

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Application under Section 243(1) of the *Bankruptcy and Insolvency Act*
and Section 101 of the *Courts of Justice Act*

BETWEEN:

FOREMOST MORTGAGE HOLDING CORPORATION, 697350 ONTARIO LIMITED, SANTINO BARTOLINI, MARGHERITA BARTOLINI, JERRY RUMACK, JUDY RUMACK, ANTONIO SAVIO, 614921 ONTARIO LIMITED, DINAPET HOLDINGS LIMITED, SAM GOLDMAN, ELLEN NEWMAN, JOHN LOCKWOOD INVESTMENTS LTD., CLARA SOFFIATURO, GABRIELE SOFFIATURO, BEV NEWMAN, NANCY LEVY, PAUL VALANNE, WING-YEE HUI, L. AND S. INVESTMENTS INC., ELLIOT ROVAN, MARSHA ROVAN, REMO BACCI, ELDA BACCI, MERLE NOWACK, COMMUNITY TRUST COMPANY, WISEMOVE INC., FREILACH RESORTS INC., GILBERT ZAMONSKY, FRANK PEZZENTE, MARIA PEZZENTE, 1375051 ONTARIO LTD., VINCENZO MALLOZZI, CARLA MALLOZZI, FRANK GOODMAN, LILLIAN GOODMAN, GAYLE GOLDMINTZ, NIVES D=ANGELO, ADRAIAN BACCI and ALEX D'ANGELO

Applicants

- and -

EVIAN TOWNES INC.

Respondent

FIFTH REPORT OF THE RECEIVER

November 18, 2016

PURPOSE OF FIFTH REPORT

1. This Fifth report (the “**Fifth Report**”) of A. Farber & Partners Inc., as receiver (“**Farber**” or the “**Receiver**”), without security, of all the assets, undertakings and properties of Evian Townes Inc. (“**Evian**”) is filed with the Court to advise of the Receiver’s activities and to support its request for an order:

- (a) Authorizing the Sale Transaction (as defined herein), vesting in the respective Purchasers thereunder the right, title and interest of the subject properties and authorizing the Receiver to take all steps required to complete the Sale Transaction;
- (b) Approving the activities of the Receiver since its Fourth report dated October 25, 2016 (the “**Fourth Report**”);
- (c) Sealing Confidential Appendices 1 and 2 until further order of the Court.

DISCLAIMER

2. This Fifth Report has been prepared for the use of this Court and Evian’s stakeholders as general information relating to Evian and to assist the Court in making a determination of whether to approve the relief sought. This Fifth Report may not be appropriate for any other purpose. The Receiver assumes no responsibility or liability for loss or damage occasioned by any party as a result of the circulation, publication, reproduction or use of this report. Any use which any party, other than the Court, makes of this report or any reliance on or a decision made based upon it is the responsibility of such party.

INTRODUCTION AND BACKGROUND

3. Evian owns a residential townhouse development (the “**Development**”) on a property at 507-515 Elizabeth Street, in the City of Burlington, Ontario (the “**Property**”). The Development involves the construction of 14 townhouse units freehold standard condominiums.

4. The Applicants loaned money to Evian to finance the Development and jointly hold a first mortgage on the property. On December 22, 2015, as a result of an impasse regarding funding of the Development to completion, the Applicants commenced an application seeking the appointment of a Receiver pursuant to section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 and section 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the “**BIA**”). A copy of their Application Record, which contains further information regarding the background and nature of the Development and the circumstances leading to the Receiver’s appointment, is available at <http://www.farberfinancial.com/insolvency-engagements/evian-townes-inc>.

5. By Order dated January 5, 2016 (the “**Initial Order**”), the Honourable Madam Justice Mesbur appointed Farber as receiver, without security, of all of the assets, undertakings and properties of Evian acquired for, or used in relation to a business carried on by Evian, including all proceeds thereof (the “**Property**”). A true copy of the Initial Order is attached as **Appendix “A”**.

6. Farber is a non-possessory receiver. Evian remains in possession of the Property. However, the Initial Order does empower and authorize the Receiver to act in respect of the Property, including but not limited to exercising control over the Property and taking possession of and exercising control over any and all proceeds, receipts and disbursements arising out of the Property; receiving, preserving and protecting the Property, or any parts thereof, and engaging counsel, consultants and experts to assist with the exercise of the Receiver’s powers and duties.

SALE TO BE APPROVED

7. By order dated June 17, 2016, The Honourable Madam Justice Conway authorized the sale of 13 of the 14 units comprising the Development. As set out in the Fourth Report, those sales have closed.

8. At the time of Justice Mesbur's order, one unit (Unit 8) was not yet complete. Work on that unit is now nearly complete, and the Receiver listed it for sale with Forest Hill Realty, Oakville ("**Forest Hill**").

9. On November 9, 2016, the Receiver entered into an Agreement of Purchase and Sale in respect of Unit 8 on behalf of Evian (the "**Sale Transaction**"). The purchasers are two individuals who are arm's length from the Receiver. A copy of the Agreement of Purchase and Sale is attached as **Confidential Appendix "1"**.

10. The Receiver recommends that this Court approve the Sale Transaction because:

(a) The agreed purchase price is equal to the price at which the Receiver listed Unit 8 for sale;

(b) Prior to listing the unit for sale, the Receiver obtained a valuation for the unit as of May 6, 2016. The agreed purchase price is approximately 8% higher than the appraised value of the unit. A copy of the May 6, 2016 appraisal for Unit 8 is attached as **Confidential Appendix "2"**; and

(c) Unit 8 was listed for sale with Forest Hill from September 12, 2016 until the date of the Agreement of Purchase and Sale.

11. The Receiver notes that Initial Order authorizes and empowers it to:

- (a) “[C]onvey [or] transfer... the Property or any part or parts thereof out of the ordinary course of business” without notice pursuant to the *Personal Property Security Act* or *Mortgages Act* (para. 3(k)); and
- (b) “apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property” (para. 3(l)).

SEALING ORDER

12. Confidential Appendices 1 and 2 contain information disclosing the agreed sale price and appraised value, respectively, of Unit 8. The Receiver expects that disclosure of this information prior to the closing of the Sale Transaction may prejudice its negotiating position in the sale process for Unit 8 that would be required if the Sales Transaction is not approved or do not close for any reason.

HST

13. As set out in the Fourth Report, Evian filed an assignment in bankruptcy on October 4, 2016. A. Farber & Partners Inc. was appointed the Trustee in Bankruptcy (the “**Trustee**”). Concurrent receivership and bankruptcy processes have continued since. Evian’s assets are subject to the Initial Order, and it appears there will not be sufficient funds to satisfy all of Evian’s secured debts.

14. As further set out in the Fourth Report, the Receiver collected \$1,179,141.90 of HST collected in respect of the 13 unit sales that closed in September 2016 (the “**Collected HST**”). In the Receiver’s view, because of Evian’s bankruptcy, the Canada

Revenue Agency (“CRA”) now holds an unsecured claim to the Collected HST, which funds do not constitute a deemed trust in the receivership estate as they would but for the bankruptcy.

15. The Receiver sought authorization to distribute proceeds of sale of the 13 sold units. By order dated October 27, 2016, The Honourable Mister Justice Newbould authorized a distribution from sale proceeds. A copy of Justice Newbould’s order is attached as **Appendix “B”**.

16. The Receiver gave notice to the CRA of its view that its claim to the Collected HST is unsecured and its intention to distribute those funds to secured creditors. The Receiver has not distributed the amount of the Collected HST pending the CRA’s confirmation that it will not challenge the Receiver’s doing so. The Receiver has since spoken with a representative of the CRA who has confirmed that the CRA does not take a position with respect to the Receiver’s intention to distribute those funds to secured creditors. The Receiver therefore intends to include the Collected HST in the amount it distributes pursuant to Justice Newbould’s October 27, 2016 order.

ADDITIONAL ACTIVITIES OF THE RECEIVER TO DATE

17. The Receiver’s other activities since its appointment consist of:

- (a) Maintenance and updating of the case website at <http://www.farberfinancial.com/insolvency-engagements/evian-townes-inc> in accordance with the Guide Concerning Commercial List E-Service and Posting all relevant motion materials, Orders and other related information to the website;

- (b) Correspondence with counsel, Matas Management Services Inc. (“Matas”), former counsel to Evian and various lien claimants with respect to reviewing liens and determining Evian’s position on the validity and dollar value thereof;
- (c) Calls and correspondence with contractors that registered liens after the Initial Order and negotiating arrangements to have the lien discharged;
- (d) Ongoing review of the construction process with Matas for Unit 8, the exterior landscaping and deficiency repairs, including ongoing monitoring of the costs of same prepared by Matas;
- (e) Numerous calls and emails with contractors and Matas regarding issues on the timing, funding for and quality of construction work performed and to be performed;
- (f) Arrangement of ongoing insurance of the development;
- (g) Calls and correspondence with Matas, Foremost and Tarion regarding the construction management agreement, ongoing coverage for the units, and deposit bonding with Aviva;
- (h) Correspondence with Evian’s former counsel re various outstanding pre-receivership lien and non-lien litigation matters;
- (i) Ongoing dealings with CRA and their audit and assessment of the post-receivership input tax credits claimed by the Receiver;

- (j) Arrange for preparation and filing of outstanding March 31, 2015 corporate tax returns;
- (k) Meetings and discussions with Matas and counsel re limitation period for a pre-receivership potential litigation claim and options to pursue claim for benefit of the creditors;
- (l) Dealing and updating with secured creditor, lien holder, contractor and unsecured creditor queries; and
- (m) Discussions with Matas regarding the process and efforts to complete various aspects of the Development necessary to have various letters of credit released by the City of Burlington, Burlington Hydro and Halton Region and dealing with claims against the letters by a contractor for pre-receivership work not paid by Evian prior to the Initial Order.

RELIEF REQUESTED

18. Based on the foregoing, the Receiver respectfully requests that this Court issue an order:

- (a) Authorizing the Sale Transaction, vesting in the Purchasers thereunder the right, title and interest of the subject properties and authorizing the Receiver to take all steps required to complete the Sale Transactions;
- (b) Approving the activities of the Receiver since the Fourth Report as detailed herein;

(c) Sealing Confidential Appendices 1 and 2 unless and until the Receiver files a certificate confirming that the Sale Transaction has closed.

All of which is respectfully submitted this 18th day of November 2016.

**A. FARBER & PARTNERS INC.
IN ITS CAPACITY AS RECEIVER OF
EVIAN TOWNES INC.
and with no personal or corporate liability.**

A. Farber & Partners Inc.
