report of the Receiver, May 4, 2018, p. 15, para. 38).

78. On May 23, 2017, in response to a request by the Debtor, The City of Hamilton extended the Conditional Site Plan Approval.

Motion Record, p. 64, (Appendix "B", First Report of the Receiver, May 4, 2018, p. 15, para. 39).

79. The July 25, 2017, bank reconciliation indicated that the only funds held by the Debtor was \$11,164.54 in an account at the Bank of Montreal. The Receiver requested the Debtor's bookkeeper to issue a cheque to the Receiver for the funds on hand. The bookkeeper undertook to promptly obtain a cheque signed by Mr. Santaguida for the account balance and to inform the Receiver once that was done.

Motion Record, p. 62, (Appendix "B", First Report of the Receiver, May 4, 2018, p. 13, para. 30).

80. After several several follow-up requests and a personal attendance at the bank, the Receiver received a bank draft dated August 4, 2017, in the amount of only \$644.54.

Motion Record, p. 62 (Appendix "B", First Report of the Receiver, May 4, 2018, p. 13, paras 31-32).

81. It discovered that a cheque for the remaining amount had been written to the Debtor's lawyer.

Motion Record, p. 63 (Appendix "B", First Report of the Receiver, May 4, 2018, p. 14, para 33).

82. The Receiver requested that the funds be returned and brought a motion in respect of the matter.

Motion Record, p. 63 (Appendix "B", First Report of the Receiver, May 4, 2018, p. 14, para 35-36).

Fees and disbursements

83. Pursuant to the Receivership Order, the Receiver has provided services and incurred disbursements.

Motion Record, p. 28 (Third Report of the Receiver, p. 24, para. 69) and p. 443 (Appendix "BB", affidavit of Deborah Hornbostel, April 8, 2019).

84. The detailed time descriptions contained in the dockets provide a fair and accurate description of the services provided and the amounts charged by representatives of the Receiver from May 1, 2018, to and including March 31, 2019. Included with the affidavit is a summary of the time charges of those whose services are reflected in the detailed dockets, including the total fees and hours billed.

Motion Record, p. 29 (Third Report of the Receiver, p. 25, para. 70) and p. 443 (Appendix "BB", affidavit of Deborah Hornbostel, April 8, 2019).

85. Additionally, the Receiver has incurred legal fees of its counsel in respect of these proceedings, as more particularly set out in the fee affidavit of Oren Chaimovitch which covers the period from April 30, 2018, to March 25, 2019.

Motion Record, p. 29 (Third Report of the Receiver, p. 25, para. 71). and p. 477 (Appendix "CC", affidavit of Oren Chaimovitch sworn April 4, 2019).

86. The Receiver respectfully submits that the Receiver's fees and disbursements and its counsel's fees and disbursements are fair and reasonable in the circumstances and have been validly incurred in accordance with the provisions of the Receivership Order.

Motion Record, p. 29 (Third Report of the Receiver, p. 25, para.72).

87. The Receiver requests that the Court approve its interim accounts from May 1, 2018, to March 31, 2019, in the amount of \$276,747.00, plus applicable HST of \$35,977.11.

Motion Record, p. 29 (Third Report of the Receiver, p. 25, para.73).

88. The Receiver also requests that the Court approve the accounts of its legal counsel for the period from April 30, 2018, to March 25, 2019, in the amount of \$58,812.83 for fees and disbursements, inclusive of HST of \$6,690.31.

Motion Record, p. 29 (Third Report of the Receiver, p. 25, para.74).

89. The fees and disbursements before the dates set out above were approved by the court on May 16, 2018.

Motion Record, p. 10 (Third Report of the Receiver, p. 10, para. 9) and p. 105 (Tab "D", Ancillary Order, May 16, 2018).

Mr. Santaguida's affidavit

90. On May 27, Mr. Santaguida delivered an affidavit which is unfair and inaccurate and, in that respect, the Receiver points out the following, making reference to particular paragraphs in it:

- (a) paragraph 2 – This is the first provision of documentation to the Receiver from Mr. Santaguida with respect to the ownership of the shares of the Debtor. For the purpose of filing tax returns, the Receiver had obtained and relied on shareholder information from the 2015 and 2016 annual tax returns that had been filed by the Debtor with CRA indicating that the sole shareholder of the Debtor was Mrs. Santaguida. As a result of this disclosure, all tax returns that the Receiver has reviewed and filed will have to be corrected, something which may have implications on the amount of tax owing if Mr. Santaguida controlled other taxable corporations during the years 2015 through 2019. The Receiver has requested details from Mr. Santaguida's accountant as to the sharing of the small business deduction among Mr. Santaguida's corporations during those years in order to file amended tax returns.
- (b) paragraph 3 – As explained in the Third Report, the documentation provided to the Receiver with respect to the purchase and funding of the Property indicated that it was purchased and funded 227 and not Mrs. Santaguida. The Discharge Statement dated January 15, 2019 and provided to the Receiver on January 29, 2019 was issued by 227 rather than Mrs. Santaguida. Accordingly, Mrs. Santaguida does not appear to hold a mortgage for the initial purchase funding of the Property.

- (c) Paragraph 8 – The Receiver did not prepare “financial statements” but did provide its internal working papers consisting of an excel schedule used for the preparation of the 2017, 2018 and 2019 corporate tax returns. The interest charge used by the Receiver was pursuant to the schedule presented as Appendix “X” in the Third Report and was capitalized as interest on the “Shareholder Loan” on the balance sheet in the working papers, consistent with the categorization used by the Debtor, not the Receiver, in its financial statements of prior years.
- (d) paragraph 8 – The meeting was initiated by Mr. Luna. As previously noted, the Debtor had never provided the Receiver with the supporting documentation for the general ledger entries. The Receiver requested the records to support the tax return filings that the Receiver prepared based on the Debtor’s general ledger. The Receiver attended at Mr. Luna’s office on May 27 to retrieve two boxes of records and answer any questions with respect to the corporate tax returns filed by the Receiver. Mr. Luna had no questions. The Receiver asked for the minute book but was told by Mr. Luna that he did not have it.
- (e) paragraph 9 – The information therein speaks to the complexity, intertwining, and poor record keeping of the operations of the various corporations owned by the Santaguidas. The opinion on the registration of a mortgage is one issue but the claiming of an amount secured by that mortgage is another. No evidence has been provided to indicate that Mrs. Santaguida advanced \$701,583 to 220 with respect to the vacating of a lien for Terrasan 327 Royal York Rd. Limited (“Terrasan”).
- (f) paragraph 15 – The successful closing of the sales transaction was questionable and difficult, requiring three extensions of the closing date, as detailed in the Second and Third Reports of the Receiver. The Receiver was not certain that the transaction would close until it actually did in October, 2018 and the Receiver was not in a position to consider any further distribution to creditors until the completion of the claims process in February, 2019, with respect to the unit purchasers. During that time, the Receiver was still waiting for the Santaguidas to provide the requested information with respect to Santerra and Mrs. Santaguida’s purported mortgages and attempting to schedule a date for their examinations.
- (g) paragraph 16 – The examinations were requested because of a lack of cooperation and response by the Santaguida’s in providing information. As previously mentioned herein,

their counsel undertook to provide the Receiver with the requested information in April, 2018 but did not do so until January 31, 2019 and February 8, 2019. Subsequent efforts to arrange dates of examination did not work out and accordingly, the Receiver filed its Third Report to the Court to seek directions based on the information it has received and reviewed.

- (h) paragraph 19, 20 and 24 –Based on the evidence provided and reported, the payment was made by 227.
- (i) paragraph 26 and 27 –The Receiver notes that information on the advances of Mrs. Santaguida were not provided until January 31, 2019 and February 8, 2019 and that Mr. Santaguida did not turn over the bank statements that were in his possession until May 27, 2019. Although there remains one advance in the amount of \$80,000 that has not been supported with proof of deposit into the Debtor’s bank account, the Receiver is satisfied on the balance of probabilities that the advance was likely deposited in the Debtor’s account.
- (j) paragraph 33 – The Receiver also desires an efficient process to address the residual matters in the receivership and for that reason has sought an order from the court with respect to a claims process for the unsecured creditors.
- (k) paragraph 34 – The Receiver has relied on the books and records of the Debtor. The Receiver has not been provided with complete tax returns filed by the Debtor prior to the receivership and is therefore unaware how long the incorrect shareholder information has been provided to CRA. The Receiver requires further information from Mr. Santaguida in order to amend the corporate tax filings.
- (l) paragraph 39 – Presumably Mr. Santaguida is referring to the entry recorded in the Debtor’s general ledger account of Santerra which was provided as Appendix “L” in the Third Report. The Receiver did not record anything inaccurately, as stated by Mr. Santaguida. The Receiver merely reported to the court how the transaction was recorded in the books and records of the Debtor, which by Mr. Santaguida’s owns admissions were not well kept. These records show a payment from the Debtor to Santerra as related to a loan to Mrs. Santaguida.
- (m) paragraph 45 and 46 – The Receiver has reviewed GNCA’s legal fee invoices and has found them to be reasonable. There is no requirement for those fees to be taxed by the Court.

- (n) paragraph 49 – The Receiver proposes a claims process by which unsecured creditors, including CORfinancial Corp., are the opportunity to prove their alleged claims, something particularly important given Mr. Santaguida’s evidence with respect to poor record keeping. Until that process is complete, it is prudent to include the amount as a reserve.
- (o) paragraph 52 – The Receiver agrees with the model, which mirrors what it has suggested, in general but not the amounts. The Receiver agrees that the tax liability should be paid but cautions that the amount may increase as a result of the change in shareholder information and depending on the information we are awaiting from Mr. Santaguida and his related corporations. The issue of Santerra is not moot as Mr. Santaguida states. It only becomes moot if all other creditors of the Debtor are paid in full.

Second Supplementary Motion Record, pp 7-10 (Second Supplementary First Report of the Receiver, pp 7-10, para.11).

PART III: THE LAW

91. Although no motion has been brought, the Debtor and the Santaguidas appear to be asking for the Receiver to be removed.

92. The threshold for this is very high.

Canada Trustco Mortgage Co v York-Trillium Development Group Ltd, 1992 CarswellOnt 168 (Ct J (Gen Div) [Commercial List]) at para 5


PART IV: RELIEF SOUGHT

93. As set out at the outset of the present factum, the Receiver respectfully seeks an order and directions as follows:

- (a) authorizing the Receiver to transfer the funds, remaining after the completion of repayment of deposits made for the purchase of condominium units, to the general receivership trust account for the benefit of the estate;
- (b) authorizing the Receiver to proceed with payment of the fees and expenses of Guarantee Company of North America (“Guarantee Co.) as claimed to date as well as any reasonable subsequent claims to be determined in accordance with the relevant security;
- (c) approving a collateral cash order to permit the Tarion Bond to be terminated;
- (d) authorizing the Receiver to proceed as follows:

- i. to conduct an expeditious claims process in respect of unsecured creditors which would require the Receiver to review and to make recommendations to the court, on notice to all known creditors, as to the disposition of claims and any other matters which remain outstanding in the receivership;
- ii. failing a tolling agreement, to authorize the Receiver to commence an action so as to protect against the expiry of any limitation period in respect of the unaccounted for net transfer of approximately \$3.5 million to Santerra Asset Management and Development Inc. ("Santerra"), a corporation which appears related to the Debtor;
- (e) directing, if necessary, the principals of the Debtor to provide any other documents and information necessary for the Receiver to bring the receivership to a timely conclusion;
- (f) any further directions and authorization to give effect to the foregoing;
- (g) approving the activities and conduct of the Receiver;
- (h) approving the Receiver's Interim Statement of Receipts and Disbursements; and
- (i) approving and authorizing payment of the fees and disbursements of the Receiver and its counsel.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 31st day of May, 2018



Lawrence Hansen

DEVRY SMITH FRANK *LLP*

Lawyers for the receiver
msi Spergel Inc.

SCHEDULE “A”

LIST OF AUTHORITIES

1. *Canada Trustco Mortgage Co v York-Trillium Development Group Ltd*, 1992 CarswellOnt 168 (Ct J (Gen Div) [Commercial List])

SCHEDULE "1"

2203284 Ontario Inc.
Transactions by Account
All Transactions

Type	Date	Num	Name	Memo	Ctr	Split	Amount	Balance	Audit No	Comments	
1155 - Santerra Asset Management & Dev											
General Jor	2015-07-08	GJ-036									
Cheque	2015-09-30	383	Santerra Asset Management & Dev. Inc.			Trust Account - Minden Gross	2,581,543.11	2,581,543.11	1		
Cheque	2015-09-30	384	Santerra Asset Management & Dev. Inc.			VOID:	0.00	2,581,543.11			
Cheque	2015-10-06	393	Santerra Asset Management & Dev. Inc.			1101 - Bank of Montreal:1997-354	1,230,000.00	3,711,543.11	2		
Cheque	2015-10-13	395	Santerra Asset Management & Dev. Inc.			1101 - Bank of Montreal:1997-354	110,000.00	3,821,543.11	3		
Deposit	2015-12-03	371	Santerra Asset Management & Dev. Inc.			1101 - Bank of Montreal:1997-354	150,000.00	3,971,543.11	4		
Deposit	2016-02-09	409	Santerra Asset Management & Dev. Inc.			1101 - Bank of Montreal:1997-354	-140,000.00	3,831,543.11	5		
Deposit	2016-03-30	446	Santerra Asset Management & Dev. Inc.			1101 - Bank of Montreal:1997-354	-40,000.00	3,791,543.11	6		
Deposit	2016-04-08	455	Santerra Asset Management & Dev. Inc.			1101 - Bank of Montreal:1997-354	-6,000.00	3,785,543.11	7		
Deposit	2016-04-28	467	Santerra Asset Management & Dev. Inc.			1101 - Bank of Montreal:1997-354	-50,000.00	3,735,543.11	8		
Transfer	2016-07-05					1101 - Bank of Montreal:1997-354	-28,000.00	3,707,543.11	9		
Transfer	2016-07-28					1101 - Bank of Montreal:1997-354	-3,500.00	3,704,043.11	10		
Deposit	2016-09-29	557	Santerra Asset Management & Dev. Inc.			1101 - Bank of Montreal:1997-354	-34,000.00	3,670,043.11	11	Missing, could not find	
General Jor	2016-09-01	GJ-049				1101 - Bank of Montreal:1997-354	-25,000.00	3,645,043.11		Missing, could not find	
Deposit	2016-09-14	563	Santerra Asset Management & Dev. Inc.			5102 - Office & General	-71.75	3,644,971.36	12		
Deposit	2016-09-29	569	Santerra Asset Management & Dev. Inc.			1101 - Bank of Montreal:1997-354	-11,600.00	3,611,371.36	13		
Deposit	2016-09-30	573	Santerra Asset Management & Dev. Inc.			1101 - Bank of Montreal:1997-354	-34,900.00	3,598,471.36	14		
Cheque	2016-10-28	557	Santerra Asset Management & Dev. Inc.			1101 - Bank of Montreal:1997-354	-30,518.00	3,567,953.36	15		
Deposit	2016-11-14	598	Santerra Asset Management & Dev. Inc.			1101 - Bank of Montreal:1997-354	2,238.02	3,570,191.38	16		
Deposit	2016-11-30	605	Santerra Asset Management & Dev. Inc.			1101 - Bank of Montreal:1997-354	-6,700.00	3,563,491.38	17		
Deposit	2016-12-30	617	Santerra Asset Management & Dev. Inc.			1101 - Bank of Montreal:1997-354	-1,000.00	3,562,491.38	18		
Deposit	2017-01-12	626	Santerra Asset Management & Dev. Inc.			1101 - Bank of Montreal:1997-354	-30,000.00	3,532,491.38	19		
Deposit	2017-01-25	628	Santerra Asset Management & Dev. Inc.			1101 - Bank of Montreal:1997-354	-30,000.00	3,502,491.38	20		
General Jor	2017-02-08	GJ-050				1101 - Bank of Montreal:1997-354	-30,300.00	3,472,191.38	21		
Cheque	2017-02-14	583	Santerra Asset Management & Dev. Inc.			1101 - Bank of Montreal:1997-354	-26,000.00	3,446,191.38	22		
General Jor	2017-03-31	GJ-060				1101 - Bank of Montreal:1997-354	15,500.00	3,461,691.38	23	Rent Allocation.	
Total 1155 - Santerra Asset Management & Dev							3,457,075.19	3,457,075.19			
TOTAL							3,457,075.19	3,457,075.19			
Santerra Asset Management - Balance								3,454,591.10			
Variance								2,331.09			
Missing April 2017 Rent Allocation								2,331.09			
Unexplained Variance								0.00			

DUCA FINANCIAL SERVICES CREDIT UNION LTD.
Applicant

and

2203284 ONTARIO LTD.
Respondent

Court File No.: CV-17-11827-00CL

ONTARIO

SUPERIOR COURT OF JUSTICE

Proceeding commenced at

TORONTO

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