

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

FIREPOWER DEBT GP INC., AS AGENT

Applicant (Respondent)

and

THEREDPIN, INC. and THEREDPIN.COM REALTY INC.

Respondents

MOTION RECORD

(Motion for Direction on Appeal returnable February 11, 2019)

January 31, 2019

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Court of Appeal File No. C66336

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

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Respondents

NOTICE OF MOTION

The moving parties/appellants, the former real estate agents of TheRedPin.com Realty Inc. (“TRP Realty”) will bring a motion to the Court on Monday, February 11, 2019 at 9:30 a.m., or as soon after that time as the Motion can be heard at the court house, Osgoode Hall, 130 Queen Street West, Toronto, Ontario, M5H 2N5.

PROPOSED METHOD OF HEARING: The motion is to be heard:

- in writing under subrule 37.12.1(1);
- in writing as an opposed motion under subrule 37.12.1(4);
- orally.

THE MOTION IS FOR:

- (a) an Order, as may be necessary, extending the time for delivery of a Notice of Appeal;

- (b) an Order giving direction in respect of whether leave to appeal is required, and if leave to appeal is required, setting a date by which the appellants must move for leave to appeal;
- (c) costs of this motion; and
- (d) such further and other grounds as counsel may advise and this Honourable Court may permit.

THE GROUNDS FOR THE MOTION ARE:

Overview

- (a) this is an appeal from a decision of the Honourable Justice Penny (the “Motion Judge”), who determined on a motion for directions that commissions earned or to be earned by former real estate agents of TRP Realty (the “TRP Agents”) were not impressed with a trust, and therefore belonged to secured creditors of TRP Realty pursuant to general security agreements;
- (b) the Motion Judge’s decision was rendered on November 30, 2018;
- (c) the TRP Agents delivered a Notice of Appeal on December 27, 2018 (the “Notice of Appeal”) under the *Courts of Justice Act* (the “CJA”);
- (d) upon delivery of the Notice of Appeal, certain respondents took the position that the Notice of Appeal was out of time, and that the appeal had to be brought within the 10 day period provided for under s. 31(1) of the *Bankruptcy and Insolvency Act General Rules* (the “BIA Rules”);

- (e) these respondents also took the position that leave to appeal was required under s. 193(e) of the *Bankruptcy and Insolvency Act* (the “BIA”), and that there was no appeal as of right from the Motion Judge’s decision;

Appeal Under the BIA or CJA

- (f) the TRP Agents submit that the issue before the Motion Judge was not determined on the basis of jurisdiction conferred upon him under the BIA, but instead by the Motion Judge interpreting and applying common law legal principles. The TRP Agents accordingly submit that an appeal of the Motion Judge’s decision lies as of right to the Court of Appeal as a final decision under s. 6(1)(b) of the CJA;
- (g) in the alternative, if the appeal ought to have been brought under the BIA, it is in the interests of justice to grant an extension of time to deliver a Notice of Appeal;
- (h) in particular, an extension of time should be granted as any failure to appeal under the BIA Rules was inadvertent, there is no prejudice to the respondents in extending the time to appeal, the appeal is meritorious (in that it presents an arguable case and is not frivolous), and the BIA Rules specifically contemplate an extension of time to bring an appeal;

Leave

- (i) the appellants submit that if the appeal to the Court of Appeal lies under the BIA, it is an appeal as of right under s. 193(a), (b), and (c) of the BIA because:
 - (i) the point at issue relates to future commissions, and therefore future rights;

- (ii) the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings; and
- (iii) the commissions and future commissions at issue exceed \$10,000;
- (j) in the alternative, if leave to appeal is required, the appellants seek an order directing them to seek leave to appeal in writing by motion to this Court within 30 days of the date of an Order;

Other

- (k) sections 183, 187(11), 193 of the BIA;
- (l) sections 31, 32 of the BIA Rules;
- (m) section 6 of the CJA; and
- (n) such further and other grounds as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the Motion:

- (a) affidavit of Jordan Goldblatt, sworn January 30, 2019; and
- (b) such further and other evidence as counsel may advise and this Honourable Court may permit.

January 31, 2019

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Applicant (Respondent)

-and- **THEREDPIN, INC. et al.**
Respondents

Court of Appeal File No. C66336

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PROCEEDING COMMENCED AT
TORONTO

NOTICE OF MOTION

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AFFIDAVIT OF JORDAN GOLDBLATT

I, Jordan Goldblatt, of the City of Toronto, in the Province of Ontario, MAKE OATH AND

SAY:

1. I am counsel to certain appellants, the former real estate agents of the respondent, the RedPin.com Realty Inc., and as such, have knowledge of the matters to which I hereinafter depose.

The Motion

2. On June 14, 2018, when the Honourable Justice Hailey granted an Order appointing MNP Ltd. ("MNP") as receiver over the assets, undertakings and properties of TheRedPin, Inc. and TheRedPin.com Realty Inc. ("TRP Realty"). Attached as **Exhibit "A"** is a copy of the Order of Justice Hailey appointing MNP as receiver.

3. Shortly after MNP's appointment, Adair Goldblatt Bieber LLP ("AGB") was retained as counsel to certain former agents of TRP Realty (the "TRP Agents") in respect of determining whether real estate commissions paid and to be paid to TRP Realty were impressed with a trust in their favour, and thus were their property to the exclusion of TRP Realty's creditors.

4. By an Order of the Honourable Justice Chiappetta dated September 11, 2018, AGB was appointed as counsel to all former agents of TRP Realty, and Dennise Paccione and Michael Sotoadeh were the TRP Agents appointed to represent the group's interests in respect of the commissions issue. Attached as **Exhibit "B"** is a copy of Order of Justice Chiappetta.

5. On September 10, 2018, counsel for MNP brought a motion for advice and direction concerning whether commissions "collected and to be collected by the Receiver are held and are to be held in trust for the benefit of TRP [agents]" (the "Commissions Motion"). Attached as **Exhibit "C"** is a copy of MNP's Notice of Motion. Attached as **Exhibit "D"** is MNP's report to the court on the Commissions Motion.

6. The TRP Agents' position on the motion was supported by Tarik Gidamy, a founder of TRP Realty. Mr. Gidamy swore an affidavit confirming that he had set up TRP Realty's banking to segregate money owed to the TRP Agents into a separate commission account, and that he "always understood" that the TRP Agents' commissions "did not belong in [their] entirety to TRP Realty, even though such funds would have to be deposited into an account in the name of TRP Realty." Mr. Gidamy's affidavit also referred to 'trade record sheets', which were documents given to each TRP Agent on every transaction set to close, setting out the specific commission split between the various agents entitled to a commission through TRP Realty. The trade record sheet would specifically state that "it is understood between all parties that this agreement shall constitute a Commission Trust Agreement as set out in the contract". A copy of Mr. Gidamy's affidavit is attached as **Exhibit "E"**.

7. On the motion, a representative of a secured party admitted that money in the segregated commission account included trust funds to be paid to co-operating brokers. A copy of the answers

to undertakings from Jared Kalish, a representative of the secured creditor Firepower Debt GP Inc. where this admission is recorded, is attached as **Exhibit “F”**.

8. AGB filed a factum on behalf of the TRP Agents in respect of the Commissions Motion, which set out the evidence on which the TRP Agents relied. A copy of the factum of the TRP Agents is attached as **Exhibit “G”**.

9. The submissions of the TRP Agents were supported by their insurer, certain underwriters of Lloyd’s of London (the “Insurer”). At all times, the Insurer had separate counsel.

10. The Commissions Motion came before the Honourable Justice Penny (the “Motion Judge”) on October 22, 2018.

11. The Motion Judge rendered his decision on November 30, 2018, holding that the commissions were not subject to a trust in favour of the TRP Agents and were therefore the property of TRP’s secured creditors pursuant to their general security agreements. Attached as **Exhibit “H”** to my affidavit is a copy of the Motion Judge’s Reasons for Decision.

The Appeal

12. After having received the decision of the Motion Judge, I had discussions with my instructing clients with regard to whether they wished to appeal. The particulars of those discussions are solicitor-client privileged.

13. During this time period, I had discussions with counsel for the Insurer in regard to determining whether it was intending to appeal the decision. Eventually, I was advised that the Insurer was also appealing, and I discussed with counsel for the Insurer that my office would deliver a Notice of Appeal referring to the Insurer’s appeal.

14. I was instructed to deliver a Notice of Appeal on December 20, 2018.

15. At no point did I discuss with counsel for the Insurer its view in respect of the timeline by which a Notice of Appeal had to be delivered. I assumed that the Insurer's counsel had arrived at the same conclusion I had in respect of the timeline.

16. Having regard to the holiday season, I did not deliver a Notice of Appeal until December 27, 2018. I believed the Notice of Appeal was timely. Attached as **Exhibit "I"** is a copy of the Notice of Appeal I delivered on December 27, 2018.

17. After delivering the Notice of Appeal, counsel for one of the secured creditors, Harvey Chaiton, wrote to advise that in his view, the proposed appeal was out of time under the *Bankruptcy and Insolvency Act* (the "*BIA*") General Rules, and that there was no right of appeal from the Motion Judge's decision under the *BIA*. Attached as **Exhibit "J"** to my affidavit is an email from Mr. Chaiton dated December 27, 2018.

18. By letter dated December 28, 2018, I responded to Mr. Chaiton advising that my view was that the appeal was not out of time and setting out certain authority in respect of same. Attached as **Exhibit "K"** to my affidavit is a copy of my letter to counsel dated December 28, 2018.

19. Upon delivery of my letter on December 28, 2018, Mr. Chaiton advised that his client did not agree that the appeal could be brought under the *Courts of Justice Act*, and re-iterated that it was necessary for the appellants to seek an extension of time to appeal as well as to seek leave to appeal. Attached as **Exhibit "L"** is a copy of the letter from Harvey Chaiton dated December 28, 2018.

20. On December 31, 2018, I delivered an Amended Notice of Appeal referencing the issues raised by Mr. Chaiton. Attached as **Exhibit "M"** is a copy of the Amended Notice of Appeal.

21. On January 16, 2019, I wrote to counsel, advising that I had instructions to bring this motion. Between December 31, 2018 and January 16, 2019, I considered the issue of whether the secured parties were correct, and obtained advice (the particulars of which are privileged) in respect of this issue.

22. I can advise that February 11, 2019 was the first available date on which all counsel were available to argue this motion.

23. To the best of my knowledge, nothing has occurred on this matter between November 30, 2018, the date the Motion Judge made his Order, and the date I swear this affidavit. Similarly, nothing of significance occurred between the date the Motion Judge rendered his decision and December 27, 2018, when my office delivered a Notice of Appeal.

24. Now shown to me and marked as **Exhibit "N"** to my affidavit is a copy of a Draft Order that has been approved as to form and content by counsel involved in this matter. I confirm that this Order is in the process of being taken out as at the date I swear this affidavit.

SWORN BEFORE ME at the City of Toronto, in the Province of Ontario on January 31, 2019

Molly Warwick

Commissioner for Taking Affidavits
(or as may be)

Jordan Goldblatt

JORDAN GOLDBLATT

MOLLY CATHERINE WARWICK,
a Commissioner, etc., Province of Ontario,
for Adair Goldblatt Bieber LLP,
Barristers and Solicitors.
Expires June 7, 2021.

FIREPOWER DEBT GP INC., AS AGENT
Applicant

-and- THEREDPIN, INC. et al.
Respondents

Court File No. C66336

ONTARIO
SUPERIOR COURT OF JUSTICE
PROCEEDING COMMENCED AT
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Lawyers for the TRP Agents

This is **Exhibit "A"** referred to in the
Affidavit of Service of Jordan Goldblatt
sworn January 31, 2019

Molly Warwick

Commissioner for Taking Affidavits (or as may be)

**MOLLY CATHERINE WARWICK,
a Commissioner, etc., Province of Ontario,
for Adam Goldblatt Bisber LLP,
Barristers and Solicitors.
Expires June 7, 2021.**

Court File No. CV-18-599644-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE)	THURSDAY, THE 14 TH
JUSTICE)	DAY OF JUNE, 2018
<i>HAINES</i>)	

FIREPOWER DEBT GP INC., AS AGENT

Applicant

- and -

THEREDPIN, INC. and THEREDPIN.COM REALTY INC.

Respondents

**ORDER
(appointing Receiver)**

THIS APPLICATION made by the Applicant for an Order pursuant to section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "BIA") and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended (the "CJA") appointing MNP Ltd. ("MNP") as receiver (the "Receiver") without security, of all of the assets, undertakings and properties of the Respondents, TheRedPin, Inc. and TheRedPin.com Realty Inc. (the "Debtors"), acquired for, or used in relation to a business carried on by the Debtors, was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of Jared Kalish sworn June 13, 2018, including the exhibits thereto, and on hearing the submissions of counsel for the Applicant and such other counsel listed on the Counsel Slip, no one appearing for the other parties listed on the service list although duly served as appears from the affidavit of service of Aryan Ziaie sworn June 13, 2018, and on reading the consent of MNP to act as the Receiver,

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Application and the Application Record is hereby abridged and validated so that this application is properly returnable today and hereby dispenses with further service thereof.

APPOINTMENT

2. **THIS COURT ORDERS** that pursuant to section 243(1) of the BIA and section 101 of the CJA, MNP is hereby appointed Receiver, without security, of all of the assets, undertakings and properties of the Debtors acquired for, or used in relation to a business carried on by the Debtors, including all proceeds thereof (the "**Property**").

RECEIVER'S POWERS

3. **THIS COURT ORDERS** that the Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Property and, without in any way limiting the generality of the foregoing, the Receiver is hereby expressly empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:

- 3 -

- (a) to take possession of and exercise control over the Property and any and all proceeds, receipts and disbursements arising out of or from the Property;
- (b) to receive, preserve, and protect the Property, or any part or parts thereof, including, but not limited to, the changing of locks and security codes, the relocating of Property to safeguard it, the engaging of independent security personnel, the taking of physical inventories and the placement of such insurance coverage as may be necessary or desirable;
- (c) to manage, operate, and carry on the business of the Debtors, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part of the business, or cease to perform any contracts of the Debtors;
- (d) to engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Receiver's powers and duties, including without limitation those conferred by this Order;
- (e) to purchase such equipment, inventories, supplies, premises or other assets to continue the business of the Debtors or any part or parts thereof;
- (f) to receive and collect all monies and accounts now owed or hereafter owing to the Debtors and to exercise all remedies of the Debtors in collecting such monies, including, without limitation, to enforce any security held by the Debtors;
- (g) to settle, extend or compromise any indebtedness owing to the Debtors;
- (h) to execute, assign, issue and endorse documents of whatever nature in respect of any of the Property, whether in the Receiver's name or in the name and on behalf of the Debtors, for any purpose pursuant to this Order;

- 4 -

- (i) to initiate, prosecute and continue the prosecution of any and all proceedings and to defend all proceedings now pending or hereafter instituted with respect to the Debtors, the Property or the Receiver, and to settle or compromise any such proceedings. The authority hereby conveyed shall extend to such appeals or applications for judicial review in respect of any order or judgment pronounced in any such proceeding;
- (j) to market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate and, without limiting the generality of the foregoing, the Receiver is hereby authorized to carry out a sales process for the Property in accordance with the steps and timelines set out in **Schedule "A"** attached hereto;
- (k) to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business, with approval of this Court, and in such case notice under subsection 63(4) of the *Ontario Personal Property Security Act* shall not be required;
- (l) to 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;
- (m) to report to, meet with and discuss with such affected Persons (as defined below) as the Receiver deems appropriate on all matters relating to the Property and the receivership, and to share information, subject to such terms as to confidentiality as the Receiver deems advisable;
- (n) to apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and, if thought desirable by the Receiver, in the name of the Debtors;

- 5 -

- (o) to enter into agreements with any trustee in bankruptcy appointed in respect of the Debtors, including, without limiting the generality of the foregoing, the ability to enter into occupation agreements for any property owned or leased by the Debtors;
- (p) to exercise any shareholder, partnership, joint venture or other rights which the Debtors may have; and
- (q) to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations;

and in each case where the Receiver takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other Persons (as defined below), including the Debtors, and without interference from any other Person.

DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE RECEIVER

4. **THIS COURT ORDERS** that (i) the Debtors, (ii) all of its current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on its instructions or behalf, and (iii) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order (all of the foregoing, collectively, being "**Persons**" and each being a "**Person**") shall forthwith advise the Receiver of the existence of any Property in such Person's possession or control, shall grant immediate and continued access to the Property to the Receiver, and shall deliver all such Property to the Receiver upon the Receiver's request.

5. **THIS COURT ORDERS** that all Persons shall forthwith advise the Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or

affairs of the Debtors, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the "**Records**") in that Person's possession or control, and shall provide to the Receiver or permit the Receiver to make, retain and take away copies thereof and grant to the Receiver unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this paragraph 5 or in paragraph 6 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Receiver due to the privilege attaching to solicitor-client communication or due to statutory provisions prohibiting such disclosure.

6. **THIS COURT ORDERS** that if any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service provider or otherwise, all Persons in possession or control of such Records shall forthwith give unfettered access to the Receiver for the purpose of allowing the Receiver to recover and fully copy all of the information contained therein whether by way of printing the information onto paper or making copies of computer disks or such other manner of retrieving and copying the information as the Receiver in its discretion deems expedient, and shall not alter, erase or destroy any Records without the prior written consent of the Receiver. Further, for the purposes of this paragraph, all Persons shall provide the Receiver with all such assistance in gaining immediate access to the information in the Records as the Receiver may in its discretion require including providing the Receiver with instructions on the use of any computer or other system and providing the Receiver with any and all access codes, account names and account numbers that may be required to gain access to the information.

7. **THIS COURT ORDERS** that the Receiver shall provide each of the relevant landlords with notice of the Receiver's intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the Receiver's entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Receiver, or by further Order of this Court upon application by the Receiver on at least two (2) days notice to such landlord and any such secured creditors.

NO PROCEEDINGS AGAINST THE RECEIVER

8. **THIS COURT ORDERS** that no proceeding or enforcement process in any court or tribunal (each, a "Proceeding"), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.

NO PROCEEDINGS AGAINST THE DEBTORS OR THE PROPERTY

9. **THIS COURT ORDERS** that no Proceeding against or in respect of the Debtors or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtors or the Property are hereby stayed and suspended pending further Order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

10. **THIS COURT ORDERS** that all rights and remedies against the Debtors, the Receiver, or affecting the Property, are hereby stayed and suspended except with the written consent of the

Receiver or leave of this Court, provided however that this stay and suspension does not apply in respect of any "eligible financial contract" as defined in the BIA, and further provided that nothing in this paragraph shall (i) empower the Receiver or the Debtors to carry on any business which the Debtors are not lawfully entitled to carry on, (ii) exempt the Receiver or the Debtors from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

NO INTERFERENCE WITH THE RECEIVER

11. **THIS COURT ORDERS** that no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Debtors, without written consent of the Receiver or leave of this Court.

CONTINUATION OF SERVICES

12. **THIS COURT ORDERS** that all Persons having oral or written agreements with the Debtors or statutory or regulatory mandates for the supply of goods and/or services, including without limitation, all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Debtors are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Receiver, and that the Receiver shall be entitled to the continued use of the Debtors' current telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this

Order are paid by the Receiver in accordance with normal payment practices of the Debtors or such other practices as may be agreed upon by the supplier or service provider and the Receiver, or as may be ordered by this Court.

RECEIVER TO HOLD FUNDS

13. **THIS COURT ORDERS** that all funds, monies, cheques, instruments, and other forms of payments received or collected by the Receiver from and after the making of this Order from any source whatsoever, including without limitation the sale of all or any of the Property and the collection of any accounts receivable in whole or in part, whether in existence on the date of this Order or hereafter coming into existence, shall be deposited into one or more new accounts to be opened by the Receiver (the "**Post Receivership Accounts**") and the monies standing to the credit of such Post Receivership Accounts from time to time, net of any disbursements provided for herein, shall be held by the Receiver to be paid in accordance with the terms of this Order or any further Order of this Court.

EMPLOYEES

14. **THIS COURT ORDERS** that all employees or independent contractors of the Debtors shall remain the employees or independent contractors of the Debtors until such time as the Receiver, on the Debtors' behalf, may terminate the employment of such employees or independent contractors. The Receiver shall not be liable for any employee-related liabilities, including any successor employer liabilities as provided for in section 14.06(1.2) of the BIA, other than such amounts as the Receiver may specifically agree in writing to pay, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*.

PIPEDA

15. **THIS COURT ORDERS** that, pursuant to clause 7(3)(c) of the Canada *Personal Information Protection and Electronic Documents Act*, the Receiver shall disclose personal information of identifiable individuals to prospective purchasers or bidders for the Property and to their advisors, but only to the extent desirable or required to negotiate and attempt to complete one or more sales of the Property (each, a "**Sale**"). Each prospective purchaser or bidder to whom such personal information is disclosed shall maintain and protect the privacy of such information and limit the use of such information to its evaluation of the Sale, and if it does not complete a Sale, shall return all such information to the Receiver, or in the alternative destroy all such information. The purchaser of any Property shall be entitled to continue to use the personal information provided to it, and related to the Property purchased, in a manner which is in all material respects identical to the prior use of such information by the Debtors, and shall return all other personal information to the Receiver, or ensure that all other personal information is destroyed.

LIMITATION ON ENVIRONMENTAL LIABILITIES

16. **THIS COURT ORDERS** that nothing herein contained shall require the Receiver to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the

Canadian Environmental Protection Act, the *Ontario Environmental Protection Act*, the *Ontario Water Resources Act*, or the *Ontario Occupational Health and Safety Act* and regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Receiver from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Receiver shall not, as a result of this Order or anything done in pursuance of the Receiver's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

LIMITATION ON THE RECEIVER'S LIABILITY

17. **THIS COURT ORDERS** that the Receiver shall incur no liability or obligation as a result of its appointment or the carrying out the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*. Nothing in this Order shall derogate from the protections afforded the Receiver by section 14.06 of the BIA or by any other applicable legislation.

RECEIVER'S ACCOUNTS

18. **THIS COURT ORDERS** that the Receiver and counsel to the Receiver shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges unless otherwise ordered by the Court on the passing of accounts, and that the Receiver and counsel to the Receiver shall be entitled to and are hereby granted a charge (the "**Receiver's Charge**") on the Property, as security for such fees and disbursements, both before and after the making of this Order in respect of these proceedings, and that the Receiver's Charge shall form a first

charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subject to sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

19. **THIS COURT ORDERS** that the Receiver and its legal counsel shall pass its accounts from time to time, and for this purpose the accounts of the Receiver and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

20. **THIS COURT ORDERS** that prior to the passing of its accounts, the Receiver shall be at liberty from time to time to apply reasonable amounts, out of the monies in its hands, against its fees and disbursements, including legal fees and disbursements, incurred at the standard rates and charges of the Receiver or its counsel, and such amounts shall constitute advances against its remuneration and disbursements when and as approved by this Court.

FUNDING OF THE RECEIVERSHIP

21. **THIS COURT ORDERS** that the Receiver be at liberty and it is hereby empowered to borrow by way of a revolving credit or otherwise, such monies from time to time as it may consider necessary or desirable, provided that the outstanding principal amount does not exceed \$200,000 (or such greater amount as this Court may by further Order authorize) at any time, at such rate or rates of interest as it deems advisable for such period or periods of time as it may arrange, for the purpose of funding the exercise of the powers and duties conferred upon the Receiver by this Order, including interim expenditures. The whole of the Property shall be and is hereby charged by way of a fixed and specific charge (the "**Receiver's Borrowings Charge**") as security for the payment of the monies borrowed, together with interest and charges thereon, in priority to all security interests, trusts, liens, charges and encumbrances, statutory or

otherwise, in favour of any Person, but subordinate in priority to the Receiver's Charge and the charges as set out in sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

22. **THIS COURT ORDERS** that neither the Receiver's Borrowings Charge nor any other security granted by the Receiver in connection with its borrowings under this Order shall be enforced without leave of this Court.

23. **THIS COURT ORDERS** that the Receiver is at liberty and authorized to issue certificates substantially in the form annexed as **Schedule "B"** hereto (the "**Receiver's Certificates**") for any amount borrowed by it pursuant to this Order.

24. **THIS COURT ORDERS** that the monies from time to time borrowed by the Receiver pursuant to this Order or any further order of this Court and any and all Receiver's Certificates evidencing the same or any part thereof shall rank on a *pari passu* basis, unless otherwise agreed to by the holders of any prior issued Receiver's Certificates.

SERVICE AND NOTICE

25. **THIS COURT ORDERS** that the E-Service Protocol of the Commercial List (the "**Protocol**") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List website at <http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/e-service-protocol/>) shall be valid and effective service. Subject to Rule 17.05 this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules of Civil Procedure. Subject to Rule 3.01(d) of the Rules of Civil Procedure and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission. This Court further

orders that a Case Website shall be established in accordance with the Protocol with the following URL: mnpdebt.ca/theredpin

26. **THIS COURT ORDERS** that if the service or distribution of documents in accordance with the Protocol is not practicable, the Receiver is at liberty to serve or distribute this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or facsimile transmission to the Debtors' creditors or other interested parties at their respective addresses as last shown on the records of the Debtors and that any such service or distribution by courier, personal delivery or facsimile transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

27. **THIS COURT ORDERS** that the Applicant, the Receiver and their respective counsel are at liberty to serve or distribute this Order, any other materials and orders as may be reasonably required in these proceedings, including any notices, or other correspondence, by forwarding true copies thereof by electronic message to the Applicant's creditors or other interested parties and their advisors. For greater certainty, any such distribution or service shall be deemed to be in satisfaction of a legal or juridical obligation, and notice requirements within the meaning of clause 3(c) of the Electronic Commerce Protection Regulations, Reg. 81000-2-175 (SOR/DORS).

GENERAL

28. **THIS COURT ORDERS** that the Receiver may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

29. **THIS COURT ORDERS** that nothing in this Order shall prevent the Receiver from acting as a trustee in bankruptcy of the Debtors.

30. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

31. **THIS COURT ORDERS** that the Receiver be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Receiver is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

32. **THIS COURT ORDERS** that the Applicant shall have its costs of this application, up to and including entry and service of this Order, provided for by the terms of the Applicant's security or, if not so provided by the Applicant's security, then on a substantial indemnity basis to be paid by the Receiver from the Debtors' estate with such priority and at such time as this Court may determine.

33. **THIS COURT ORDERS** that any interested party may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to the Receiver and to any other party

- 16 -

likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

A handwritten signature in cursive script, appearing to read "Hainey J.", is written over a horizontal line.

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JUN 14 2018

PER / PAR:

Handwritten initials, possibly "of", written in cursive script.

SCHEDULE "A"

SALE PROCESS AND TIME LINE

1. Definitions. All capitalized terms used but not defined herein shall have the meaning ascribed to them in the order of the Ontario Superior Court of Justice [Commercial List] (the "Court") dated June 14, 2018 (the "Receivership Order") authorizing, *inter alia*, the Receiver to conduct the marketing and sale of all or part of the Property of TheRedPin, Inc. and TheRedPin.com Realty Inc. (collectively the "Company") in accordance with the terms hereof.
2. Contacting Interested Parties. Commencing on the week of June 18, 2018 the Receiver shall contact potential purchasers of the Property or business of the Company and advise such parties of the opportunity to acquire the Property or business (the "Opportunity").
3. Advertisement. During the week of June 18, 2018, or as soon thereafter as practical, the Receiver shall advertise the Opportunity one time in The Globe and Mail (National Edition).
4. Due Diligence. During the week June 18, the Receiver shall make available to prospective purchasers (collectively, the "Prospective Purchasers"), upon receipt of an executed confidentiality agreement from a Prospective Purchaser, (a) a confidential information memorandum describing the Property and Opportunity in sufficient detail as is reasonably required by Prospective Purchasers to consider submitting an offer for the Property and facilitate the conduct of due diligence by Prospective Purchasers; and, (b) access to an electronic data room, prepared and maintained by the Receiver, containing documents and information pertaining to the Opportunity.
5. Offer Deadline. Any offers to purchase the Property must be submitted in writing to and received by the Proposal Trustee at 111 Richmond Street West, Suite 300, Toronto, ON, M5H 2G4, attention: Alan Shiner, by no later than 5:00pm (E.S.T.) on July 23, 2018 (the "Offer Deadline").
6. Qualifying Offers. The Receiver in consultation with FIREPOWER DEBT GP INC, AS AGENT and Trilogy Growth Fund LP the (the "Secured Creditors"), shall determine whether any offers are "Qualifying Offers". Qualifying Offers must, among other things, meet the following minimum criteria:
 - (a) the offer must be for a purchase price that the Receiver, in consultation with the Secured Creditors, would accept (subject to such further negotiation as may take place in accordance with this sales process);
 - (b) the offer must be accompanied by a deposit in the form of certified cheque payable to the Receiver in Trust which is equal to at least 10% of the aggregate purchase price payable under the offer;
 - (c) the offer must be open for acceptance until July 25, 2018
 - (d) the offer must not contain any contingency relating to due diligence or financing or any other material conditions precedent to the offeror's obligation to complete the

transaction other than court approval;

- (e) the offeror must provide written evidence satisfactory to the Receiver of its ability to consummate the transaction;
 - (f) the offer must be accompanied by a copy of the offer blacklined to the form of purchase and sale agreement to be provided to Prospective Purchasers by the Receiver; and
 - (g) the offer must be on such terms and conditions as are typical in the context of sales in the context of court appointed receiver (and as will be set out in the form of sale agreement to be provided by the Receiver), which terms shall include without limitation: (i) the sale of the Property on an “as is, where is” basis, without any representations, warranties or conditions made or granted in connection therewith; (ii) that the completion of the transaction is conditional on the granting of an approval and vesting Order by the Court; and, (iii) a closing by no later than August 16, 2018.
7. Negotiation of Qualifying Offers. The receiver may, in consultation with the Secured Creditors, enter into negotiations with the offerors in respect of one or more of the Qualifying Offers in an effort to ascertain the highest and best offer. Additionally, it is open to the Receiver, in consultation with the Secured Creditors, to elect not to accept any of the Qualifying Offers, whether before or after negotiation of the same. The Receiver reserves the right to accept a qualifying offer prior to the offer deadline
 8. Winning Offer. By no later than July 27, 2018, the Receiver shall, in consultation with the Secured Creditors, determine the highest and best offer with respect to the Property (the “**Winning Offer**”), at which point the Receiver shall enter into a definitive agreement in connection therewith (the “**Sale Agreement**”), subject to Court approval.
 9. Court Approval of the Winning Offer. On or before August 10, 2018, the Receiver shall make a motion to the Court for approval of the Sale Agreement and vesting order in respect of the same.
 10. Return of Deposits. All deposits received (except such deposit forming part of the Winning Offer) shall be held by the Receiver in Trust until the execution of the Sale Agreement and, thereafter, returned to the respective Prospective Purchasers thereafter. The deposit forming part of the winning Offer shall be dealt with in accordance with the Sale Agreement.

Modifications. The Receiver reserves the right to amend the sales process steps and time line.

SCHEDULE "B"
RECEIVER CERTIFICATE

CERTIFICATE NO. _____

AMOUNT \$ _____

1. **THIS IS TO CERTIFY** that MNP Ltd., the receiver (the "**Receiver**") of the assets, undertakings and properties of TheRedPin, Inc. and TheRedPin.com Realty Inc. (the "**Debtors**") acquired for, or used in relation to a business carried on by the Debtors, including all proceeds thereof (collectively, the "**Property**") appointed by Order of the Ontario Superior Court of Justice (Commercial List) (the "**Court**") dated the 14th day of June, 2018 (the "**Order**") made in an action having Court file number __-CL-_____, has received as such Receiver from the holder of this certificate (the "**Lender**") the principal sum of \$ _____, being part of the total principal sum of \$ _____ which the Receiver is authorized to borrow under and pursuant to the Order.

2. The principal sum evidenced by this certificate is payable on demand by the Lender with interest thereon calculated and compounded [daily][monthly not in advance on the _____ day of each month] after the date hereof at a notional rate per annum equal to the rate of _____ per cent above the prime commercial lending rate of Bank of _____ from time to time.

3. Such principal sum with interest thereon is, by the terms of the Order, together with the principal sums and interest thereon of all other certificates issued by the Receiver pursuant to the Order or to any further order of the Court, a charge upon the whole of the Property, in priority to the security interests of any other person, but subject to the priority of the charges set out in the Order and in the *Bankruptcy and Insolvency Act*, and the right of the Receiver to indemnify itself out of such Property in respect of its remuneration and expenses.

4. All sums payable in respect of principal and interest under this certificate are payable at the main office of the Lender at Toronto, Ontario.
5. Until all liability in respect of this certificate has been terminated, no certificates creating charges ranking or purporting to rank in priority to this certificate shall be issued by the Receiver to any person other than the holder of this certificate without the prior written consent of the holder of this certificate.
6. The charge securing this certificate shall operate so as to permit the Receiver to deal with the Property as authorized by the Order and as authorized by any further or other order of the Court.
7. The Receiver does not undertake, and it is not under any personal liability, to pay any sum in respect of which it may issue certificates under the terms of the Order.

DATED the ____ day of _____, 20__.

MNP Ltd., solely in its capacity
as Receiver of the Property, and not in its
personal capacity

Per: _____

Name:

Title:

This is **Exhibit "B"** referred to in the
Affidavit of Service of Jordan Goldblatt
sworn January 31, 2019

Molly Warwick

Commissioner for Taking Affidavits (or as may be)

MOLLY CATHERINE WARWICK,
a Commissioner, etc., Province of Ontario,
for Adam Goldblatt Bleber LLP,
Barristers and Solicitors.
Expires June 7, 2021.

Court File No. CV-18-59964400CL



**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE)
JUSTICE *Chiappetta*)
TUESDAY, THE 11TH
DAY OF SEPTEMBER, 2018

BETWEEN:

(Court Seal)

FIREPOWER DEBT GP INC., AS AGENT

Applicant

and

THEREDPIN, INC. and THEREDPIN.COM REALTY INC.

Respondents

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

ORDER

THIS MOTION, brought by thirty-eight real estate agents formerly providing services to TheRedPin.com Realty Inc. (“TRP Realty”), as set out at Schedule “A” to the Notice of Motion, in respect of an order appointing Dennise Paccione and Michael Sotoadeh as representative agents of all real estate agents who contracted with TRP Realty for the provision of realtor services prior to June 14, 2018 (collectively the “TRP Agents”), was heard this day at the Court House, 330 University Ave., Toronto, Ontario, M5G 1R7.

ON READING the affidavit of Dennise Paccione, sworn August 15, 2018, and the affidavits of Molly Warwick affirmed August 23, 2018 and September 5, 2018, and on hearing submissions of counsel for the moving parties, and, on being advised by counsel that the motion is proceeding unopposed,

1. THIS COURT ORDERS that service of the herein motion on the TRP Agents is validated.
2. THIS COURT ORDERS that Dennise Paccione and Michael Sotoadeh are hereby appointed as representatives of the TRP Agents (the "Representative TRP Agents") in respect of their entitlement to real estate commissions paid or to be paid to TRP Realty.
3. THIS COURT ORDERS that Adair Goldblatt Bieber LLP shall be appointed as counsel to the Representative TRP Agents ("Representative Counsel").
4. THIS COURT ORDERS that Representative Counsel may rely on and act on the instruction of the Representative TRP Agents in the course of their engagement without further communication from the TRP Agents, except as may otherwise be ordered by this Honourable Court.
5. THIS COURT ORDERS that the Representative TRP Agents, or Representative Counsel on their behalves, are authorized to take all steps and to perform all acts necessary or desirable to carry out the terms of this Order on behalf of the TRP Agents, including, without limitation, by:
 - (a) filing and preparing materials, including any appeal materials, and advancing submissions in respect of a motion determining competing entitlements to the Commissions, currently scheduled to be heard October 22, 2018 (the "Commissions Motion");

- (b) negotiating, as may be appropriate, any resolution to the Commissions Motion; and
- (c) bringing any motion as may be required to advance the interests of the TRP Agents, including (without limiting the generality of the foregoing), a motion directing that the fees, expenses and disbursements incurred by the TRP Agents in respect of the Commissions Motion form a charge against the assets of the Respondents (the "Charge Motion").

6. THIS COURT ORDERS that Representative Counsel shall be entitled to apply to this Court for advice and direction in the discharge or variation of its powers of duties set out under this Order.

7. THIS COURT ORDERS that the Representative TRP Agents shall have no personal liability or obligations as a result of the performance of their duties in carrying out the provisions of this Order, or any subsequent Order in this proceedings, save and except for liability arising out of gross negligence or willful misconduct.

8. THIS COURT ORDERS that no proceeding may be commenced against the Representative TRP Agents or Representative Counsel in respect of the performance of duties under this Order without leave of this Court, and on at least seven days' notice to the Representative TRP Agents or Representative Counsel.

9. THIS COURT ORDERS that a copy of this Order shall be forthwith delivered to all TRP Agents by way of e-mail, and, a copy of this Order shall forthwith be posted on the web-site of the Receiver, MNP Ltd.

10. THIS COURT ORDERS that any TRP Agent who does not wish to be bound by this Order shall notify Representative Counsel by email to jgoldblatt@agblp.com by no later than September 21, 2018, and thereafter, shall not be bound by this Order and shall be responsible for representing themselves, personally or through counsel, as an independent individual party to the extent they wish to appear in this proceeding.

11. THIS COURT ORDERS that this Order is without prejudice to the positions to be taken by any party in connection with the Charge Motion that may be brought by the Representative TRP Agents seeking payment of their legal fees, expenses and costs from the property, assets and undertakings of the Respondents and/or seeking a charge over the property, assets and undertakings of the Respondents to secure payment of their legal fees, expenses and costs in priority to the interests of the Respondents' secured creditors.

12. THIS COURT ORDERS that there shall be no Order as to costs, other than as may be determined in respect of the Charge Motion.



(Signature of Judge)

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FIREPOWER DEBT GP INC., AS AGENT
Applicant

-and- THEREDPIN, INC. et al.
Respondents

Court File No. CV-18-59964400CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

PROCEEDING COMMENCED AT
TORONTO

ORDER

ADAIR GOLDBLATT BIEBER LLP
95 Wellington Street West
Suite 1830, P.O. Box 14
Toronto ON M5J 2N7

Jordan Goldblatt (50755H)
Email: jgoldblatt@agblp.com
Tel: 416.920.9777
Fax: 647.689.2059

Lawyers for the Moving Parties

RCP-E 4C (May 1, 2016)

This is **Exhibit "C"** referred to in the
Affidavit of Service of Jordan Goldblatt
sworn January 31, 2019

Molly Warwick

Commissioner for Making Affidavits (or as may be)

**MOLLY CATHERINE WARWICK,
a Commissioner, etc., Province of Ontario,
for Adam Goldblatt Bisber LLP,
Barristers and Solicitors.
Expires June 7, 2021.**

Court File No. CV-18-599644-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

BETWEEN:

FIREPOWER DEBT GP INC., AS AGENT

Applicant

and

THEREDPIN, INC. and THE REDPIN.COM REALTY INC.

Respondents

**IN THE MATTER OF 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**

**NOTICE OF MOTION
(returnable October 22, 2018)**

MNP Ltd. (“MNP”) in its capacity as the Court-appointed receiver (the “Receiver”), of the undertaking, property and assets of TheRedPin, Inc. (“TRP”) and The Redpin.Com Realty Inc. (“TRP Realty” and, together with TRP, the “Debtors”), will make a motion to a judge presiding over the Commercial List on Monday, October 22, 2018 at 10:00 a.m., or as soon after that time as the motion can be heard, at 330 University Avenue, Toronto, Ontario.

PROPOSED METHOD OF HEARING: The motion is to be heard orally.

1. **THE MOTION IS FOR:** the Court’s advice and direction concerning whether any or all of the Third-party Commission (as defined below) collected and to be collected by the Receiver are held and are to be held in trust for the benefit of TRP Salespersons, the Outside Brokerages, the Assignees and/or the Cashback Buyers (as such terms are

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defined below) and such further and other relief as counsel may advise and this Honourable Court may permit.

1. **THE GROUNDS FOR THE MOTION ARE:**

- (a) pursuant to the Order of the Honourable Justice Hainey made June 14, 2018 (the “**Receivership Order**”), MNP was appointed as receiver, of the undertaking, property and assets of the Debtors (the “**Property**”);
- (b) the Receiver has filed with the Court its Second Report dated September 10, 2018 (the “**Second Report**”) outlining, among others things:
 - (i) the background to and circumstances surrounding the Debtors’ agreements and practices with regard to collection and distribution of commissions paid on purchase and sale transactions; and
 - (ii) the dispute between various creditors or creditor classes over commission amounts collected or to be collected by the Receiver;
- (c) as at the date of the Receivership Order, there were approximately \$6,650,000 in commissions receivables due to TRP Realty (the “**Commissions Receivables**”) which are not expected to be fully collected until 2023;
- (d) of the Commissions Receivables, approximately \$3,700,000 (the “**Third-party Commissions**”) are owed to:
 - (i) brokerages co-operating on sale transactions (the “**Outside Brokerages**”);
 - (ii) TRP Realty’s licensed/registered salespersons (the “**TRP Salespersons**”);
 - (iii) assignees of TRP Salespersons (the “**Assignees**”); or
 - (iv) buyers under TRP Realty’s “cashback” program (the “**Cashback Buyers**”).

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- (e) various TRP Salespersons have asserted that the Third-party Commissions are subject to a trust in their favour;
- (f) the Underwriters of Lloyds, who insure certain of the TRP Salespersons' Third-party Commissions, has also asserted that the Third-party Commissions are subject to a trust;
- (g) the Applicant, Firepower Debt GP, Inc. as Agent ("**Firepower**") and Trilogy Growth Fund LP ("**Trilogy**", and together with Firepower, the "**Secured Creditors**", and, together with the Outside Brokerages, the TRP Salespersons, the Assignees and the Cashback Buyers, the "**Competing Parties**") have asserted that, to the extent the Third-party Commissions are not subject to trust(s) in favour Outside Brokerages, TRP Salespersons, Assignees and/or Cashback Buyers, the Third-party Commissions subject to the Secured Parties' respective security interests;
- (h) the Receivership Order:
 - (i) empowers and authorizes the Receiver to take possession of and exercise control over the Property and any and all proceeds, receipts and disbursement arising out of or from the Property;
 - (ii) empowers and authorizes the Receiver to receive and collect all monies and accounts owing to the Debtors;
 - (iii) permits the Receiver to apply from time to time to this Court for advice and direction in the discharge of its powers and duties; and
 - (iv) directs and empowers the Receiver to report to the Court in respect of these proceedings at such times and intervals as the Receiver may deem appropriate.

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- (i) the Receiver requires advice and direction as to whether to treat any Third-party Commissions as trust funds not for the benefit of the Secured Creditors;
 - (j) the other grounds set out in the Second Report;
 - (k) section 249 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended;
 - (l) rules 1.04 and 37 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended; and
 - (m) such further and other grounds as counsel may advise and this Honourable Court may permit.
2. **THE FOLLOWING DOCUMENTARY EVIDENCE** will be used at the hearing of the motion:
- (a) the Second Report; and
 - (b) such further and other material as counsel may submit and this Honourable Court may permit.

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Date: September 10, 2018

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TO: ATTACHED SERVICE LIST

FIREPOWER DEBT GP INC., AS AGENT

and

THEREDPIN, INC. and THE REDPIN.COM REALTY INC.

Applicant

Respondents

Court File No. CV-18-599644-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceedings commenced at Toronto

NOTICE OF MOTION

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This is **Exhibit "D"** referred to in the
Affidavit of Service of Jordan Goldblatt
sworn January 31, 2019

Molly Warwick

Commissioner for Taking Affidavits (or as may be)

**MOLLY CATHERINE WARWICK,
a Commissioner, etc., Province of Ontario,
for Adair Goldblatt Bieber LLP,
Barristers and Solicitors.
Expires June 7, 2021.**

Court File No. CV-18-599644-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE**

**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**

BETWEEN:

FIREPOWER DEBT GP INC., AS AGENT

Applicant

- and -

THEREDPIN, INC. and THEREDPIN.COM REALTY INC.

Respondents

**SECOND REPORT TO THE COURT SUBMITTED BY MNP LTD.,
IN ITS CAPACITY AS COURT-APPOINTED RECEIVER OF
THEREDPIN, INC. AND THEREDPIN.COM REALTY INC.**

September 10, 2018

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Court File No. CV-18-599644-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE**

**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**

BETWEEN:

FIREPOWER DEBT GP INC., AS AGENT

Applicant

- and -

THEREDPIN, INC. and THEREDPIN.COM REALTY INC.

Respondents

**SECOND REPORT TO THE COURT SUBMITTED BY MNP LTD.,
IN ITS CAPACITY AS COURT-APPOINTED RECEIVER OF
THEREDPIN, INC. AND THEREDPIN.COM REALTY INC.**

September 10, 2018

I INTRODUCTION

1. On June 14, 2018 (the **"Date of Appointment"**), MNP Ltd. was appointed as receiver (the **"Receiver"**) without security, of all assets, undertakings and properties of TheRedPin, Inc. (**"TRP Inc."**) and Theredpin.Com Realty Inc. (**"TRP Realty"**) and together with the TRP Inc., collectively hereinafter referred to as the **"Debtors"**) acquired for or used in relation of a business carried on by the Debtors, including all proceeds thereof (the **"Property"**) pursuant to an Order, dated June 14, 2018 (the **"Appointment Order"**) issued by the Ontario Superior Court of Justice (Commercial List) (the **"Court"**). A copy of Appointment Order is attached hereto as **Appendix "A"**.

2. At a 9:30 AM hearing held on July 26, 2018, the Court Ordered the scheduling of the (i) Representation Order Motion (as such term is later defined) to be heard on September 11, 2018, and (ii) the Advice and Direction Motion (as such term is later defined) to be heard on October 22, 2018. In connection with the Advice and Direction Motion, a case timetable was agreed to by the parties and is attached hereto as **Appendix "B"**.
3. On August 15, 2018, Adair Goldblatt Bieber LLP ("**AGB**") served material in connection with its Motion (returnable September 11, 2018) for an Order, *inter alia*, to appoint representative agents on behalf of all of the TRP Salespersons (as such term is later defined) and to appoint AGB as counsel to the representative agents (the "**Representation Order Motion**").
4. On August 23, 2018, the Receiver filed its first report to the Court (the "**First Report**"), wherein it sought an Order, *inter alia*, approving and authorizing a sale of certain of the Debtors' Property. (the "**Purchased Assets**"). On September 4, 2018, the Receiver filed with the Court its Supplementary Report to the First Report, dated August 31, 2018 for the purpose of informing the Court that the Purchaser had advised the Receiver that title to the Purchased Assets is being taken in the name of 2653047 Ontario Inc.
5. On September 4, 2018, the Court ordered, *inter alia*, the approval to the Receiver's activities and the contemplated sale of the Purchased Assets. A copy of the September 4, 2018 Court Orders and the endorsement of Madam Justice Chiappetta are attached as **Appendix "C"**.

II PURPOSE OF THIS REPORT

6. The purpose of this Report is to provide the Court with information in support of the Receiver's Motion for advice and direction (the "**Advice and Direction Motion**") concerning whether any or all of the Third-party Commissions (as such term is later defined) collected and to be collected by

the Receiver are held and to be held in trust for benefit of the TRP Salespersons, the Outside Brokerages, the Assignees and/or the Cashback Buyers (as all such terms are later defined).

III TERMS OF REFERENCE

7. In preparing this Report, the Receiver has relied on information (the “**Information**”) regarding the Debtors and the Property:

(a) included in the Application/Motion Record(s) and other materials filed with the Court in connection with these proceedings. In particular, information included in:

(i) the affidavit of Jared Kalish sworn June 13, 2018, which was Tab 2 to the Application Record, dated June 13, 2018, filed with this Court in support of the application for the Appointment Order;

(ii) the affidavit of Dennise Paccione sworn August 15, 2018 (the “**Paccione Affidavit**”), which was Tab 2 to the Motion Record, dated August 15, 2018, filed with this Court in support of the Representation Order Motion;

(b) information provided by the Debtors’ directors and management, the Applicant and their respective legal counsel;

(c) TRP Realty’s available books and records (“**Books & Records**”); and

(d) as otherwise made available or provided to the Receiver and its counsel.

8. Except as described in this Report, the Receiver has not audited, reviewed or otherwise attempted to verify the accuracy or completeness of the Information in a manner that would wholly or partially comply with Generally Accepted Assurance Standards of the Chartered Professional Accountants of Canada Handbook.

9. All references contained herein to a buyer(s) also include a tenant(s) and all references contained herein to a seller(s) also include a landlord(s), unless otherwise specified. Accordingly, and in the context of TRP Realty's operations, all references contained herein to an agreement(s) of purchase and sale also include a lease agreement(s), unless otherwise specified.
10. All references contained herein to a real estate salesperson(s) also include a broker(s) as such terms are defined in the Ontario *Real Estate and Business Brokers Act, 2002* and associated regulations (collectively, "**REBBA 2002**"), unless otherwise specified.
11. All currency references contained herein are in Canadian Dollars, unless otherwise specified. All capitalized terms not otherwise defined herein shall have the meanings as defined in the Appointment Order, unless otherwise specified.
12. Subject to further information being filed with the Court by the Competing Parties, as well as additional information being received and/or identified by the Receiver leading up to this Motion being heard on October 22, 2018, the Receiver intends to file with this Court one or more supplemental reports, as appropriate.
13. Certain of the documents provided in this Report have been redacted by the Receiver in order address potential personal privacy issues.

IV BACKGROUND

General

14. In Ontario, REBBA 2002 is the provincial legislation that establishes the rules by which all real estate salespersons, brokers and brokerages must follow. The Real Estate Council of Ontario ("**RECO**") is the body that is responsible for the administration of REBBA 2002 and regulates that activity of trading real estate in the province of Ontario. Further, all brokerages, brokers and real

estate salespersons working in Ontario must be registered with RECO and meet all of the requirements for registration under the REBBA 2002.

15. With respect to the roles of the real estate brokerage, broker and salesperson:
- (a) It is the real estate brokerage that is the party that is authorized to trade in real estate on behalf of buyers or sellers;
 - (b) every brokerage must designate a broker as its broker of record to ensure that the brokerage complies with REBBA 2002; and
 - (c) it is generally the brokers and salespersons, who are employed by the brokerage, that perform the listing and selling activities that generate the trades.
16. As noted on the First Report, TRP Realty is a wholly owned subsidiary of TRP Inc., providing real estate brokerage services utilizing TRP Inc.'s technology platform. TRP Realty is an Ontario real estate brokerage registered with and regulated by RECO pursuant to REBBA 2002. TRP Realty's revenues are primarily derived from real estate commissions generated from the activities of its licensed/registered salespersons or "agents" (the "TRP Salespersons" or individually, the "TRP Salesperson") earned on the closing of leasing, purchasing and sale transactions of principally residential properties.
17. Generally speaking, TRP Realty acted either for a buyer(s), where it was the co-operating brokerage, or for a seller(s), where it was the listing brokerage. To give some context to the relevancy or impact of this distinction on the matters at issue in this Advice and Direction Motion, of the approximately 730 pending transactions to be settled by the Receiver, only 28 trades related to transactions where TRP Realty was the listing brokerage. In addition, where TRP Realty was the listing brokerage, it received deposits from the buyers pursuant to their respective

agreements of purchase and sale, which were deposited into the Real Estate Trust Account (as such term is later defined).

18. At the Date of Appointment, there were sixty-three (63) active TRP Salespersons and forty-three (43) former TRP Salespersons who still had pending commissions.
19. Following the execution of either a Buyer Rep Agreement or Listing Agreement (as such terms are later defined), an agency relationship is created between the buyer or seller, respectively, and the brokerage, TRP Realty, and not with the TRP Salesperson(s). Accordingly, all commissions on trades earned are paid to and collected by the brokerage, TRP Realty, and not the individual TRP Salesperson(s).

Real Estate Transaction Documents

20. As TRP Realty was a real estate brokerage operating in Ontario and regulated by RECO pursuant to REBBA 2002, many of the documents used by TRP Realty were the forms developed by Ontario Real Estate Association (“OREA”) and are the standard, particularly within the resale market.
21. However, in connection with pre-construction (new, still to be built) condominium transactions where the buyer transacts directly with the builder/developer, the transaction documents (i.e. the agreement of purchase and sale and co-operating brokerage/referral agreement) are specific to the builder/developer and the project/development.
22. To give context to the implications and relevancy of the distinction between resale and pre-construction transactions, the Receiver estimates that approximately 21% or approximately \$1.42 million of the Commissions Receivables (as such term is later defined) owing to TRP Realty at the Date of Appointment relate to resales, including leases, and where the OREA forms would be applicable. The balance of 79% or approximately \$5.23 million of the Commissions Receivables

owing to TRP Realty at the Date of Appointment are estimated to relate to pre-construction/new development transactions (where the OREA forms would not be applicable – notwithstanding there may be exceptions). In these types of transactions, TRP Realty receives a commission or referral fee as based on the co-operating brokerage/referral agreement with the builder/developer.

23. Some of the key OREA documents used in TRP Realty's day-to-day brokerage operations when representing buyers and sellers are as follows:

- (a) Working with a REALTOR – OREA Form 810 – Outlines the relationships between the real estate brokerage (listing or co-operating), the salesperson and the customer (buyer or seller);
- (b) Listing Agreement – OREA Form 200 (the “**Listing Agreement**”) – Is the contract between the seller and the listing brokerage that outlines the terms of the listing, including the rate of commission to be paid to the listing brokerage and the co-operating brokerage, as well as gives permission to the listing brokerage to act on the seller's behalf. A copy of a blank Listing Agreement is attached hereto as **Appendix “D”**;
- (c) MLS Data Information Form (the “**MLS Info Form**”) – Is the input form used to capture all relevant data on the listing if it is to be posted on the Multiple Listing Service (“**MLS**”) in order to increase the property's exposure. Included in the information captured by this form, which is then posted on the MLS listing is the rate of commission to be paid to the listing brokerage and the co-operating brokerage. A copy of a blank Listing Agreement is attached hereto as **Appendix “E”**);

- (d) Buyer Representation Agreement - OREA Form 300 (the "**Buyer Rep Agreement**") - Is the contract between the buyer and the real estate brokerage that outlines the terms of the relationship, including the rate of commission to be paid to the brokerage, as well as gives permission to the brokerage to act on the buyer's behalf. A copy of a blank Buyer Rep Agreement is attached hereto as **Appendix "F"**;
- (e) Agreement of Purchase and Sale – OREA Form 100¹ (the "**Residential APS**") - Is the contract between the buyer and the seller in connection with a real estate transaction for a residential property. Although the document is focused on the details of the transaction between the buyer and seller, it does however have a section marked "FOR OFFICE USE ONLY COMMISSION TRUST AGREEMENT", wherein the listing brokerage agrees to a trust arrangement with the co-operating brokerage in connection with the commission to paid. In the context of this Advice and Direction Motion, the relevancy of this commission trust section appears to be only applicable where TRP Realty is the listing brokerage, as it establishes a trust obligation on the part of the listing brokerage (for the benefit of the co-operating brokerage). A copy of a blank Residential APS is attached hereto as **Appendix "G"**; and
- (f) Confirmation of Co-operation and Representation – OREA Form 320 (the "**Co-operation Agreement**") – Is the document that identifies all the parties and their respective relationships in the real estate transaction and also stipulates the commission arrangements as between the listing brokerage and the co-operating brokerage. Almost mirroring the "Commission Trust Agreement" section in the

¹ In connection with a residential leasing transaction the agreement is the Agreement to Lease – OREA Form 400

Residential APS, the Co-operation Agreement includes a similar section but again, this section appears to be only relevant to the issue at hand where TRP Realty was/is the listing brokerage, since it only establishes a trust obligation on the part of the listing brokerage (for the benefit of the co-operating brokerage). A copy of a blank Co-operation Agreement is attached hereto as **Appendix "H"**.

Other Trade/Commission Related Documents

24. In the various OREA forms, the MLS Rules and Regulations (the "**MLS Rules**") are referenced. In particular, Article 13 of the MLS Rules covers commission trusts. Attached hereto as **Appendix "I"** is an excerpt from the MLS Rules with respect to commission trusts.

25. Based on the Receiver's review of the Books & Records, including TRP Realty's real estate back office software ("**brokerWOLF**") and the documents it prepared, issued and executed in connection with the trades completed by TRP Realty, the Receiver has identified the following additional documents relevant to determining the respective Competing Parties' claims:
 - (a) Trade Record sheet produced from brokerWOLF (the "**Trade Record**") – Pursuant to Section 17(1) of the Ontario Regulations 579/05 of the REBBA 2002 ("**O. Reg. 579/05**"), a trade record sheet is required to be produced by the brokerage for each trade. Section 17(1) of O. Reg. 579/05 sets out the minimum information requirements to be contained on the trade record sheet, including but not limited the nature of the trade, the property, the parties to the transaction (i.e. buyer, seller, their respective legal counsel, TRP Salesperson(s), and the Outside Brokerage(s), details of the transaction (e.g. selling price, the commissions, deposits, status of conditions, etc.), as well as the receipt and disposition of deposit funds received by the brokerage. Pursuant to Section 17(3) of O. Reg 579/05, the salesperson is to sign

the trade record sheet once all conditions of the agreement of purchase and sale are satisfied. Pursuant to Section 17(5) of O. Reg 579/05, the brokerage's broker of record is to sign the trade record if it is satisfied that all information contained therein is accurate. Notwithstanding the above, the Receiver was advised by the Deal Administrator (defined later) that the Trade Record was typically signed by the TRP Salesperson(s) and the TRP Realty's Broker of Record just prior to the commission being paid to the TRP Salesperson(s); usually once the trade was completed/closed and TRP Realty was in funds.

The Trade Record is the form of trade record sheet used by TRP Realty. A sample copy of the Trade Record issued by TRP Realty is attached hereto as **Appendix "J"**. Based on the Receiver's review of brokerWOLF's on-line support manual and other documentation/promotional material² created by brokerWolf, the preset report called the "Transaction Record Sheet" is one and the same as the Trade Record. A copy of brokerWOLF's "Transaction Record Sheet" is attached hereto as **Appendix "K"**.

Although there is no prescribed form for the trade record sheet set-out in O. Reg 579/05 as noted by RECO³, OREA has produced a standardized trade record form (OREA Form 640) that brokerages may choose to use. TRP Realty did not use this form of trade record sheet. A copy of the Trade Record Sheet – OREA Form 640 is attached hereto as **Appendix "L"**.

² See brokerWOLF – Sample Reports – CANADA (modified:17/04/20), p. 23 (<http://get.lwolf.com/rs/803-SUI-561/images/brokerWOLFSampleReportsCAMARKED.pdf>)

³ RECO's Inspections Kit July 2016 - A Guide to Brokerage Inspections, p. 8

As noted by Jordan Goldblatt (“Goldblatt”) of AGB in the June 22nd AGB Letter (as such term is later defined), the Trade Record includes the following language: “It is understood between all parties that this agreement shall constitute a Commission Trust Agreement as set out in the contract.” Based on the Receiver’s review of brokerWolf’s sample “Transaction Record Sheet” report (see Appendix “K”), it would appear to the Receiver that this phrase is standard to this preset report. As such, it is unclear to the Receiver what specific contract this statement is supposed to be referring to. The Receiver has in an attempt to try and clarify this and other issues, emailed Vincenzo (Enzo) Ceniti, TRP Realty’s broker of record just prior to the Date of Appointment (the “**Broker of Record**”), but has not yet received a response. Additionally, in order to further try and clarify this issue, the Receiver has contacted Lone Wolf Technologies Inc., the maker of brokerWOLF, but has not yet received a response.

Based on the Receiver’s review of brokerWOLF⁴, the reference to “Rbc-Commission Trust Activity” on the Trade Record, as also noted by Goldblatt, appears to be reflective of the “Short Name” entered by TRP Realty in brokerWOLF associated with the bank account in use at such time. The reference on the Trade Records now indicates “Rbc – Commission Activity”;

⁴ In brokerWOLF’s Bank Account Information [E.1.4] set-up screen, to set-up a bank account, users must select an Account Type from one of only three available types (General, Trust or Commission Trust). The users must then enter a Short Name, Name, Address and G/L Account associated with the bank account. Additionally, the Short Name is a user defined field, and is the reference name that appears on various documents produced using brokerWOLF.

- (b) The Electronic Funds Transfer (“EFT”) remittance advices – Similar to the situation with the Trade Record, the “Rbc-Commission Trust Activity” references on the EFT remittance advices, as also noted by Goldblatt, as well appears to be reflective of the “Short Name” entered in brokerWOLF based on the Receiver’s review of brokerWOLF as noted in above. A sample copy of an EFT remittance advices issued by TRP Realty is attached hereto as **Appendix “M”**; and
- (c) Sales Representative Independent Contractor’s Agreement, without Schedule “A” - Confidentiality and Intellectual Property Assignment Agreement (the “**Contractor’s Agreement**”) – Is the contract between TRP Realty and the TRP Salesperson, which among other things, details the TRP Salesperson’s commission split with TRP Realty, but does not include any trust provisions. A sample copy of the February 2018 version of the Contractor’s Agreement is attached hereto as **Appendix “N”**.

The Bank Accounts

26. Section 27(1) of REEBA 2002, states:

Every brokerage shall,

- (a) *maintain in Ontario an account designated as a trust account, in,*
- (i) *a bank, or an authorized foreign bank, within the meaning of section 2 of the Bank Act (Canada),*
- (ii) *a corporation registered under the Loan and Trust Corporations Act, or*
- (iii) *a credit union within the meaning of the Credit Unions and Caisses Populaires Act, 1994;*
- (b) *deposit into the account all money that comes into the brokerage’s hands in trust for other persons in connection with the brokerage’s business;*
- (c) *at all times keep the money separate and apart from money belonging to the brokerage; and*

(d) *disburse the money only in accordance with the terms of the trust.*

27. In connection with its brokerage activities, TRP Realty maintained three (3) bank accounts:

- (a) The real estate trust account – a designated trust account, as required to be set-up pursuant to Section 27(1) of REEBA 2002, where TRP Realty acted as the listing brokerage and where deposits provided by buyers pursuant to agreements of purchase and sale were deposited (the “**Real Estate Trust Account**”). The Real Estate Trust Account was set-up by TRP Realty and held at The Toronto- Dominion Bank (“**TD Bank**”);
- (b) The commissions account – the separate bank account in which all commissions due to TRP Realty were received and then paid out (the “**Commissions Account**”) to the co-operating brokerages (the “**Outside Brokerages**” or individually, the “**Outside Brokerage**”), if applicable, the TRP Salespersons and TRP Realty itself (collectively, the “**Total Commissions**”). The Commission Account was set-up by TRP Realty and held at Royal Bank of Canada (“**RBC**”). This RBC bank account was opened on or about January 19, 2018, with activity starting February 2018 and was the only commission bank account of TRP Realty known to be active at the Date of Appointment.

Keith McSpurren, the CEO of the Debtors from June 2017 to June 2018, has advised the Receiver that the Commissions Account was not a trust account, nor did he open any trust accounts. In addition, the Receiver has reached out to the Broker of Record on the circumstance surrounding the accounts set-up for commissions and other issues but has not yet received a response.

In order to try and clarify this issue, the Receiver has contacted RBC but has not yet received a response.

The Receiver notes that, notwithstanding the reference on the EFT remittances advices, the pre-printed blank cheques for the Commission Account at RBC contain the notation "COMMISSION TRUST" on it. A sample copy of the blank RBC cheque for the Commission Account is attached hereto as **Appendix "O"**.

Prior to this, TRP Realty maintained from March 2014 until March 8, 2018 a "Business Account" at Comerica Bank of Canada ("**Comerica Bank**"), which included "COMMISSION TRUST" in the mailing address line of the statement. Attached to this Report as **Appendix "P"** is a copy of the February 28, 2018 to March 28, 2018 Comerica Bank statement.

The Receiver notes that on the pre-printed blank cheques for the commission account at Comerica Bank also contain the notation "COMMISSION TRUST" on it. A sample copy of the blank Comerica Bank cheque for the commission account is attached hereto as **Appendix "Q"**.

Apart from the notation on the mailing address line of the bank statement and the pre-printed cheques, based on the Receiver's review of the Books & Records, it has not yet found any evidence that TRP Realty designated this account as a trust account or not. In order to try and clarify this issue, the Receiver has contacted Comerica Bank but has not yet received a response.

The Receiver's review of Books & Records revealed that prior to Comerica Bank, TRP Realty maintained an account at TD Bank (up until August 28, 2014), which included

“TRUST ACCT” in the mailing address line of the statement. Attached to this Report as **Appendix “R”** is a copy of the August 29, 2014 to December 31, 2014 TD Bank statement. This bank account appears to have been inactive/closed since August 29, 2014. Apart from the “TRUST ACCT” notation, the Receiver has not yet found any evidence that TRP Realty designated this account as a trust account or not. In order to try and clarify this issue, the Receiver has contacted TD Bank. TD Bank has advised that it can’t validate if the account was designated as a trust or not; despite requests to have the documentation pulled, TD Bank has advised that the information isn’t catalogued on its system and could not be located.

Although Section 27(1) of REEBA 2002 (as noted earlier in this Report) requires that “all money that comes into the brokerage’s hands in trust for other persons in connection with the brokerage’s business” be deposited in a trust account, the Receiver has confirmed with RECO that there is no requirement for a brokerage to maintain a designated trust account for commissions. Notwithstanding, in one of RECO’s resource materials for brokerages, it states that an:

“account that most brokerages maintain is a commission trust account, which is used to process commission payments owing to registrants of the brokerage and to co-operating brokerages.”⁵

- (c) The general operating account – the account from which TRP Realty’s operating expenses (e.g. payroll, service providers, Canada Revenue Agency (“**CRA**”))

⁵ RECO’s Inspections Kit July 2016 - A Guide to Brokerage Inspections, p. 9

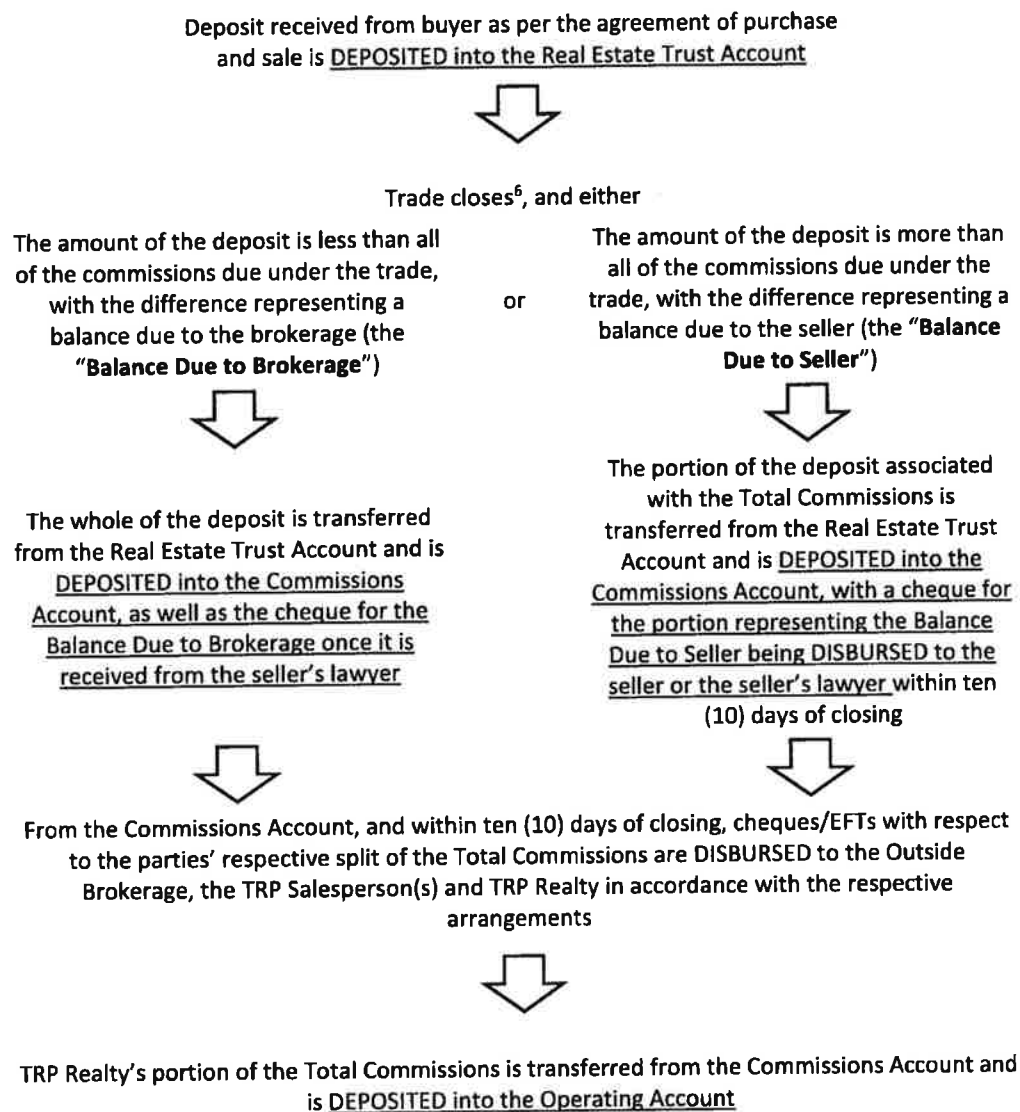
remittances, etc.) were paid from (the “**Operating Account**”), including the Cashback Rebates (as such term is later defined). The Operating Account was set-up by TRP Realty and held at RBC. Prior to then, TRP Realty had its general operating account at Comerica Bank as well.

28. A reconciliation of the Real Estate Trust Account prepared by the BrightIron Consulting Corp. (the “**Bookkeepers**”), TRP Realty’s external bookkeepers, and reviewed by RECO’s inspector indicated that no shortage existed.
29. A reconciliation of the Commissions Account prepared by the Bookkeepers indicated that a small deficiency of approximately \$3,200 existed as at the Date of Appointment. The deficiency appears to relate to potential overpayments to certain TRP Salespersons and bank charges incurred on the Commissions Account. As per the Bookkeepers, deficiencies in the commission account were addressed through a transfer of funds from the general operating account.

Commission Collection Flow

30. From the Receiver’s discussions with Raenae Paton (the “**Deal Administrator**”), TRP Realty’s former deal administrator, the basic flow (the receipts and distribution) of monies in and out of the aforementioned bank accounts in connection with the settlement of trades and the payment of commissions generally follows one of the following two (2) paths:

(a) Where TRP Realty was the listing brokerage and acted for the seller



⁶ If the trade does not close the deposit is returned to the party who provided the deposit, usually the prospective buyer(s), once a Mutual Release is executed by all parties – buyer, seller, listing brokerage and co-operating brokerage.

- (b) Where TRP Realty was the co-operating brokerage and acted for the buyer⁷

The trade closes and a cheque payable to TRP Realty is received from the listing broker or builder and is DEPOSITED into the Commissions Account and represents the commissions due on the trade to the TRP Salesperson(s) and TRP Realty (collectively, the “**Co-operating TRP Brokerage Commissions**”)



From the Commissions Account, and within ten (10) days of closing, cheques/EFTs with respect to the parties’ respective split of the Co-operating TRP Brokerage Commissions are **DISBURSED** to the TRP Salesperson(s) and TRP Realty in accordance with the respective arrangements



TRP Realty’s portion of the Co-operating TRP Brokerage Commissions is transferred from the Commissions Account and is DEPOSITED into the Operating Account

31. As mentioned earlier in this Report, approximately 96% of the number of outstanding trades to be settled by the Receiver are where TRP Realty is the co-operating brokerage (approximately 4% where TRP Realty is the listing brokerage).

The Commissions Collected or To Be Collected

32. As at the Date of Appointment and based on the information provided to the Receiver by TRP Realty and extracted from its computer systems, the Receiver understands that there were commissions receivable due to the brokerage totaling approximately \$6.65 million (the “**Commissions Receivables**”); the Commissions Receivables are not expected to be fully collected until sometime in 2023 due to a portion of the trades being associated with pre-construction condominium transactions.

⁷ Includes pre-construction condominium transactions, however in such transactions the builder/developer/vendor will pay TRP Realty, the co-operating brokerage its commission in two (2) or more installments based on certain milestones, with the final payment on closing of the transaction.

33. Based on a spreadsheet maintained by TRP Realty with respect the Commissions Receivables, the Receiver's comments and analysis of such spreadsheet are as follows:

Projected Year of Collection	Projected Total Commissions to be Collected	Projected Portion of Commissions due to the Outside Brokerages, TRP Salespersons, Assignees and Cashback Buyers	Projected Portion of Commissions due to TRP Realty
2018	\$ 3,004,495	\$ 1,760,637	\$ 1,243,858
2019	1,825,283	794,519	1,030,764
2020	938,554	573,617	364,937
2021	438,584	271,484	167,100
2022	361,721	253,846	107,874
2023	84,478	52,841	31,637
Total	\$ 6,653,115	\$ 3,706,944	\$ 2,946,170

NOTES TO ABOVE CHART: This chart is based on information prepared by TRP Realty's Deal Administrator. The above collection figures assume that all known transactions close. In addition, the above timing for the collections was based on the anticipated closing date of resale transactions, but with respect to pre-construction condominium transactions such timing was based on her best estimate for the closing date and payout of the final instalment. Accordingly, the actual timing and amount of the collections could be different, and such difference could be material. The above figures are exclusive of Harmonized Sales Tax ("HST").

- (a) It was projected that 72.6% of the Commissions Receivables would be collected by December 31, 2019;
- (b) A total of approximately \$3.7 million of the Commissions Receivables relates to commissions owing by TRP Realty to the Outside Brokerages, the TRP Salespersons, the Assignees and Cashback Buyers (the "Third-party Commissions"); and
- (c) The Commissions Receivables relates to more than 730 properties and more than 940 transactions or trades, due to there being multiple commission instalments on pre-construction condominium properties.
34. As of August 21, 2018, the Receiver had collected a total of approximately \$907,600 (inclusive of HST) of the Commissions Receivables, which was in addition to the \$131,210.95, inclusive of HST,

that was in the Commissions Account held at RBC. All of the aforementioned monies have been deposited in a separate bank account held by the Receiver (separate from the receivership operating account and the monies relating to the deposits held in trust).

The Competing Parties⁸

35. In connection with the Total Commissions collected and to be collected, the following parties have been identified by the Receiver as having claims to same:
- (a) The secured creditors – the Applicant, acting as agent for FirePower Asset Management Inc.⁹ and FirePower GAP Debt LP (collectively the “**Lenders**”) and Trilogy Growth Fund LP (“**Trilogy**”) hold perfected general security agreements (“**GSAs**”) covering all of TRP Realty’s assets, property and undertakings, including its interest in the Commissions Receivables (collected and to be collected);
 - (b) The Outside Brokerage – The obligation to the Outside Brokerage by TRP Realty exists only where TRP Realty is the listing brokerage. In such cases the split of the Total Commissions between TRP Realty, as the listing brokerage, and the Outside Brokerage is set-out in the Listing Agreement and, if the property is listed on the MLS system, on the MLS Info Form and on the Co-operation Agreement, if the property not listed on the MLS system;
 - (c) The TRP Salespersons – The TRP Salespersons commissions are internally set between TRP Realty and the TRP Salespersons pursuant to the Contractor’s Agreement and are reflected as a percentage of the Total Commissions after the payment of the Outside

⁸ Excludes other potential priority payable parties (e.g. CRA) or parties with subrogated claims (e.g. Underwriters of Lloyds – ClaimsPro LP), as detailed in the First Report

⁹ As of June 15, 2018, FirePower Asset transferred its interest in the Loan Agreement to FirePower GAP Debt II LP.

Brokerage's commissions (the "**Net Commissions**") or where the trade was subject to a "Cashback" program, as a percentage of the Net Commissions after deducting the Cashback Rebate (as such term is later defined);

- (d) TRP Realty – Regardless of whether the TRP Realty acted as the listing brokerage when acting for a seller or as the co-operating brokerage when acting for a buyer, all commissions on trades earned are paid to and collected by the brokerage, as noted earlier in this Report, and are set-out in the Listing Agreement (if applicable), Buyer Rep Agreement and the Co-operation Agreement. As the real estate brokerage under which all real estate transactions or trades are conducted, the commissions earned are split between the Outside Brokerage, the TRP Salespersons and TRP Realty itself, as discussed above. As noted above, TRP Realty's interest is subject to the security interest of Trilogy and the Lenders pursuant their respective GSAs;
- (e) AccessEasyFunds Limited ("**AccessEasy**") and 1834176 Ontario Inc. o/a Agent's Equity ("**Agent's Equity**" and together with AccessEasy collectively, the "**Assignees**") – Certain of the TRP Salespersons sought advances on their commissions and have entered into Commission Advance Agreements (as such term is later defined) with the Assignees. The total amount owing to the Assignees in connection these Commission Advance Agreements total approximately \$32,000 (assuming all related trades close); and
- (f) Buyers under TRP Realty's "Cashback" programs (the "**Cashback Buyers**") – As an incentive on certain real estate transactions, buyers who bought through TRP Realty were entitled to receive cash rebates (generally between 10% and 25%) of the Net Commissions earned on the real estate transaction (the "**Cashback Rebate**") on the

closing of the transaction and TRP Realty's receipt of the commissions. In the ordinary course where a Cashback Rebate is due, once the Net Commission is received and deposited into the Commissions Account, the amount of the associated Cashback Rebate is transferred to the Operating Account. It is from the Operating Account that a cheque is then issued to the Cashback Buyer. Based on the information made available to the Receiver by TRP Realty, the total Cashback Rebates outstanding amount to approximately \$443,000 (assuming all related trades close).

36. The Lenders, Trilogy, the TRP Salespersons, the Outside Brokerages, the Assignees and the Cashback Buyers are hereinafter collectively referred to as, the "**Competing Parties**".
37. The quantum and split of the commissions earned on real estate transactions varied according to the type of the transaction and when the trade was initiated. For example, for the majority of the transactions¹⁰:
 - (a) In a purchase or listing transaction, the total commission on the real estate transaction was typically between 4.25% and 5.0% of the gross sale price of the property for sale. In such cases the Outside Brokerage's commissions are typically around 2.5% of the gross sale price of the property, with the balance of between 1.75% and 2.5% being split between TRP Realty and the TRP Salesperson(s). Historically, there was a broad range of splits depending on the particular TRP Salesperson, the nature of the transaction and when the transaction was initiated. More recently in February 2018, TRP Realty implemented a new and simplified

¹⁰ Excluding transactions where the buyer or seller are related to the TRP Salesperson. In such cases, the split between TRP Realty and the TRP Salesperson(s) ranged anywhere from a flat amount for TRP Realty (\$150 to \$500) with the balance to the TRP Salesperson(s).

commissions structure with its TRP Salespersons; in the case of purchase and listing transactions (excluding certain situations), the split was 30/70 (30% for TRP Realty, 70% for the TRP Salesperson(s)); and

- (b) In a leasing transaction the total commission on the real estate transaction was typically one month's lease payment. In such cases the Outside Brokerage's commissions are typically one half of one month's lease payment. For the last several years the split on leasing transactions was 20/80 (20% for TRP Realty, 80% for the TRP Salesperson(s)) with a minimum fee for TRP Realty of \$250.

38. As noted in the Paccione Affidavit, AGB has been retained by a number of the TRP Salespersons to represent them in connection with the TRP Salespersons' trust claim for a portion of the Third-party Commissions, as outlined above.

39. As noted in the First Report, Chaitons (as such term is defined in the First Report) is legal counsel for the Lenders and Faskens (as such term is defined in the First Report) is legal counsel to Trilogy.

V THE ISSUE

40. The Receiver is not aware of any concerns with respect to whether the Competing Parties, as outlined earlier in this Report, have a legitimate claim against TRP Realty. Rather the key issues is:

whether any or all of the Third-party Commissions collected and to be collected by the Receiver are held and to be held in trust for benefit of the TRP Salespersons, the Outside Brokerages, the Assignees and/or the Cashback Buyers.

VI THE PARTIES' POSITIONS TAKEN AND/OR CONSIDERATIONS TO BE TAKEN INTO ACCOUNT

The TRP Salespersons

41. In AGB's letter to the Receiver dated June 15, 2018 (the "**June 15th AGB Letter**"), Goldblatt asserted that it his clients' position that the commissions received by TRP Realty are "impressed with a trust in favour of the Agents [the TRP Salespersons]" and referred to the Court's decision in *Eu v. Rosedale Realty Corp (Trustee of)* in support of this position. The Receiver leaves it the Competing Parties to argue the merits and/or the distinguishing factors of the aforementioned case with respect to the issue to be addressed in this motion. A copy of the June 15th AGB Letter is attached hereto as **Appendix "S"**.
42. In the June 15th AGB Letter, Goldblatt further asserts that the "commissions were paid to a commission trust account, and then paid out to the Agents [the TRP Salespersons].".
43. On June 22, 2018, Goldblatt wrote to the Receiver's independent legal counsel (the "**June 22nd AGB Letter**"), Harry Fogul of Aird & Berlis LLP ("**A&B**"), wherein he enclosed two (2) types of documents: sample executed Trade Records, as well as sample EFT remittance advices; all relating to trades initiated in 2017 or prior. A copy of the June 22nd AGB Letter, together with the enclosures, is attached hereto as **Appendix "T"**. In the June 22nd AGB Letter, Goldblatt writes:

"Second, I enclose, by way of example only, trade records reflecting commissions paid to my clients. As you can see, each statement evidences that the funds were being paid pursuant to a "Commission Trust Agreement". Further, electronic transfer fund statements also evidence these amounts being paid from what I understand to be a segregated "RBC Commission Trust Account" account, and these words are literally used on the ETFs. While I understand the Receiver is unlikely to weigh in on the trust/commissions issue, if the Receiver's review of TRP Realty's books and records suggests my clients were somehow uniquely treated, I trust you will let me know."

44. As referenced in the June 22nd AGB Letter, the Trade Record (attached hereto this Report as Appendix "J") includes the following language:

"It is understood between the parties that this agreement shall constitute a Commission Trust Agreement as set-out in the contract."

45. The Contractor's Agreements between the TRP Salespersons and TRP Realty sets out, among other things, the TRP Salespersons remuneration, the commissions structure and split under various transaction categories, but it does not contain any trust provisions or language.

The Assignees

46. Notwithstanding the TRP Salespersons' potential trust claim and the possible implications of such a determination for the Assignees, each of the Assignees have their own respective Commission Advance Agreements, which include trust provisions. The trust provision language in each of the respective Commission Advance Agreements differ as follows:

- (a) With respect to the Commission Purchase Agreement (the "**AccessEasy Agreement**") of AccessEasy (a sample of which is attached to this Report as **Appendix "U"**) there is a trust provision which states:

"The Broker hereby acknowledges the Sales Representative's entitlement to the Sales Commission and acknowledges receipt of the foregoing irrevocable authorization and direction and hereby undertakes to pay the Payment Obligations to AccessEasy out of the Sales Commission immediately following receipt of the commission and finalization of the related commission reconciliations and agrees that after the Closing Date all amounts it may hold on account of the Sales Commission will be held in trust for the benefit of AccessEasy until disbursed by it to AccessEasy in accordance with this Agreement."

- (b) Similarly, with respect to the Commission Sale Agreement (the “**Agent’s Equity Agreement**” and together with the AccessEasy Agreement, collectively referred to as “**Commission Advance Agreements**”) of Agent’s Equity (a sample of which is attached to this Report as **Appendix “V”**) there is a trust provision which states:

“...the Commission Purchased will be held by the Broker in trust pending immediate payment to “Agent’s Equity, that there are no disputes, claims, setoff, counterclaims, judgments or garnishees against the Commission Purchased, or any other matter which the Sellers are aware of which would affect the payment of the Commission Purchased to Agent’s Equity.”

and

“Upon acceptance of this agreement, and receipt of the Net Advance, notwithstanding that the Purchaser and/or Vendor of the “Property” may change, the Broker agrees to collect and hold in trust for Agent’s Equity, the Commission Purchased upon successful completion of the sale...”

47. Based on the Receiver’s review of each of the respective Commission Advance Agreements, that in addition to the TRP Salesperson, the Broker of Record or Associated Broker of Record appear to have executed the documents on behalf of TRP Realty.

The Outside Brokerages

48. Notwithstanding the TRP Salespersons’ potential trust claim and the possible implications of such a determination for the Outside Brokerages, the Outside Brokerages and TRP Realty execute the Co-operation Agreement, which among other things, which as noted earlier in this Report, is used to reassure the parties to the transaction that they will be treated fairly. In the Co-operation Agreement there is trust provision, which states:

“COMMISSION TRUST AGREEMENT: If the above Co-operating Brokerage is receiving payment of commission from the Listing Brokerage, then the agreement between Listing Brokerage and Co-operating Brokerage further includes a Commission Trust Agreement, the consideration for which is the Co-operating Brokerage procuring an offer for a trade of the property, acceptable to the Seller. This Commission Trust Agreement shall be subject to and governed by the MLS® rules and regulations pertaining to commission trusts of the Listing Brokerage’s local real estate board, if the local board’s MLS® rules and regulations so provide. Otherwise, the provisions of the OREA recommended MLS® rules and regulations shall apply to this Commission Trust Agreement. For the purpose of this Commission Trust Agreement, the Commission Trust Amount shall be the amount noted in Section 3 above. The Listing Brokerage hereby declares that all monies received in connection with the trade shall constitute a Commission Trust and shall be held, in trust, for the Co-operating Brokerage under the terms of the applicable MLS® rules and regulations.”

49. The Receiver notes that although the Co-operation Agreement has TRP Realty named as one the parties to the agreement (the other is the brokerage on the other side of the transaction), a review of executed copies of this document by the Receiver indicate that such document is frequently executed by the TRP Salesperson and not the Broker of Record or Associated Broker of Record. As noted earlier in this Report, the Receiver has reached out to the Broker of Record on a number of issues, including this one, but has not yet received a response.
50. In addition, and as noted earlier in this Report, where TRP Realty is the listing brokerage, the Residential APS includes a trust provision, which states:

“In consideration for the Co-operating Brokerage procuring the foregoing Agreement of Purchase and Sale, I hereby declare that all moneys received or receivable by me in connection with the Transaction as contemplated in the MLS® Rules and Regulations of my Real Estate Board shall be receivable and held in trust. This agreement shall constitute a Commission Trust Agreement as defined in the MLS® Rules and shall be subject to and governed by the MLS® Rules pertaining to Commission Trust.”

51. The Receiver notes that although the Residential APS appears to establish a trust obligation by TRP Realty, the Receiver's review of executed copies of this document indicate that such document is frequently executed by the TRP Salesperson and not the Broker of Record or Associated Broker of Record. As noted earlier in this Report, the Receiver has reached out to the Broker of Record on a number of issues, including this one, but has not yet received a response.

Cashback Buyers

52. Cashback Rebates were taken off the top of the Net Commissions and paid out to the Cashback Buyers from the general operating account. As a result, both the TRP Salespersons and TRP Realty effectively shared in the cost of the Cashback Rebate, based on their respective percentage split of the Net Commissions.
53. Based on the Receiver's review of the Books & Records and discussions with Cashback Buyers, the agreement between TRP Realty and the Cashback Buyer outlining the terms of the Cashback Rebate (the "**Cashback Agreement**") is limited to a one (1) page document that was emailed to the Cashback Buyer and required the Cashback Buyer to complete a short customer satisfaction survey and sign the document. A sample copy of the Cashback Agreement is attached to this Report as **Appendix "W"**.
54. Copies of the Cashback Agreement reviewed by the Receiver were executed by TRP Realty's broker of record.

The Lenders and Trilogy

55. As reported in the First Report, the Receiver has obtained an opinion from A&B, the Receiver's independent legal counsel, confirming the validity and enforceability of the GSAs held by the Lenders and Trilogy.

56. As reported in the First Report, the Receiver has been advised by its independent legal counsel that the Lenders and Trilogy each hold perfected GSAs covering all of the assets, property and undertakings of TRP Realty, including TRP Realty's interest in the Commissions Receivables.
57. The Lenders and Trilogy are asserting that unless the Third-party Commissions collected or to be collected were being held or are to be held in trust for other parties, including the TRP Salespersons, the Outside Brokerages, the Assignees and the Cashback Buyers, such funds are subject to the security interest of the Lenders and Trilogy.

VII ALLOCATION OF THE COSTS OF THE RECEIVERSHIP AND DISTRIBUTIONS

58. If all or certain of the Competing Parties are determined to be entitled to receive a portion of the Third-party Commissions collected by the Receiver, the Receiver believes that such parties should bear a portion of the Receiver's professional fees in connection with the set-up and collection of the Commissions Receivables, as well as the distribution of monies to them, as they would be the beneficiaries of such efforts.
59. As the collection of the Commissions Receivables is expected to run until sometime in 2023 and as it unreasonable for those parties entitled to such funds, if so determined, to wait until the conclusion of these receivership proceedings for the proportional application of the total actual costs incurred, the Receiver proposes that the Receiver's cost should be applied on a standard cost and transactional or on a per trade basis.
60. Prior to the Advice and Direction Motion being heard on October 22, 2018, the Receiver intends to file a supplemental report outlining its proposed standard cost allocation methodology and rate structure to be approved by the Court.

61. Additionally, once a determination is made on the Advice and Direction Motion, the Receiver anticipates being in a position to make distributions. Accordingly, as part of the aforementioned supplemental report the Receiver intends to file with the Court, the Receiver will also outline its proposed distribution methodology to be approved by the Court and seek its authorization to make distributions according to same.

VIII RELIEF REQUESTED BY THE RECEIVER

62. Based on the foregoing, the Receiver seeks the advice and directions of the Court with respect to whether any or all of the Third-party Commissions collected and to be collected by the Receiver are held and to be held in trust for benefit of the TRP Salespersons, the Outside Brokerages, the Assignees and/or the Cashback Buyers.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of September, 2018

MNP LTD.,
in its capacity as Court-appointed Receiver of
TheRedPin, Inc. and TheRedPin.com Realty Inc.
and not in its personal or corporate capacities
Per:



Matthew Lem, CIRP
Licensed Insolvency Trustee

This is **Exhibit "E"** referred to in the
Affidavit of Service of Jordan Goldblatt
sworn January 31, 2019

Molly Warwick

Commissioner for Taking Affidavits (or as may be)

MOLLY CATHERINE WARWICK,
a Commissioner, etc., Province of Ontario,
for Adair Goldblatt Bieber LLP,
Barristers and Solicitors.
Expires June 7, 2021.

Court File No. CV-18-59964400CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

B E T W E E N:

FIREPOWER DEBT GP INC., AS AGENT

Applicant

and

THEREDPIN, INC. and THEREDPIN.COM REALTY INC.

Respondents

AFFIDAVIT

I, Tarik Gidamy, of the City of Toronto, in the Province of Ontario, MAKE OATH AND SAY:

1. I am one of the founders of the respondents, TheRedPin, Inc. and TheRedPin.com Realty Inc. (“TRP Realty”), and as such I have knowledge of the matters to which I hereinafter depose.

Background

2. I was one of the individuals who incorporated the respondents in order to create a real estate brokerage driven by technological advances. Our goal was to be able to operate in a more efficient matter through technology, and in turn to pass those savings on to our clients.

3. In 2010, the respondents were incorporated. Eventually, I became an shareholder, officer and director of both respondents. I continue to hold shares in both companies. I am no longer an officer or director of either company.

4. Until May 2017, I was also “Broker of Record” of TRP Realty, which was the operating company that provided real estate brokerage services.

5. It was my job to set up and run the business. I continued as Broker of Record until May, 2017.

Agents’ Independent Contractor Agreements

6. When TRP Realty began its operations, I was directly involved in hiring our agents.

7. I am familiar with the “Sales Representative Independent Contractor’s Agreement” appended as Exhibit “N” to the Receiver’s Second Report (the “Contractor’s Agreement”). While this exhibit in the Receiver’s report is dated February 1, 2018, it is similar to the other independent contractor agreements that TRP Realty would have entered into with TRP Agents when I was Broker of Record.

8. The Contractor’s Agreements provide that TRP Realty is entitled to a balance of commission on closing, after the agent is paid.

9. I always understood that the money paid to TRP Realty on the closing of a transaction in respect of a commission entitlement under the Contractor’s Agreements did not belong in its entirety to TRP Realty, even though such funds would have to be deposited into an account in the name of TRP Realty.

10. Rather, TRP Realty’s entitlement on closing in respect of a commission was only to the extent of its share as set out in the Contractor’s Agreement with a TRP Agent. The remainder of the commission would be paid to the TRP Agent.

The Bank Accounts

11. I set up the initial banking structure for TRP Realty. The banking structure was guided by statutory and regulatory requirements imposed on TRP Realty by regulators, and by the structure of the business. Initially, I set up three accounts, all with Toronto-Dominion Bank:

- (a) first, a real estate trust account (the "Real Estate Trust Account"). Under the *Real Estate and Business Brokers Act* (the "Act"), real estate brokerages are required to maintain a trust account where deposits provided by buyers are deposited. The Real Estate Trust Account served this purpose;
- (b) second, a commissions account (the "Commissions Account"). Briefly, the Commissions Account was where money that had to be paid for commissions, and belonged to other parties as per agreements, was deposited. I will describe this account in more detail in the next few paragraphs of this affidavit; and
- (c) third, an operating account (the "Operating Account"). The Operating Account was used to pay TRP Realty's day-to-day expenses and costs, including payroll and overhead. Money in the Operating Account belonged to TRP Realty.

12. My recollection is that all three accounts were set up at or around the same time.

13. When the three accounts were set up, I had signing authority on all three. I received bank statements and reconciliations from all three accounts on a regular basis.

14. Service fees in respect of all three accounts were only ever supposed to be paid from the Operating Account. I recall early after the bank accounts were set up that an error was made and service fees were deducted from the Real Estate Trust Account. We immediately had TD fix this error. Thereafter, at no point, to the best of my recollection, were any banking fees deducted from the Commissions Account or the Real Estate Trust Account. Similarly, neither the Commissions Account nor the Real Estate Trust Account bore interest.

15. Funds in the Commissions Account and the Real Estate Trust Account that TRP Realty was obliged to pay out to other parties did not belong to TRP Realty as per agreements and trade records. TRP Realty could only make use of money to its credit in the Commissions Account when it was transferred into the Operating Account.

16. Eventually, the Commissions Account was moved from TD Bank to Comerica Bank of Canada. Nevertheless, throughout my time at TRP Realty, the manner and purpose for which these accounts were set up did not change.

17. I am aware that at paragraph 27(b) of the Receiver's Second Report on this matter, an individual named Keith McSpurren, described as the "CEO of the Debtors from June 2017 to June 2018" comments on his view of the Commissions Account during his time as CEO, including the statement that "he [did not] open any trust accounts".

18. I note that Mr. McSpurren was never Broker of Record for any of the respondents, and thus, would have different duties and obligations to the TRP Agents than I did as Broker of Record.

The Flow of Funds

19. The Receiver's Second Report at paragraph 30 accurately sets out the flow of funds on transactions, other than when TRP Realty was a listing agent, and there was a balance to the seller, it would be paid directly from the Real Estate Trust Account.

20. Funds paid into the Commissions Account in respect of commissions were:

- (a) only deposited to the Commissions Account when a transaction closed, or transaction milestone, was achieved;
- (b) deposited to the Commissions Account to be disbursed to the credit of a specific agent or agents in respect of a specified transaction;
- (c) deposited to the Commissions Account with no expectation that TRP Realty could make use of those funds in the course of its business, unless and until paid from the Commissions Account to the Operating Account, as per its usual business practice; and
- (d) deposited to the Commissions Account in accordance with TRP Realty's obligations and the particular TRP Agent's entitlement as set out in the Contractor's Agreement.

21. The reason why the funds, including those owing to the TRP Agents, were paid to the Commissions Account (which was in TRP Realty's name) rather than directly to the agents is because every agent must be licensed and paid through their brokerage, in this case, TRP Realty.

TRP's Documents


22. I am aware that TRP Realty would deliver to each TRP Agent a trade record sheet on the "going firm" of a transaction. The trade record sheet would set out information in respect of the transaction, including the specific commission split between the various agents entitled to a commission through TRP Realty. The trade record sheet would specifically state that "it is understood between all parties that this agreement shall constitute a Commission Trust Agreement as set out in the contract".

23. I am aware that in the Receiver's Second Report, it is noted that the "Commission Trust Agreement" language excerpted above was part of standard or default language set out in our software broker WOLF. Whether this is true or not, I have no idea. What I do know is that the software was highly customizable.

24. In addition, I signed literally thousands of trade record sheets, and never questioned this phrase.


25. Lastly, when Electronic Funds Transfer payments or cheques were made to TRP Agents, they were reflected as being made from an account that was recorded as a trust account. This accorded with my view as to how the business was being run.

SWORN BEFORE ME at the City of
Toronto, in the Province of Ontario on
Sept 19, 2018



Commissioner for Taking Affidavits
(or as may be)

J. Giddick



TARIK GIDAMY

FIREPOWER DEBT GP INC., AS AGENT
Applicant

-and- **THEREDPIN, INC. et al.**
Respondents

Court File No. CV-18-59964400CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT
TORONTO

AFFIDAVIT of TARIK GIDAMY

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Lawyers for the TRP Agents

RCP-E 4C (May 1, 2016)

This is **Exhibit "F"** referred to in the
Affidavit of Service of Jordan Goldblatt
sworn January 31, 2019

Molly Warwick

Commissioner for Taking Affidavits (or as may be)

MOLLY CATHERINE WARWICK,
a Commissioner, etc., Province of Ontario,
for Adair Goldblatt Bieber LLP,
Barristers and Solicitors.
Expires June 7, 2021.

**ANSWERS TO UNDERTAKINGS
GIVEN AT THE CROSS-EXAMINATION OF JARED KALISH, HELD ON OCTOBER 11, 2018**

U/T No.	Page No.	Question No.	Undertaking	ANSWER
1	14-15	71	To advise whether or not FirePower had access to TRP Realty's bank account statements prior to the loan advance.	FirePower had been provided with copies of commission and operating account bank statements but not the statutory trust account bank statements
2	15	72	To advise whether after making the loan advance, FirePower had access to the bank account statements.	No further bank statements were provided once the loan was dispersed
3	15	75	Was FirePower aware that there were three bank accounts at the time the advance was made in 2017.	Yes
4	39	207	To advise whether FirePower disputes the fact that there was a trust over the cooperating broker amounts.	No dispute there is a trust over the cooperating broker amounts where there is a commission trust agreement between the listing broker and the cooperating broker
5	39	208	To advise whether FirePower agrees that the accounts receivable had, as a part of it, amounts impressed with a trust.	No accounts receivable is net of cooperating broker trust amounts

This is **Exhibit "G"** referred to in the
Affidavit of Service of Jordan Goldblatt
sworn January 31, 2019

Molly Warwick

Commissioner for Taking Affidavits (or as may be)

**MOLLY CATHERINE WARWICK,
a Commissioner, etc., Province of Ontario,
for Adair Goldblatt Bieber LLP,
Barristers and Solicitors.
Expires June 7, 2021.**

Court File No. CV-18-59964400CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

BETWEEN:

FIREPOWER DEBT GP INC., AS AGENT

Applicant

and

THEREDPIN, INC. and THEREDPIN.COM REALTY INC.

Respondents

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

**JOINT FACTUM OF THE TRP AGENTS
AND CERTAIN UNDERWRITERS OF LLOYD'S OF LONDON
(Motion for direction returnable October 22, 2018)**

October 15, 2018

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Lawyers for Underwriters of Lloyds

TO: **SERVICE LIST**

Court File No. CV-18-59964400CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

BETWEEN:

FIREPOWER DEBT GP INC., AS AGENT

Applicant

and

THEREDPIN, INC. and THEREDPIN.COM REALTY INC.

Respondents

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

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Court File No. CV-18-59964400CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

BETWEEN:

FIREPOWER DEBT GP INC., AS AGENT

Applicant

and

THEREDPIN, INC. and THEREDPIN.COM REALTY INC.

Respondents

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

**JOINT FACTUM OF THE TRP AGENTS
AND CERTAIN UNDERWRITERS OF LLOYD'S OF LONDON**

PART I - OVERVIEW

1. The issue on this motion is whether certain commissions paid to the respondent, TheRedPin.com Realty Inc. ("TRP Realty") are impressed with a trust in favour of its real estate agents (the "TRP Agents"), or for any other party.
2. While there is no doubt that TRP Realty received the commissions as the real estate brokerage through which the TRP Agents acted, the legal issue to be determined turns on its intention upon receipt of the commissions: did TRP Realty intend to make use of the commissions to its benefit, or was it merely holding the commissions for other parties?
3. The evidence clearly establishes that TRP Realty segregated the commission in a separate bank account, and made no use of these funds for its own operations. Further, while this segregated

all three banks reference the segregated account as a trust account, and the funds paid from it as trust funds. At all times, this segregated account bore no interest, and was debited no account fees.

4. Indeed, if TRP Realty's intention was *not* to set up a trust, none of the steps it took make any commercial, banking, or operational sense.

5. All the TRP Agents need do on this motion is satisfy the Court on a balance of probabilities that the commissions were impressed with a trust in their favour. They easily meet this test.

PART II - SUMMARY OF FACTS

Background: TRP Realty

6. TRP Realty is a real estate brokerage licensed by the Real Estate Council of Ontario ("RECO"). It is the wholly owned subsidiary of TheRedPin, Inc. ("TRP Inc.").

7. TRP Realty provides its services through licensed real estate agents. While TRP Realty at one time hired real estate agents as employees,¹ it is only those agents who were independent contractors whose entitlements are at issue on the motion (all of which, the "TRP Agents").

8. Even though clients would have their most direct relationship with a real estate agent, not the brokerage,² RECO requires that it is the brokerage, not the agent, who is paid commissions on real estate transactions.³

¹ Affidavit of Dennise Paccione, sworn September 19, 2018, at paras. 9-10, Responding Motion Record of Dennise Paccione and Michael Sotoadeh Representatives of the Former Agents of TheRedPin.com Realty Inc., dated October 22, 2018, at Tab 2 ["Paccione Affidavit"].

² Paccione Affidavit, at para. 8.

³ Affidavit of Tarik Gidamy, sworn September 19, 2018, at para. 21, Responding Motion Record of Dennise Paccione and Michael Sotoadeh Representatives of the Former Agents of TheRedPin.com Realty Inc., dated October 22, 2018, at Tab 1 ["Gidamy Affidavit"]. See also s. 4 of the *Real Estate and Business Brokers Act, 2002*, S.O. 2002, c. 30, Sched. C.

9. Each TRP Agent contracted with TRP Realty (the “TRP Agent Contract”), pursuant to which he or she had an entitlement to be paid commissions on real estate transactions in which the agent was involved. The TRP Agent Contract also provided that the TRP Agent would split a portion of his or her commission with TRP Realty.

Background: This Proceeding

10. On June 14, 2018, by Order of the Honourable Justice Hainey, MNP Ltd. (the “Receiver”) was appointed as receiver over the assets, undertakings and properties of TRP Inc. and TRP Realty.

11. At the time of the receivership order, TRP Realty was owed approximately \$6,650,000 in commissions, although the full amount will not be collected until 2023 (the “Commissions Receivables”).⁴

12. Of the Commissions Receivables, approximately \$3,700,000 (the “Third-Party Commissions”) is owed to:

- (a) brokerages that acted for buyers on transactions (the “Cooperating Brokerages”);
- (b) the TRP Agents;
- (c) assignees of the TRP Agents (the “Assignees”); and
- (d) buyers under TRP Realty’s “cashback” program (the “Cashback Buyers”).⁵

⁴ Second Report to the Court Submitted by MNP Ltd., in its Capacity as Court-Appointed Receiver of TheRedPin, Inc. and TheRedPin.com Realty Inc., dated September 10, 2018, at para. 31, Motion Record of MNP Ltd., dated September 10, 2018, at Tab 2 [“First Commissions Report”].

⁵ First Commissions Report, at para. 33.

13. The Receiver has brought this motion for advice and direction concerning whether any or all of the Third-Party Commissions collected and to be collected by the Receiver are held in trust for the benefit of the Cooperating Brokerages, TRP Agents, Assignees, and/or Cashback Buyers.

14. FirePower Asset Management Inc. and FirePower GAP Debt LP, and Trilogy Growth Fund LP (collectively, the “Secured Creditors”) assert that the Third-Party Commissions are not held in trust and are subject to General Security Agreements in their favour.

15. On September 11, 2018, by Order of the Honourable Justice Chiappetta, Dennise Paccione and Michael Sotoadeh were appointed as representatives of the TRP Agents.

The Commissions: TRP Realty’s Internal Structure

16. The Receiver has filed three reports on this motion: a report dated September 10, 2018 (the “First Commissions Report”), a supplementary report dated September 28, 2018 (the “Second Commissions Report”) and a second supplementary report dated October 12, 2018 (the “Third Commissions Report”, and collectively, the “Receiver’s Reports”).

17. The Receiver’s Reports evidence that TRP Realty structured its banking to segregate and protect the money it owed to third parties from the money to which it was entitled. As set out below, this banking structure is consistent with TRP Realty’s organizational structure.

18. Specifically, TRP Realty maintained three bank accounts:

- (a) a real estate trust account (the “Real Estate Trust Account”), which is where TRP Realty deposited buyer deposits, as required under section 27(1) of the *Real Estate and Business Brokers Act, 2002*, S.O. 2002, c. 30, Sched. C;

- (b) a commissions account (the “Commissions Account”), which is where all commissions earned on transactions were deposited and from which monies belonging to third parties, such as the Cooperating Brokerages and TRP Agents, were paid; and
- (c) an operating account (the “Operating Account”), into which TRP Realty deposited the commissions it earned on transactions (pursuant to the TRP Agent Contracts) and from which it paid its operating expenses, such as payroll and overhead.⁶

19. All three accounts were set up by Tarik Gidamy, who was involved in incorporating TRP Realty in 2010 and served as its broker of record from when it commenced operations until May 2017.⁷ Mr. Gidamy was responsible for setting up and running the business.⁸ Mr. Gidamy has sworn that he set up three accounts for TRP Realty as:

[f]unds in the Commission Account and the Real Estate Trust Account that TRP Realty was obliged to pay out to other parties did not belong to TRP Realty as per agreements and trade records. TRP Realty could only make use of money to its credit in the Commissions Account when transferred into the Operating Account.⁹

20. Mr. Gidamy’s evidence was that funds were:

- (a) only deposited to the Commissions Account when a transaction closed, or transaction milestone, achieved;
- (b) deposited to the Commissions Account to be disbursed to the credit of a specific TRP Agent or Agents in respect of a specified transaction;

⁶ Gidamy Affidavit, at para. 11.

⁷ Gidamy Affidavit, at para. 3-5.

⁸ Gidamy Affidavit, at para. 5.

⁹ Gidamy Affidavit, at para. 15.

- (c) deposited to the Commissions Account with no expectation that TRP Realty could make use of those funds in the course of its business, unless and until paid from the Commissions Account to the Operating Account, as per its usual business practice; and
- (d) deposited to the Commissions Account in accordance with TRP Realty's obligations and the particular TRP Agent's entitlement as set out in the TRP Agent Contract.¹⁰

21. Consistent with the intention to segregate money that did not belong to TRP Realty from the funds to which it was entitled, neither the Real Estate Trust Account nor the Commissions Account bore interest and service fees for these accounts were always paid from the Operating Account.¹¹

22. Ms. Paccione is a representative of the TRP Agents on this motion. Her evidence mirrors that of Mr. Gidamy in that it was always understood and agreed that the Commissions belonged to the TRP Agents, and did not belong to TRP Realty.¹²

23. Indeed, when Ms. Paccione was negotiating her February 1, 2017 contract, she became aware that TRP Realty was obtaining further funding from external parties. Kyle Murdock, the Vice President of Sales for TRP Realty, reassured Ms. Paccione that he had spoken with Mr. Gidamy and that the Commissions would be paid to the TRP Agents in priority to any money owing to investors or creditors.¹³

¹⁰ Gidamy Affidavit, at para. 20.

¹¹ Gidamy Affidavit, at para. 14.

¹² Paccione Affidavit, at paras. 7, 14, 19, and 28.

¹³ Paccione Affidavit, at para. 16 and Exhibit "C".

The Commissions: The Flow of Funds

24. Commission funds came into TRP Realty in one of two ways, depending on whether TRP Realty was the listing brokerage, acting for the seller in the transaction, or whether it was the cooperating brokerage, acting for the buyer.

(i) TRP as Listing Brokerage

25. When TRP Realty was the listing brokerage, it would receive a deposit from the buyer, which it would deposit into the Real Estate Trust Account. Once the transaction closed, the gross commissions would be transferred into the Commissions Account.¹⁴

26. As listing brokerage, TRP Realty would incur an obligation to remit commissions to the Cooperating (purchaser's) Brokerage. TRP Realty's obligation to pay commissions to the Cooperating Brokerage is more fully described below. From a flow of funds perspective, TRP Realty would transfer the gross commissions, including amounts owed to the Cooperating Brokerage, from the Real Estate Trust Account to the Commissions Account, and then make payment to the Cooperating Brokerage and the TRP Agent in accordance with their respective contractual entitlements.

(ii) TRP as Cooperating Brokerage

27. When TRP Realty was the cooperating brokerage, TRP Realty received funds from the listing brokerage on closing. The funds would be deposited directly into the Commissions Account. TRP Realty was the cooperating brokerage on 96% of the outstanding trades.¹⁵

¹⁴ Any shortfall in the deposit would be made up by the seller and deposited into the Commissions Account. If the deposit from the buyer was in excess of what was owed, the excess would be paid to the seller directly from the Real Estate Trust Account. See Gidamy Affidavit, at para. 14.

(iii) Payment from the Commissions Account to the TRP Agent

28. When TRP Realty was in a position to pay Commissions to a TRP Agent, the TRP Agent would receive his or her Commissions from the Commissions Account via cheque or electronic funds transfer (“EFT”).

The Commissions Account Was a Trust Account

29. While the issue of whether funds in the Commissions Account were impressed with a trust is the determination that this Court must make on this motion, evidence reflects that the word “trust” was found in a multitude of documents associated with the Commissions Account.

(i) The Cooperating Brokerages’ Commissions Were Trust Funds

30. The Ontario Real Estate Association (“OREA”) makes available standard form documents that it expects realtors will use in carrying out deals. The standard form documents specify that commission funds received by a listing brokerage are impressed with a trust in favour of a cooperating brokerage.

31. The OREA “Confirmation of Co-operation and Representation” agreement (the “Cooperation Agreement”) contains a “commission trust agreement”:

COMMISSION TRUST AGREEMENT: If the above Co-operating Brokerage is receiving payment of commission from the Listing Brokerage, then the agreement between Listing Brokerage and Co-operating Brokerage further includes a Commission Trust Agreement, the consideration for which is the Co-operating Brokerage procuring an offer for a trade of the property, acceptable to the Seller. This Commission Trust Agreement shall be subject to and governed by the MLS[®] rules and regulations pertaining to commission trusts of the Listing

¹⁵ First Commissions Report, at para. 31.

Brokerage's local real estate board, if the local board's MLS[®] rules and regulations so provide. Otherwise, the provisions of the OREA recommended MLS[®] rules and regulations shall apply to this Commission Trust Agreement. For the purpose of this Commission Trust Agreement, the Commission Trust Amount shall be the amount noted in Section 3 above. **The Listing Brokerage hereby declares that all monies received in connection with the trade shall constitute a Commission Trust and shall be held, in trust for the Co-Operating Brokerage under the terms of the applicable MLS[®] rules and regulations.**¹⁶ [Emphasis added.]

32. Consistent with the Cooperation Agreement, each OREA Agreement of Purchase and Sale ("APS") also contains a "commission trust agreement":

COMMISSION TRUST AGREEMENT

To: Co-operating Brokerage shown on the foregoing Agreement of Purchase and Sale

In consideration for the Co-operating Brokerage procuring the foregoing Agreement of Purchase and Sale, I **[the Listing Brokerage]** hereby declare that all moneys received or receivable by me in connection with the Transaction as contemplated in the MLS[®] Rules and Regulations of my Real Estate Board shall be receivable and held in trust. This agreement shall constitute a Commission Trust Agreement as defined in the MLS[®] Rules and shall be subject to and governed by the MLS[®] Rules pertaining to Commission Trust.¹⁷ [Emphasis added.]

33. Finally, Article 13 of the MLS[®] Rules and Regulations requires that the funds paid to a listing broker be impressed with a trust in favour of the cooperating broker:

All deposits and other monies received by or due to the Listing Brokerage directed to satisfy commission payable or damages or other compensation in lieu of commission, plus applicable HST on any of the foregoing, in connection with the Transaction shall be

¹⁶ First Commissions Report, at Appendix "H".

¹⁷ First Commissions Report, at Appendix "G". While the Receiver notes in the First Commissions Report that the OREA Cooperation Agreement and APS were often executed by the TRP Agent, and not by TRP Realty's broker of record, Article 13 the MLS[®] Rules and Regulations explicitly contemplated this scenario: "At the same time as an offer for a Transaction procured by a Co-operating Brokerage is accepted, the Listing Brokerage shall execute and deliver to the Co-operating Brokerage, a Commission Trust Agreement for the Transaction. For the purposes of this section 13.02, Listing Brokerage...shall include a Broker or Salesperson Registrant representing the Listing Brokerage...as the case may be" (emphasis added). See First Commissions Report, at Appendix "I", s. 13.02.

receivable by and held by the Listing Brokerage in trust and constitute a Commission Trust. The beneficiaries of the Commission Trust shall be the Cooperating Brokerage to the extent of the Commission Trust Amount, and the Listing Brokerage as to the balance after payment of the Commission Trust Amount.¹⁸ [Emphasis added.]

34. Article 13 further requires that the commissions paid to the cooperating brokerage be paid from the listing brokerage's commission trust account:

Following the completion of the Transaction no funds shall be transferred or paid from the Listing Brokerage's Commission Trust Account to or for the benefit of the Listing Brokerage or any third party until the Commission Trust Amount has been disbursed to the Co-operating Brokerage. All such disbursements shall be made directly from the Listing Brokerage's Commission Trust Account. Where the Listing Brokerage has more than one trust account, funds impressed with the Commission Trust may be transferred from one trust account maintained by the Listing Brokerage to the Commission Trust Account maintained by the Listing Brokerage, and such funds shall at all times, notwithstanding any such transfer, continue to be impressed with the Commission Trust.¹⁹ [Emphasis added.]

35. In other words, there ought to be no dispute that there was an express trust over the Cooperating Brokerage's commissions in the TRP Realty Commissions Account.

(ii) The TRP Agents' Commissions Were Trust Funds

36. Just as the OREA Cooperation Agreement, APS, and Article 13 of the MLS[®] Rules and Regulations require TRP Realty to hold commissions in trust for Cooperating Brokerages in the Commissions Account, so too do TRP Agents' documents also reference the existence of a trust.

¹⁸ First Commissions Report, at Appendix "I", s. 13.01.

¹⁹ First Commissions Report, at Appendix "I", s. 13.03.

37. While the word “trust” does not appear in the TRP Agent Contract, the TRP Agent Contract fixed TRP Realty with an obligation to pay commissions. When this obligation is juxtaposed against the contemporaneous documents that were delivered to TRP Agents in the course of real estate transactions, it is apparent that the intention of the contracting parties was to create a trust relationship.

38. First, when an agreement of purchase and sale had “gone firm” (i.e. when the buyer and seller had waived all conditions), TRP Realty provided the TRP Agent with a trade record sheet (the “Trade Sheet”), setting out information in respect of the transaction and the specific commission split between TRP Realty and the TRP Agent.²⁰ The Trade Sheet specifically stated that “it is understood between all parties that **this agreement shall constitute a Commission Trust Agreement** as set out in the contract” (emphasis added).²¹

39. While the actual phrase “commission trust agreement” is utilized in the Cooperating Brokerage documents, set out above, on cross-examination, Ms. Paccione testified that in her view, it meant that the funds “are the same...treated the same”,²² and that the “contract” referred to on the Trade Sheet and pursuant to which there was a trust was the TRP Agent Contract.²³

40. The Trade Sheets were signed both by TRP Realty’s broker of record and the TRP Agent to whom the Commissions were owed. The Trade Sheets required the broker of record and the TRP Agent to certify that “to the best of my knowledge the above information is correct”. These documents were signed thousands of times: literally thousands of times TRP Realty and a TRP Agent represented to each other that commissions were impressed with a trust. While this phrase

²⁰ Paccione Affidavit, at para. 27(a).

²¹ Paccione Affidavit, at Exhibit “F”; First Commissions Report, at Appendix “J”.

²² Cross-Examination of Dennise Paccione, held October 4, 2018, at pg. 30, Q. 141, Joint Supplementary Record, Tab 2 [“Paccione Cross-Examination”].

²³ Paccione Cross-Examination, at pg. 31, Q. 146.

may have been generated by TRP Realty's software, Mr. Gidamy "never questioned this phrase" being included in the Trade Sheet.²⁴

41. Second, almost all third party banking documents in respect of the Commissions Account *explicitly referenced the existence of a trust*. Specifically:

- (a) until August 2014, the Commissions Account was held at TD Bank. Statements from this account stated "TRUST ACCT" in the mailing line of the statement;²⁵
- (b) from March 2014 to March 2018, the Commissions Account was at Comerica Bank (which, it should be noted, was a lender). Bank statements from Comerica during this time period stated "COMMISSION TRUST" in the mailing line;²⁶
- (c) from March 2014 to March 2018, cheques drawn on the Commissions Account, used to pay commissions to TRP Agents contained the notation "COMMISSION TRUST" on them;²⁷
- (d) from January 2018, the Commissions Account was held at RBC. Cheques drawn on this account, and used to pay agents, contained the notation "COMMISSION TRUST";²⁸
- (e) when TRP Realty paid commissions to TRP Agents through EFTs, it did so through an "RBC-Commission Trust" account.²⁹ While this notation was changed sometime in 2018 to read only "RBC-COMMISSION", this change was not

²⁴ Gidamy Affidavit, at para. 24.

²⁵ First Commissions Report, at para. 27(b) and Exhibit "R".

²⁶ First Commissions Report, at para. 27(b) at Exhibit "P".

²⁷ First Commissions Report, at Exhibit "Q".

²⁸ First Commissions Report, at Exhibit "O".

²⁹ Paccione Affidavit, at para. 27(b) and Exhibit "G".

discussed with the TRP Agents and there is no evidence that it reflected a substantive change in the treatment of the Commissions.³⁰

42. It would be quite a coincidence if three banks (Comerica, RBC, and TD) all created accounts that were designated as trust accounts if there was not actually a trust.

43. Third, while there is no statutory requirement for the creation of a commissions trust account, source materials for brokerages prepared by RECO refer to the creation of a separate commissions account for the purposes of paying “registrants of the brokerage and to cooperating brokerages” and refer to it as a “commission trust account”.³¹

44. Fourth, TRP Realty’s insurer, 3303128 Canada Inc. trading as Alternative Risk Services, has given evidence that it encourages the use of commission trusts and commission trust accounts by real estate brokerages for the purposes of risk management. That is, such use allows the agents to assert trust claims against other funds outside of the policy, and also allows the insurer to advance subrogated claims against trust funds.³²

45. The insurer’s coverage policy includes definitions of “commission trust” and “commission trust account” that are consistent with the manner in which TRP Realty used the Commissions Account and treated the funds in it:

“Commission Trust” means a constituted trust where all deposits and other monies received by or due to a Brokerage directed to satisfy Commission payable or damages or other compensation in lieu of Commission, plus applicable taxes, on any trade in real estate are received and held by the Brokerage in trust. **Where the deposit is received by a listing Brokerage, the beneficiaries of the**

³⁰ Paccione Affidavit, at para. 27(b); First Commissions Report, at Appendix “M”.

³¹ First Commissions Report, para. 27(b).

³² Affidavit of William Ryan Durrell, sworn October 3, 2018, at paras. 7-8, Joint Supplementary Record, at Tab 1 [“Durrell Affidavit”].

Commission Trust shall be the cooperating Brokerage and any listing Salesperson or listing Broker to the extent of any agreed Commission amount, and the listing Brokerage as to the balance after payment of such agreed Commission. Where the funds are received and held by the cooperating Brokerage, the beneficiaries of the Commission Trust shall be the cooperating Salesperson or cooperating Broker to the extent of any agreed Commission amount and the cooperating Brokerage as to the balance after payment of such agreed Commission...

“Commission Trust Account” means a trust account maintained at a Canadian chartered bank or a trust company and designated as a “Commission Trust Account”. The Commission Trust Account shall be used only for the receipt and disbursement of Commission Trust funds, and kept separate and apart from the statutory trust account that a Brokerage is required to maintain for customer and/or client funds.³³

46. Accordingly, TRP Realty set up its banking operations in a manner that mirrored what both RECO and its insurer expressed would constitute a trust account.

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

47. The sole issue on this motion is whether any or all of the Third-Party Commissions collected or to be collected by TRP Realty are held in trust for the benefit of the Cooperating Brokerages, TRP Agents, Assignees, and/or Cashback Buyers.

48. The TRP Agents submit that the Commissions are impressed with a trust in their favour.

A Trust Was Intended

49. The definition of a trust “generally regarded as being one of the best” is set out in Professor Donovan Waters’ text on trusts:

³³ Durrell Affidavit, at Exhibit “A”.

A trust is the relationship which arises whenever a person (called the trustee) is compelled in equity to hold property, whether real or personal, and whether by legal or equitable title, for the benefit of some persons (of whom he may be one, and who are termed beneficiaries) or for some object permitted by law, in such a way that the real benefit of the property accrues not to the trustees, but to the beneficiaries or other objects of the trust.³⁴

50. A valid trust exists where there are three certainties: certainty of intent, certainty of subject-matter, and certainty of object.³⁵

51. Certainty of subject-matter requires certainty regarding what comprises the property of the trust, while certainty of object requires certainty regarding who the beneficiary or beneficiaries are.³⁶

52. In the present case, certainty of subject-matter and certainty of object are not at issue: it is clear that the Commissions form the property of the trust and that the beneficiaries in question are the TRP Agents.

53. Rather, the present case turns on certainty of intent.

54. Certainty of intent requires that it be clear that the donor or settlor intended to create a trust – that they intended for the property in question to be held for the benefit of another.³⁷ As stated in *Oosterhoff on Trusts*, certainty of intent is established where a court determines that “the person [or entity] possessed of the property is obliged to hold it for another’s benefit.”³⁸

³⁴ Donovan W.M. Waters, Mark R. Gillen, & Lionel D. Smith, *Waters’ Law of Trusts in Canada*, 3rd ed. (Toronto: Thomson Carswell, 2005), at pg. 3 [“*Waters*”].

³⁵ *Waters*, at pg. 19. In the present case, the TRP Agents submit that the issue before the Court is whether an express or implied trust exists over the Commissions.

³⁶ *Waters*, at pg. 132.

³⁷ *Waters*, at pg. 132; A.H. Oosterhoff, Robert Chambers & Mitchell McInnes, *Oosterhoff on Trusts: Text, Commentary and Materials*, 8th ed. (Toronto: Carswell, 2014), at §4.3.1 [“*Oosterhoff*”]; *Eu v. Rosedale Realty Corp. (Trustee of)*, 1997 CarswellOnt 2519, at para. 24 (Ont. C.J. [Gen Div.]) [“*Rosedale*”].

³⁸ *Oosterhoff*, at §4.3.1.

55. No formal document evidencing the creation of a trust is required.³⁹ Nor is it necessary that the settlor use any specific language, such as the word “trust”. Intention may be express or implied and may be determined from words or acts.⁴⁰

Jurisprudence Confirms the Existence of a Trust

56. Professor Waters’ text sets out that “the one element that predominates in the common law idea of a trust is segregated property.”⁴¹

57. In *Eu v. Rosedale Realty Corp. (Trustee of)*, which case is analogous to that at bar, the segregation of real estate agents’ commissions in a separate account supported the Court’s determination that the funds were in trust. In *Rosedale*, the agents’ claims to commissions were initially disallowed by the trustee. The agents appealed. The Honourable Justice Cameron granted the appeal, first holding that the determination of the existence of a trust was a fact-specific exercise:

The existence of a trust does not depend on the existence of the contract but on the intent of the settlor which must be determined from the surrounding circumstances. The use of the word “trust” or placing the money in a “trust account” is neither conclusive nor indispensable to determine the settlor’s intent.⁴²

58. Justice Cameron found a trust, relying largely on Rosedale Realty Corporation’s use of a segregated account for commissions.

³⁹ *Waters*, at pgs. 132-33; *Oosterhoff*, at §4.3.1.

⁴⁰ *Waters*, at pgs. 133-34 and fn. 8; *Oosterhoff*, at §4.3.1.

⁴¹ *Waters*, at pg. 3.

⁴² *Rosedale*, at para. 25. See also *Midland Pacific Properties Corp. (Trustee of), Re*, 1999 CarswellBC 1868, at para. 42 (B.C.S.C. [In Chambers]) [“*Midland*”].

59. The flow of funds in *Rosedale* is analogous to the case at bar: when Rosedale was the listing broker, it received a deposit from a purchaser, which it held in a statutory trust account. When the deal closed, the money was transferred from the statutory trust account into a “commission trust account”. The agent and cooperating brokerage were paid directly from the commission trust account. Rosedale’s split of the commissions was then transferred to a general bank account.

60. Justice Cameron reasoned that the use of a commission trust account from which the agents were paid indicated that Rosedale intended to hold the commissions in trust:

It made no business sense to place commissions into the commission trust account if they were not intended to be held in trust. It would be simpler, cheaper and quicker to pay it directly from the statutory trust account...to Rosedale’s general account...Such a complex arrangement and similarity of treatment indicates that Rosedale intended that all commissions, and not just those specifically agreed, be held in trust and that Rosedale considered itself entitled to spend for its corporate purposes only money which reached its general account.⁴³

61. Applying the analysis in *Rosedale* to the case at bar, if TRP Realty did not intend a trust, it would be simpler, cheaper and quicker for it to simply transfer the money directly from the Real Estate Trust Account into its Operating Account and pay out the Commissions to the TRP Agents from there.

62. Cases outside Ontario have reached the same result, even with inferior evidence: in *Midland Pacific Properties Corp. (Trustee of), Re*, the real estate company in question, Midland Pacific Properties Corporation, used only two accounts: a statutory trust account and a general account. The agent’s commissions were deposited into and paid out from the general account.

⁴³ *Rosedale*, para. 28.

63. The Trustee in Bankruptcy disallowed the salespeople's claims for their commissions. It submitted that the lack of a commission trust account was a "fatal flaw" to their trust claim.⁴⁴

64. The British Columbia Supreme Court disagreed. It held that while Midland held legal title to the commissions, beneficial ownership rested at all times with the salespeople:

The appellants [the salespeople] served the clients. Midland was not only aware that the commissions from transactions belonged to the appellants, they agreed to this arrangement. Midland could not use the appellants' commissions as it saw fit, and the Trustee, who can be in no better position than Midland, is bound by the parties' intention.

... I disagree with the Trustee's counsel's position that [the absence of a commission trust account] is a fatal flaw to the position of the appellants. Whether the commissions went through a commission trust account or not is not determinative of the issue of whether a trust can be implied. It is not the setting up of the account which creates the trust – it is simply a vehicle for dealing with trust property.⁴⁵

65. The reasoning in *Midland* is persuasive: it cannot be that the Secured Creditors can acquire greater rights in the Commissions than TRP Realty. An appropriate analytical tool is to consider whether TRP Realty intended the money in the Commissions Account to belong to it (such that it could make use of that money as it saw fit), or whether it was holding that money for the benefit of others.

66. TRP Realty was clearly holding money in the Commissions Account for the benefit of others. The evidence of Mr. Gidamy, who set up the banking structure, is that TRP Realty would not even deduct account fees against the Commissions Account, let alone make use of it for its own business purposes. It is entirely antithetical to TRP Realty having operated for years in this manner

⁴⁴ *Midland*, at para. 38.

⁴⁵ *Midland*, at paras. 44-45.

for the Secured Creditors to now assert that TRP Realty was in fact wrong, and it could have made use of the money as it saw fit.

The Secured Creditors Did Not Understand TRP Realty's Business

67. The Secured Creditors argue that there is no trust. Effectively, their argument is that because TRP Realty pledged their accounts receivable as security, that property was owned by TRP Realty.

68. Respectfully, such an argument is circular: TRP Realty could not pledge assets it held in trust for others, and it was for the Secured Creditors in their due diligence to determine which assets were owned by TRP Realty, and which they only held as trustee.

69. In this regard, the evidence of Jared Kalish, the representative of FirePower Debt GP Inc. ("Firepower"), must be carefully scrutinized. A fair reading of Mr. Kalish's evidence reveals that all Firepower considered in advancing funds to TRP Realty was the quantum of accounts receivable, and it otherwise had little understanding of TRP Realty's business. No diligence was done in respect of understanding the content of the accounts receivable.

70. Specifically, Mr. Kalish:

- (a) acknowledged he had no background in real estate;⁴⁶
- (b) did not know that commissions were paid to TRP Realty because of regulatory obligations, but rather believed it to be because "TRP was essentially doing lead generation";⁴⁷

⁴⁶ Cross-Examination of Jared Kalish, held October 11, 2018, at pg. 6, Q. 15, Joint Supplementary Record at Tab 5 ["Kalish Cross-Examination"].

- (c) disputed that TRP Realty received commissions from TRP Agents pursuant to a contractual commission split. He maintained this position even after being taken to the TRP Agent Contract;⁴⁸
- (d) maintained that TRP Realty was entitled to gross commissions, in the normal course of operations:

Q: And...if TRP was operating properly, its revenue at the end of the day was the net commissions, not the gross commissions?

A: That is false.

Q: That is false?

A: Yes.

Q: You thought TRP Realty had entitlement to the gross commissions?

A: They do.⁴⁹

- (e) deemed it not relevant that TRP Realty did not make use of the commissions until paid into its Operating Account;⁵⁰
- (f) did not know whether Firepower had seen TRP Realty's bank statements at the time the advance had been made,⁵¹ and did not believe they would have received such statements afterwards;⁵²

⁴⁷ Kalish Cross-Examination, at pgs. 22-23, Q. 113-117.

⁴⁸ Kalish Cross-Examination, at pgs. 8-9, Q. 31-32; pg. 10, Q. 38-39.

⁴⁹ Kalish Cross-Examination, at pg. 23, Q. 118-120.

⁵⁰ Kalish Cross-Examination, at pg. 24, Q. 123-126.

⁵¹ Kalish Cross-Examination, at pg. 14, Q. 70.

⁵² Kalish Cross-Examination, at pg. 15, Q. 72.

- (g) did not know at the time the advance was made that TRP Realty had three bank accounts;⁵³
- (h) disagreed that it would have been “important for Firepower at the time of advancing funds to understand the flow of money within TRP”;⁵⁴
- (i) admitted that the Commissions Account “wouldn’t have come up in due diligence”;⁵⁵ and
- (j) when presented with reporting from TRP Realty that had been delivered to Firepower that identified its *gross* profit as calculated after deducting commissions, denied that it was evidence that TRP Realty had communicated to Firepower that the Commissions it had to pay the TRP Agents were not its own money.⁵⁶

71. Crucially, Mr. Kalish’s evidence was initially that other than the real estate trust deposits, all other cash with TRP was its own property,⁵⁷ as it was not “restricted cash” as defined in the audited financial statements.⁵⁸ However, when taken to the OREA Cooperation Agreement, he admitted that this was “new to me”,⁵⁹ and then admitted he did not know whether the commissions owing to the Cooperating Brokerages pursuant to this agreement were included in restricted cash.⁶⁰

⁵³ Kalish Cross-Examination, at pgs. 15-16, Q. 75-76.

⁵⁴ Kalish Cross-Examination, at pg. 21, Q. 106.

⁵⁵ Kalish Cross-Examination, at pg. 18, Q. 88.

⁵⁶ Kalish Cross-Examination, at pg. 28, Q. 145-147.

⁵⁷ Kalish Cross-Examination, at pg. 19, Q. 97; pg. 32, Q. 167.

⁵⁸ Specifically, the audited financial statements define restricted cash as “amounts held in trust as required by various purchase and sales agreements.” See Affidavit of Jared Kalish, sworn October 9, 2018, at Exhibit “A”, pg. 9. This definition does not specify *what* amounts are “held in trust”, but presumably only includes purchaser deposits and not other trust amounts, such as the Cooperating Brokerages’ commissions.

⁵⁹ Kalish Cross-Examination, at pg. 34, Q. 182.

⁶⁰ Kalish Cross-Examination, at pgs. 37-38, Q. 200-201.

72. Finally, Mr. Kalish admitted that he equated gross receivables with ownership of property. The basis of this belief was not any express words to that effect, but rather the numbers: “[B]ut the numbers that they’re presenting as receivables, that means that the company owns it.”⁶¹ When a follow-up question was asked about trust funds in those receivables, that question was not answered.⁶²

73. It is respectfully submitted that the above evidence demonstrates how woefully lacking Firepower’s understanding was of the TRP Realty business. That Firepower decided, for itself, to advance funds on the basis of accounts receivable – particularly when it could have chosen some other metric and when it had complete discretion to determine whether it was satisfied with the due diligence it conducted before advancing the funds⁶³ – does not mean that those receivables were the property of TRP Realty.

Conclusion on Commissions

74. Since it began functioning as a brokerage, TRP Realty segregated funds for the TRP Agents in a separate account that it did not touch. It placed those funds in accounts with three different banks, and each time, the bank statements had the word “trust” on them. TRP Realty set out funds to be paid to the TRP Agents on Trade Sheets that confirmed the existence of a trust between the two parties. TRP Realty then paid the TRP Agents via cheque or EFT that stated “commission trust” on them. TRP Realty told Ms. Paccione that her commissions were to be paid in priority to creditors.⁶⁴

⁶¹ Kalish Cross-Examination, at pgs. 44-45, Q. 236. See generally Kalish Cross-Examination, at pgs. 43-45, Q. 229-236.

⁶² Kalish Cross-Examination, at pg. 45, Q. 237.

⁶³ Kalish Cross-Examination, at pgs. 13-14, Q. 61-65; pg. 46, Q. 244-246.

⁶⁴ Paccione Affidavit, at para. 16.

75. It is respectfully submitted that this evidence of the existence of a trust is far weightier than the Secured Creditors' belief that TRP Realty owned all accounts receivable, when any probing into the accounts receivable would have revealed this not to be true.

Other Matters

76. The TRP Agents make two further submissions: (1) they ought to be entitled to their costs in any event of the motion; and (2) in the event they succeed on this motion, they wish time to consider appointing their own receiver over the Commissions.

(i) Costs

77. In respect of costs, the TRP Agents submit that they ought to be entitled to their costs in any event of the motion.

78. If the TRP Agents do not succeed on this motion, they will lose millions of dollars in commissions that their hard work earned. Through no fault of their own, those funds will accrue to the Secured Creditors. Further, the TRP Agents advanced and pursued this litigation in a structured and orderly way, beneficial to all litigants involved, including those on this motion who are not represented, but who will receive the benefit of counsel otherwise paid for by the TRP Agents. In the circumstances, the minimal remedy which they ought to be provided is cost indemnification.

(ii) Appointment of Own Receiver

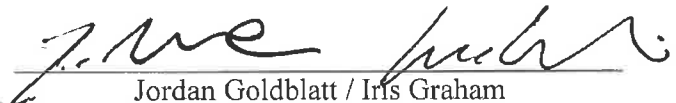
79. On October 12, 2018, the Receiver disclosed to the TRP Agents the costs it proposed to charge for distributing commissions in the event that the Commissions are trust funds.

80. As at the date of this factum, the TRP Agents have not had sufficient opportunity to consider the Receiver's proposal. Accordingly, should the TRP Agents succeed on this motion, they would request a fixed amount of time to report back to the Court in respect of either accepting the Receiver's proposal, or seeking alternate arrangements.

PART IV - ORDER REQUESTED

81. The TRP Agents respectfully request an Order declaring that the Commissions are held and are to be held in trust for them.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of October, 2018.


Jordan Goldblatt / Iris Graham


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SCHEDULE “A”
LIST OF AUTHORITIES

Case Law

1. *Eu v. Rosedale Realty Corp. (Trustee of)*, 1997 CarswellOnt 2519 (Ont. C.J. [Gen Div.])
2. *Midland Pacific Properties Corp. (Trustee of), Re*, 1999 CarswellBC 1868 (B.C.S.C. [In Chambers])

Secondary Sources

3. A.H. Oosterhoff, Robert Chambers & Mitchell McInnes, *Oosterhoff on Trusts: Text, Commentary and Materials*, 8th ed. (Toronto: Carswell, 2014)
4. Donovan W.M. Waters, Mark R. Gillen, & Lionel D. Smith, *Waters' Law of Trusts in Canada*, 3rd ed. (Toronto: Thomson Carswell, 2005)

SCHEDULE "B"**TEXT OF STATUTES, REGULATIONS & BY - LAWS****Real Estate and Business Brokers Act, 2002**

S.O. 2002, c. 30, Sched. C

Prohibition against trade in real estate unless registered

4 (1) No person shall,

- (a) trade in real estate as a brokerage unless the person is registered as a brokerage;
- (b) trade in real estate as a broker unless he or she is registered as a broker of a brokerage;
- (c) trade in real estate as a salesperson unless he or she is registered as a salesperson of a brokerage; or
- (d) trade in real estate unless registered under this Act. 2002, c. 30, Sched. C, s. 4 (1).

Unregistered persons

(2) A person who is not registered as a brokerage, broker or salesperson shall not,

- (a) directly or indirectly hold himself, herself or itself out as being a brokerage, broker or salesperson, respectively; or
- (b) perform any of the functions of a brokerage, broker or salesperson as provided in this Act. 2002, c. 30, Sched. C, s. 4 (2).

Change in partnership

(3) A change in the membership of a partnership shall be deemed to create a new partnership for the purpose of registration. 2002, c. 30, Sched. C, s. 4 (3).

Change in corporation

(4) A change in the officers or directors of a corporation registered as a brokerage may be made only with the consent of the registrar. 2002, c. 30, Sched. C, s. 4 (4).

...

Trust account

27 (1) Every brokerage shall,

- (a) maintain in Ontario an account designated as a trust account, in,
 - (i) a bank, or an authorized foreign bank, within the meaning of section 2 of the *Bank Act* (Canada),
 - (ii) a corporation registered under the *Loan and Trust Corporations Act*, or

- (iii) a credit union within the meaning of the *Credit Unions and Caisses Populaires Act, 1994*;
- (b) deposit into the account all money that comes into the brokerage's hands in trust for other persons in connection with the brokerage's business;
- (c) at all times keep the money separate and apart from money belonging to the brokerage; and
- (d) disburse the money only in accordance with the terms of the trust. 2004, c. 19, s. 18 (18); 2007, c. 7, Sched. 7, s. 190 (4).

FIREPOWER DEBT GP INC., AS AGENT
Applicant

-and- **THEREDPIN, INC. et al.**
Respondents

Court File No. CV-18-59964400CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT
TORONTO

FACTUM OF THE TRP AGENTS AND CERTAIN
LLOYD'S UNDERWRITERS
(OCTOBER 22, 2018)

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Lawyers for the TRP Agents

RCP-E 4C (May 1, 2016)

This is **Exhibit "H"** referred to in the
Affidavit of Service of Jordan Goldblatt
sworn January 31, 2019

Molly Warwick

Commissioner for Taking Affidavits (or as may be)

**MOLLY CATHERINE WARWICK,
a Commissioner, etc., Province of Ontario,
for Adair Goldblatt Bieber LLP,
Barristers and Solicitors.
Expires June 7, 2021.**

CITATION: Firepower Debt GP Inc. v. TheRedPin, Inc. 2018 ONSC 7182
COURT FILE NO.: CV-18-599644CL
DATE: 20181130

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Firepower Debt GP Inc., as Agent, Applicant

AND:

TheRedPin, Inc. and TheRedPin.com Realty Inc., Respondents

BEFORE: Penny J.

COUNSEL: *Harry Fogul* for the Receiver, MNP Ltd.

Harvey Chaiton for Firepower Debt GP Inc.

A. Kauffman for Trilogy Growth Fund LP

J. Goldblatt and I. Graham for the Agents

J.S. Klein for Certain Underwriters at Lloyds

HEARD: October 22, 2018

ENDORSEMENT

Overview

[1] TheRedPin Inc. and TheRedPin.com Realty Inc. operated a technology assisted real estate brokerage that provided an online platform to consumers which included listings for new and pre-construction projects. These companies will be referred to as TRP and TRP Realty.

[2] In June 2018, MNP Ltd. was appointed Receiver of TRP and TRP Realty. In this motion, the Receiver seeks the advice and direction of the Court about whether certain third party commissions to be collected by the Receiver are held in trust for the benefit of TRP Realty's agents (the "Agents"), outside brokers and certain assignees and "cashback" buyers.

[3] The parties agree that commissions of approximately \$3.7 million are owing to the Agents. TRP and TRP Realty, however, are insolvent. TRP Realty is indebted to Firepower Debt GP Inc. and Trilogy Growth Fund LP in an amount exceeding \$6.4 million; this is a secured obligation. If the Agents' commissions are not subject to a trust, these funds will form part of the debtors' assets subject to Firepower and Trilogy's security, leaving the Agents with unsecured claims against TRP Realty's estate, *Ontario Ministry of Consumer and Commercial Relations v. Safeguard Real Estate Ltd.*, (1994) 114 D.L.R. (4th) 546 (Gen. Div.) [Commercial List], at paras. 13-14.

[4] The parties also agree that there is no statutory or regulatory requirement to hold the Agents' commissions in trust. The Real Estate Council of Ontario confirmed to the Receiver that all registrants are, however, required to maintain a group insurance program that includes commission protection coverage. Coverage against this type of loss is not dependent upon the existence of a commission trust account, although the insurer says that it encourages the use of commission trust accounts as a prudent claims management tool.

[5] The parties further agree there is no definitive document which unambiguously establishes a trust in favour of the Agents. Rather, the existence of a trust, the Agents submit, must be implied from surrounding circumstances, transaction documents and TRP Realty's conduct. The parties agree that the determination of whether there is a trust depends on the application of the "three certainties:" certain of subject matter, certainty of object and certainty of intention.

[6] Finally, the parties agree that, of the three certainties, it is the certainty of intention that is in issue in this case. In other words, the parties agree there is certainty of subject matter (the commissions themselves) and certainty of object (TRP Realty and the Agents). The parties disagree about whether TRP Realty intended to establish a trust over the commissions on behalf of the Agents.

[7] Thus, the issue for determination on this motion for directions is whether TRP Realty intended to establish a trust in favour of the Agents over commissions payable to TRP Realty from purchasers of condominiums, most of which are scheduled to close in the future over a period that will run from 2018 until 2023.

Background

[8] The *Real Estate and Business Brokers Act, 2002*, S.O. 2002, c. 30 Sch. C, establishes the rules which all real estate salespersons, brokers and brokerages must follow. The Real Estate Council of Ontario is the body responsible for the administration of *REBBA* and regulates the activity of trading real estate in Ontario. All brokerages, brokers and real estate salespersons must be registered and meet all the requirements for registration. In particular:

- (a) the brokerage is the entity authorized to trade in real estate, not the salesperson or the broker of record;
- (b) every brokerage must designate a broker as its broker of record to ensure that the brokerage complies with the *REBBA*; and
- (c) it is the brokers and salespersons who perform the listing and selling activities that generate the trades.

[9] TRP Realty's revenues are primarily derived from real estate commissions generated from the activities of its licensed salespersons, or "agents." As of the date of the Receiver's appointment, there were 63 active Agents and 43 former Agents who still had pending commissions owing. Because TRP Realty dealt heavily with the new and future condominium market, these pending commissions are in respect of real estate deals that are scheduled to close anywhere between 2018 and 2023.

[10] TRP Realty acted either for a buyer, in which case it was the co-operating brokerage, or for a seller, in which case it was the listing brokerage. Of the 730 pending transactions to be settled by the Receiver, only 28 trades relate to transactions where TRP Realty was the listing brokerage. In all the rest, it was a co-operating brokerage.

[11] Where TRP Realty is the listing brokerage, it received deposits from the buyers under the agreements of purchase and sale. These deposits were required by regulatory rules to be deposited into the brokerage's real estate trust account. This meant the commission on these sales were also paid into the trust account because, as a practical matter, the deposit was used to satisfy the seller's obligation to the brokers to pay the commission. For this reason, most of the commissions due from TRP Realty to third parties (co-operating brokers who were not TRP Realty Agents) were lodged in the real estate trust account. This is because TRP Realty only dealt with third party brokerages on the relatively small number of occasions when it was the listing (or selling) agent.

[12] Some of the documents used by TRP Realty were standard forms developed by the Ontario Real Estate Council. These were commonly used in connection with re-sales. However, in connection with pre-construction deals, the transaction documents were usually specific to the builder or particular project. For example, of the over \$6.6 million in pending commissions as of the date of the receivership, 21% or \$1.4 million, were for resales, whereas 79%, or about \$5.2 million, were future commissions owing to TRP Realty relating to pre-construction or new development transactions where the OREC forms were typically not used.

Certainty of Intention

Legal Framework

[13] A trust is a relationship which arises whenever a person (called the trustee) is compelled in equity to hold property for the benefit of some other person (called the beneficiary) in such a way that the real benefit of the property accrues not to the trustee but to the beneficiary.

[14] As noted above, a valid trust exists where there the three certainties are satisfied: certainty of intent, certainty of subject matter and certainty of object. The issue in this case is certainty of intent.

[15] Certainty of intent requires that it be clear that the donor or settlor intended to create a trust; i.e., that the settlor intended for the property in question to be held for the benefit of another. No formal document evidencing the creation of a trust is required. Nor is it necessary that the settlor use any specific language - even the use of the word "trust" is not necessarily dispositive one way or the other. The question is one of substance - did the settlor evidence an intention that the property be held by one person for another person's benefit? This intention may be express or implied and may be determined from words or acts.

[16] Where a trust is to be implied, however, effect must be given to inferences as to the intention of the parties which a reasonable person would draw from the words or conduct of the parties and not to any subjective or other intention which was not made manifest at the time. Certainty of intention cannot solely derive from a "moral obligation as to what is to be done with the property," *Bank of Nova Scotia v. Alcon Group Inc.* 2012 NBCA 57, at para. 18 and *Waters' Law of Trusts in Canada* (4th ed.) at para. 5.1.

The Bank Accounts

[17] TRP Realty maintained three bank accounts:

- (1) a real estate trust account which is where TRP Realty deposited buyer deposits, as required under s. 27(1) of *REBBA*;
- (2) a commission account which is where all commissions earned by TRP Realty on transactions were ultimately deposited and from which commissions belonging to TRP Realty and third parties such as cooperating brokers and the Agents were paid; and
- (3) an operating account into which TRP Realty transferred the commissions it earned on transactions from the commission account and from which it paid its operating expenses such as payroll and overhead.

[18] Neither the real estate trust account nor the commission account bore interest. Service fees for these accounts were always paid from TRP Realty's operating account.

[19] Prior to August 2014, the commission account was held at TD Bank. Statements from this account contained the reference "TRUST ACCT" on the mailing line of the statement.

[20] From March 2014 to March 2018, TRP Realty banked with Comerica Bank (through the facilities of the Royal Bank of Canada). Bank statements from Comerica stated "COMMISSION TRUST" on the mailing line. Similarly, cheques drawn on the commission account contained the notation "COMMISSION TRUST" on them. When TRP Realty paid commissions to Agents through electronic transfers, it did so through an account described as "RBC - Commission Trust." This notation on the account was changed by RBC in 2018 to read only "RBC - Commission."

[21] According to information obtained by the Receiver from the Royal Bank, TRP Realty's commission account was provided with a description, on opening, of "Realty Commission." Most likely, this nomenclature was requested by the client, TRP Realty, since the bank does not normally assign nomenclature of this kind to any account. In any event, from the bank's perspective, the account is a standard operating account, not a trust account. According to the Royal Bank, among other things a Trust "know your client" form and a Trust Agreement are typically required to open and operate a trust account. No such documents were provided to or held by the Royal Bank in relation to TRP Realty's commission account.

[22] The Agents rely on an affidavit filed by Tarik Gidamy, who is a founder of TRP Realty and served as its broker of record until May 2017. Mr. Gidamy has sworn that he set up the commission account on the basis that the commissions TRP Realty was obliged to pay out to others did not belong to TRP Realty and that TRP Realty could only use money that was to TRP Realty's credit in the commission account when transferring funds to its operating account. He claims that TRP Realty had no expectation that it could use funds in its commission account owing to others, such as Agents, in the ordinary course of its business.

The Transaction and Other Documents

[23] Each TRP salesperson (Agent) entered into an 11 page contract with TRP Realty under which the Agent agreed to provide real estate services to TRP Realty (the "Contract"). Each Agent specifically agreed that his or her relationship with the company is that of independent contractor. In this Contract, TRP Realty agreed to pay commission on all transactions executed through the company provided the company received a minimum of \$500 per executed transaction to cover administrative costs. The Agent agreed that the company will receive the greater of \$500 or the company portion of the listed commission split. The company agreed to issue commission cheques each Wednesday for transactions closed where final payment was received the previous week. Commissions for pre-construction transactions were to be paid in accordance with the builder's payment schedule. The Contract contained an entire agreement clause which, among other things, provided that the Contract superseded all prior agreements. There is no provision in the Contract that commissions are to be held in trust by TRP Realty for the benefit of the Agents, nor is there any language that could reasonably be construed as having this meaning or intent.

[24] The Agents point to a number of transaction documents which, they argue, show that the commission account was intended to be a trust account. First, when an agreement of purchase and sale had "gone firm," TRP Realty provided the Agent with a trade record sheet setting out information about the transaction and the specific commission split between TRP Realty and the TRP agent.

[25] The trade record sheet is a standard form document provided through a "back office" software provider called "brokerWolf." The trade record sheet is required by regulation to contain certain specified information. The particular form of trade record sheet provided by brokerWolf included the following language (which is not prescribed by regulation): "It is understood between all parties that this agreement shall constitute a commission trust agreement *as set out in the contract*" [emphasis added]. BrokerWolf confirmed to the Receiver that this wording is in one of the "default lines that are part of the original set up/install of brokerWolf."

[26] The Agents argue that "the contract" in this report means the Contract between the Agents and TRP Realty. As noted above, however, the Contract makes no mention of, and no provision for, holding Agents' commissions in trust, nor does it contain any language from which an intention or obligation to do so could reasonably be inferred.

[27] It is common ground that certain "cooperating" broker agreements expressly contemplate TRP Realty holding commissions for cooperating brokerages in trust. The Agents reason that, if TRP Realty's commission account contained cooperating broker commissions that were held in trust, then all commissions, including TRP Realty's and the Agents', must also be held in trust.

[28] There are two difficulties with this argument. First, the documents employed in the limited number of transactions involving cooperating brokers specifically contemplated that cooperating broker commissions will be held in trust pending payment out to the cooperating brokerage. There is no similar explicit language regarding the Agents. The second problem with this argument is that it is only when TRP Realty is the listing broker that there are any cooperating brokers. The buyer's deposit, which is intended to cover agents' commissions following the closing of the transaction, is, by statute, required to be held by the listing brokerage in trust. The circumstances

of a cooperating brokerage, therefore, are simply not relevant to the treatment of Agents' commissions where, in the cases in dispute in this proceeding, TRP Realty was not the listing brokerage and did not receive any deposit on the trade.

The Flow of Funds

[29] In the 3% of cases where TRP Realty was the listing broker acting for the seller, TRP Realty received a deposit which was placed in TRP Realty's real estate trust account. When the deal closed, if the amount of the deposit was less than all of the commissions due, the whole of the deposit was transferred from the real estate trust account into the commission account. The remaining payment for the balance of the commission due to the brokerage was also deposited to the commission account once received from the seller.

[30] If the amount of the deposit was more than all commissions due, the portion of the deposit associated with the total commissions was transferred from the real estate trust account into the commission account and a cheque for the portion representing the balance due to seller was dispersed to the seller within 10 days.

[31] In either case, within 10 days of closing, cheques or electronic transfers with respect to the parties' respective split of total commissions were dispersed to the outside brokerage, the TRP salespersons and TRP Realty in accordance with the agreed commission split. TRP Realty's portion of the commission was transferred from the commission account into TRP's operating account.

[32] Where TRP Realty was the cooperating brokerage and acted for the buyer (as it was in about 97% of cases), when the trade closed a cheque payable to TRP Realty was received from the listing broker or (in most cases) the builder and then deposited into the commission account. This represented the commissions due on the transaction to TRP Realty and the Agents.

[33] Within 10 days of closing, cheques or electronic transfers with respect to the parties' respective split of the cooperating brokerage commission were dispersed from the commission account to the Agent and to TRP Realty in accordance with the agreed commission split. As with the first scenario, TRP Realty's portion of the cooperating brokerage commission was transferred from the commission account and deposited into TRP Realty's operating account.

The Audited Financial Statements and Other Financial Presentations

[34] KPMG LLP audited TRP and TRP Realty's consolidated financial statements. The last audited financial statements are for the year ended December 31, 2016. KPMG's audit opinion was signed July 10, 2017 for that year and expresses the opinion that the consolidated financial statements present fairly, in all material respects, the consolidated financial position as at December 31, 2016.

[35] The notes to the financial statements provide the basis on which the consolidated financial statements were presented, including TRP Realty's revenue recognition policies and the basis on which it disclosed its cash and cash equivalents and restricted cash.

[36] Cash and cash equivalents are defined to include “cash on hand, demand deposits that can be withdrawn without penalty, and short-term highly liquid securities, such as debt securities with an initial maturity date of not more than three months from the date of acquisition that can be readily converted into known amounts of cash and are subject to an insignificant risk of change in value.” Balances on deposit in TRP Realty’s operating account and commission account are included as cash and cash equivalents in the audited financial statements.

[37] Excluded from cash and cash equivalents are “amounts held in trust as required by various purchase and sale agreements, which are separately disclosed as restricted cash.” This category was identified as comprising only TRP Realty’s real estate trust account.

[38] To similar effect, the consolidated statements of income and comprehensive income show “Revenue” amounts and “Cost of Revenue” amounts. Note 12 to the statements indicates that the “Revenue” amount reflects the “total commission revenue.” Note 4(c) to the statements provides that “Cost of Revenue” includes agents’ “salaries, bonuses and commissions.” Note 4(c) goes on to stipulate that “agent commissions are generally paid at the time of closing on resale units and at the time the Company receives the first instalment on new units.” It is clear from the amounts in issue that total commission income included in TRP Realty’s revenue includes the Agents’ commissions. This is distinguished from “Restricted Cash.” Note 4(d) states that excluded from cash “are amounts held in trust as required by various purchase and sale agreements, which are separately disclosed as restricted cash.” Again, it is clear from the amounts in issue that “restricted cash” includes only the amounts representing buyer deposits where TRP Realty is the listing brokerage.

[39] Firepower and Trilogy point out that Mr. Gidamy, as a member of the Board of TRP and TRP Realty, not only approved the financial statements but executed management’s letter to KPMG in October 2016. The management letter signed by Mr. Gidamy represented and confirmed that:

- (a) the debtors have satisfactory title to all assets indicated;
- (b) there are no liens or encumbrances on the debtor’s assets except those disclosed in notes to the financial statements;
- (c) there are no side agreements with any parties that have not been disclosed;
and
- (d) management had no knowledge of any material unrecorded assets or liabilities or contingent assets or liabilities.

[40] The applicant’s loan documentation, signed by Mr. Gidamy on behalf of TRP and TRP Realty, contains similar representations and warranties.

[41] The evidence also contains a presentation made by Mr. Gidamy to the Board of Directors regarding the fourth-quarter performance of the 2016 year, which was also delivered to Firepower and Trilogy in February 2017. That presentation reflects “gross receivables” of \$11 million (that is, a figure which included all of the amount credited to the commission account, not just the TRP Realty portion) securing Comerica debt of \$1.5 million and the Firepower debt of \$3.5 million.

Agents' commissions are shown as a "cost of sales," in other words, as an unsecured debt obligation of TRP Realty.

[42] Firepower and Trilogy thus argue that the audited financial statements, the information provided by management to KPMG as auditor, as well as the information provided to the Board of Directors and to the secured creditors when negotiating the terms of their loans, all confirm that gross commissions are assets of TRP Realty and that commissions owed to the Agents are simply an unsecured debt of TRP Realty. The audited financial statements recognize that purchaser deposits (where TRP Realty is the listing brokerage) are 'restricted cash' held in trust. Nothing in the presentation of TRP Realty's financial statements or other financial presentations reflects a similar designation for Agents' commissions.

[43] The Agents rely heavily on the decision of Mr. Justice Cameron in *Eu v. Rosedale Realty Corp. (Trustee of)* (1997), O.R. (3d) 666 (Gen. Div.) [Commercial List] and a decision from the B.C.S.C., *Midland Pacific Properties Corp. (Trustee of), Re*, (1999), 69 B.C.L.R. (3d) 187, which followed *Eu*.

[44] In *Eu*, the agents had an agreement with the predecessor brokerage, First District, which specified that monies received on account of commissions earned by a salesperson "shall be paid by the Broker in trust." There was an agreement requiring First District to hold all commissions it received in a "commission trust account" in which it would hold the commissions for various persons or entities, including the employed and independent salespersons "under trust arrangements" other than the statutory real estate trust account. When the First District business was transferred to a new brokerage, Rosedale, the agents carried on as they had before. It appeared that neither the sale of assets from First District to Rosedale nor the contractual relationship between Rosedale and its agents was formalized to any great extent. In these circumstances, Cameron J. found that it made no business sense to place commissions into the commission trust account if they were not intended to be held in trust. Cameron J., therefore, found as a fact that the agents' relationships with Rosedale were "essentially the same as they had been with" First District, i.e., the explicit agreement between First District and its agents continued when Rosedale became the brokerage such that Rosedale held all pending commissions in a commission trust account explicitly designated and used for the benefit of Rosedale's agents.

[45] There are, in my view, three critical elements which distinguish the case at bar from the circumstances before Cameron J. in *Eu*:

- (1) the absence of any obligation on TRP Realty under its Contract with the Agents to hold commissions beneficially for the agents. Here, the Contract is clear that the relevant split of commissions earned are *owing* to the Agents once the deal closes but is conspicuously silent on how those funds will be held by the brokerage before becoming due and payable;
- (2) the absence of evidence that the commission account at TD/Comerica/RBC was, in fact, a trust account. The evidence is that the word "trust" appeared in the address line of the bank statements for a period of time but the evidence from RBC is that, as a matter of substance, the commission account was not, in fact, a trust account; and

- (3) the audited financial statements and other financial presentations made to the Board of TRP Realty and to commercial third parties unambiguously classify the commissions owing to TRP Realty and the Agents as gross revenues of TRP Realty and the Agents' split of those commissions as a cost of sales, that is, an unsecured debt owed to the Agents. This is clearly distinguished in the audited financial statements and other presentations from the treatment of purchaser deposits which are categorized as "restricted cash" and subject to a trust in favour of third parties.

[46] The court must act on such a preponderance of evidence as to show whether the conclusion the Agents seek to establish is substantially the most probable of the possible views of the facts, *Clarke v. The King* (1921), 61 S.C.R. 608 at p. 616. The question of the intention of TRP Realty in this case is a question of fact to be determined on the basis of the objective evidence, not subjective intentions formulated with the benefit of hindsight now that an unforeseen problem has arisen.

[47] Supporting the Agents' argument that the commissions were held in trust is:

- (a) the commissions were placed in a separate account which earned no interest and in respect of which there were no bank charges or fees;
- (b) statements of this account sent to TRP Realty had the words "commission trust" in the address line for a period of time; and
- (c) some of the standard form transaction documents contained reference to commissions being in a trust as provided in the Agents' agreement (although the Contract does not provide for any trust).

[48] While there is arguably scope for some ambiguity around the standard form transaction documents and bank records used in the business, these are relatively weak indicators of an inference of TRP Realty's intention. The best evidence of TRP Realty's intention is to be found in the company's Contract with the Agents and in the company's audited financial statements.

[49] The Contract does not require TRP Realty to hold commissions in trust for the Agents.

[50] There is a gravity and a formality to the presentation of audited financial statements which transcends ambiguity or inference. TRP Realty's management (Mr. Gidamy) was required to represent and confirm to the auditors that the information provided was accurate and not misleading. The auditors performed a review of the books and records of TRP Realty and provided a professional opinion that the financial statements fairly represent the financial position of TRP Realty. These financial statements were approved by the TRP Realty Board of Directors.

[51] What could be a clearer statement of TRP Realty's intention than the representations to the world in its audited financial statements that all the pending commissions in respect of transaction in which TRP Realty was not the listing broker:

- (a) are not held in trust (in contrast to deposits where TRP Realty is the listing brokerage);

- (b) are included in TRP Realty's gross revenues; and
- (c) to the extent of the Agents' split of the commissions, represent an unsecured debt owing to the Agents (a cost of sales)?

When weighed against the ambiguous inferences sought to be drawn from standard form documents provided by someone else (broker Wolf, not TRP Realty), notations included on address lines in bank statements and Mr. Gidamy's after the fact characterization of the status of the commissions (a characterization totally at odds with the representations he made to the company's auditors, to the Board of Directors and to entities such as the applicant), I am unable to conclude that the requisite intention to hold the commissions in the commission account in trust has been established.

[52] Unlike the factual conclusion reached by Cameron J. in *Eu*, the operation of TRP Realty's commission account does not make "commercial sense" only if it is a trust account. Commissions are important – they are the lifeblood of the business of TRP Realty and its only source of revenue. Commissions are the basis for the Agents' remuneration for the services they perform for the business. There is no doubt that when deals closed, the commissions were "earned" and the relevant split of this money was owed by TRP Realty to the Agents. There were, therefore, in these circumstances ample commercial, accounting and cash tracking and management reasons to direct the commissions into a separate account, altogether apart from whether they were being held in trust.

[53] In all of the circumstances, based on the objective evidence, I am unable to agree with the Agents that the requirement for certainty of intention to create a trust has been established. I conclude that the commissions, while clearly a debt owing to the Agents, are not held in trust and are, therefore, not excluded from TRP Realty's available assets subject to the Applicants' security.

Costs

[54] The Agents submit that if they do not succeed on their motion, they will lose millions of dollars in commissions, commissions that they have clearly earned. Through no fault of their own, resulting only from TRP's insolvency, the amount of the purchase price allocated to commissions (both TRP Realty's commissions and the Agents' commissions) will accrue to the benefit of the secured creditors.

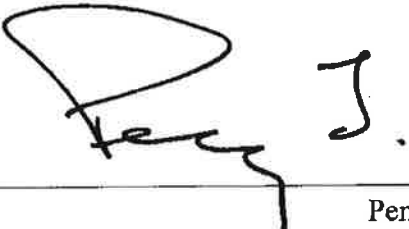
[55] The Agents further submit that they participated responsibly in advancing and pursuing their claims in a structured and orderly way. It was necessary, in any event, for this issue to be resolved for the benefit of all stakeholders, including affected persons not represented on this motion.

[56] As a result, the Agents ask that they be awarded their costs in any event.

[57] Neither the secured creditors nor the Receiver made any submissions on this point.

[58] I am in agreement with the Agents that an orderly, expeditious process for the resolution of this dispute was in the interests of all stakeholders. The Agents' participation has been responsible and of great assistance to the Court.

[59] In all of the circumstances, I find that costs shall be awarded to the Agents in the amount of \$45,000 to be paid out of the assets of TRP Realty. No costs are awarded against the Agents. The costs of the Receiver, and the allocation of the costs, shall be the subject of a subsequent application.



Penny J.

Date: November 30, 2018

This is **Exhibit "I"** referred to in the
Affidavit of Service of Jordan Goldblatt
sworn January 31, 2019

Molly Warwick

Commissioner for Taking Affidavits (or as may be)

MOLLY CATHERINE WARWICK,
a Commissioner, etc., Province of Ontario,
for Adair Goldblatt Bieber LLP,
Barristers and Solicitors.
Expires June 7, 2021.

Court of Appeal File No.
Court File No. CV-18-599644CL

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

FIREPOWER DEBT GP INC., AS AGENT

Applicant (Respondent)

and

THEREDPIN, INC. and THEREDPIN.COM REALTY INC.

Respondents

NOTICE OF APPEAL

The Appellants, the former real estate agents of the respondent The RedPin.com Realty Inc. (the “TRP Agents”) and Certain Underwriters of Lloyds of London, appeal to the Court of Appeal from the Order of the Honourable Justice M. Penny (the “Motion Judge”) dated November 30, 2018, made at Toronto.

THE APPELLANTS ASK that the Order be set aside and that an Order be granted as follows:

- a. declaring that commissions earned and payable to the TRP Agents are impressed with a trust in their favour, and do not form part of the assets of the TRP Realty that are subject to any security interest;
- b. awarding the appellants their costs of the appeal; and
- c. such further and other relief as counsel may advise and this Honourable Court may permit.

THE GROUNDS OF APPEAL are as follows:

The Parties

- a. on June 14, 2018, by Order of the Honourable Justice Hainey, MNP Ltd. (the “Receiver”) was appointed as receiver over the assets, undertakings and properties of TheRedPin Inc. and The RedPin.com Realty Inc. (“TRP Realty”);
- b. TRP Realty was a real estate brokerage until the appointment of the Receiver;
- c. the appellants, the TRP Agents, are the former real estate agents of TRP Realty who contracted with TRP Realty to provide it with real estate services;
- d. the appellant, Certain Underwrites of Lloyds of London, insures portions of the TRP Agents’ commissions;
- e. the respondents, Firepower Debt GP Inc. and Trilogy Growth Fund LP, are the secured creditors of TRP Realty (the “Secured Creditors”);

The Issue

- f. the *Real Estate and Business Brokers Act, 2002* (“REBBA”) requires that real estate agents conduct their business through licensed real estate brokerages. Accordingly, while it is the real estate agents who perform the listing and selling activities that generate real estate transactions, those transactions are carried out through the brokerage, in this case, TRP Realty;
- g. commissions owed to real estate agents are therefore first paid to the agent’s brokerage, who then is obliged to pay the commission to the agent;

- h. at the time of the receivership order, the TRP Agents were owed approximately \$3.7 million in commissions;
- i. a dispute emerged between the TRP Agents and the Secured Creditors regarding whether the commissions were impressed with a trust in favour of the TRP Agents, or, were part of the general property of TRP Realty subject to the Secured Creditors' security;
- j. the Receiver brought a motion for direction that was heard by the Motion Judge on October 22, 2018, a decision reserved to November 18, 2018. The Motion Judge determined that the TRP Agents had established that they were the beneficiaries of a trust over the commissions;

The Motion Judge's Errors

- k. the Motion Judge made a number of reviewable errors in finding as he did. In particular, the Motion Judge:
 - a. erred in law by conflating the indicia of an express trust with evidence supporting an implied trust. In particular, the Motion Judge held that the absence of a trust clause in the TRP Agents' contracts with TRP Realty significantly undermined the TRP Agents' trust claim. A trust clause in the contracts would have created an express trust, which was not the TRP Agents' submissions;
 - b. erred in law and in fact by disregarding evidence from TRP Realty's founder regarding his intention in setting up the brokerage. Specifically, TRP Realty's

founder swore that he set up a specific banking structure to segregate agents' commissions from TRP Realty's other assets, precisely because he recognized that the commissions did not belong to TRP Realty;

- c. erred in law and in fact by permitting the Secured Creditors to secure their advances over assets that TRP Realty considered as not belonging to it prior to the receivership;
- d. erred in fact and in law in respect of the import, evidentiary value, and weight to be given to TRP Realty's 2016 audited financial statements. The Motion Judge made the following errors in this regard:
 - i. while finding as a fact that "balances on deposit in TRP Realty's.... commission account are included as cash and cash equivalents in the audited financial statements", and, that the restrictions on cash included "only the amounts representing buyer deposits", he ignored that there were amounts in the commission account that were admittedly impressed with a trust in favour of co-operating brokerages. Accordingly, the audited financial statements necessarily included as revenue moneys that were impressed with a trust;
 - ii. failed to consider that even if the 2016 audited financials did pledge the commissions as security, that TRP Realty could not revoke a trust that it had already constituted;

- iii. failed to consider that the 2016 audited financials could only speak to the state of affairs in 2016, and provided no evidence regarding TRP Realty's practice and operations at any point prior;
- iv. erred in regard to the weight he afforded to the financial statements, especially as compared to other documents and processes put in place by TRP Realty's management;
- e. erred in finding there was an "absence of evidence that the commission account at TD/Comerica/RBC was, in fact a trust account". The Motion Judge reached this conclusion in spite of finding as a fact that the commission account had the word "trust" as part of its nomenclature, and that this was "most likely" "requested by the client, TRP Realty, since the bank does not normally assign nomenclature of this kind to any account";
- f. erred in finding that the commission account could be a trust account for certain purposes but not with respect to other purposes; and

Other

- l. such further and other grounds as counsel may advise and this Honourable Court may permit.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS:

- (a) section 6(1)(b) of the *Courts of Justice Act*;
- (b) the Order appealed from is final; and

(c) leave to appeal is not required.

December 27, 2018

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Jeffrey S. Klein

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Lawyers for Underwriters of Lloyds

TO: SERVICE LIST

Firepower Debt GP Inc.
Applicant
(Respondent)

-and- The RedPin Inc.
Respondent
(Respondents)

Court File No.

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT
TORONTO

NOTICE OF APPEAL

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Lawyers for Underwriters of Lloyds

This is **Exhibit "J"** referred to in the
Affidavit of Service of Jordan Goldblatt
sworn January 31, 2019

Molly Warwick

Commissioner for Taking Affidavits (or as may be)

MOLLY CATHERINE WARWICK,
a Commissioner, etc., Province of Ontario,
for Adair Goldblatt Bieber LLP,
Barristers and Solicitors.
Expires June 7, 2021.

From: [Harvey G. Chaiton](mailto:Harvey.G.Chaiton)
To: [Marlie Patterson-Earle](mailto:Marlie.Patterson-Earle@MPattersonEarle@agblp.com); hfgogul@airdberlis.com; sbabe@airdberlis.com; akauuffman@fasken.com; diane.winters@justice.gc.ca; kevin.ohara@ontario.ca; tgaa@bbslaw.com; yessenia@bbslaw.com; darren@accesseasyfunds.com; mike@agentsequity.com
Cc: [Jordan Goldblatt](mailto:Jordan.Goldblatt@AGBLP.com); [Alex Fidler-Wener](mailto:Alex.Fidler-Wener@AGBLP.com); jklein@ksalaw.com
Subject: RE: FirePower Debt GP Inc., as Agent v. TheRedPin, Inc., et al.
Date: December-27-18 2:10:18 PM
Attachments: [image001.png](#)

Receipt acknowledged, however, the proposed appeal is out of time under section 193 of the BIA. Further, there is no automatic right of appeal.

Harvey G. Chaiton
 Partner | Chaitons LLP | Tel: 416.218.1129

From: Marlie Patterson-Earle <MPattersonEarle@agblp.com>
Sent: Thursday, December 27, 2018 1:59 PM
To: Harvey G. Chaiton <Harvey@chaitons.com>; 'hfogul@airdberlis.com' <hfogul@airdberlis.com>; 'sbabe@airdberlis.com' <sbabe@airdberlis.com>; 'akauffman@fasken.com' <akauffman@fasken.com>; 'diane.winters@justice.gc.ca' <diane.winters@justice.gc.ca>; 'kevin.ohara@ontario.ca' <kevin.ohara@ontario.ca>; 'tgaa@bbslaw.com' <tgaa@bbslaw.com>; 'yessenia@bbslaw.com' <yessenia@bbslaw.com>; 'darren@accesseasyfunds.com' <darren@accesseasyfunds.com>; 'mike@agentsequity.com' <mike@agentsequity.com>
Cc: Jordan Goldblatt <JGoldblatt@agblp.com>; Alex Fidler-Wener <AFidlerWener@agblp.com>; 'jklein@ksalaw.com' <jklein@ksalaw.com>
Subject: FirePower Debt GP Inc., as Agent v. TheRedPin, Inc., et al.

All,

Please see attached correspondence from Jordan Goldblatt in connection with the above-noted matter.

Kindly confirm receipt of this email at your earliest convenience.

Thank you,

Marlie



MARLIE PATTERSON-EARLE
 Legal Assistant to Julia Wilkes and Alex Fidler-Wener

D: 416.941.5857 | F: 647.689.2050 | E: mpattersonearle@AGBLP.com
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This is **Exhibit "K"** referred to in the
Affidavit of Service of Jordan Goldblatt
sworn January 31, 2019

Molly Warwick

Commissioner for Taking Affidavits (or as may be)

**MOLLY CATHERINE WARWICK,
a Commissioner, etc., Province of Ontario,
for Adair Goldblatt Bieber LLP,
Barristers and Solicitors.
Expires June 7, 2021.**

December 28, 2018

DELIVERED VIA EMAILMr. Harvey Chaiton
Chaitons LLP
5000 Yonge Street, 10th Floor
Toronto, ON M2N 7E9Mr. Aubrey E. Kauffman
Fasken Martineau DuMoulin LLP
2400 – 333 Bay Street
Toronto, ON M5H 2T6

Counsel,

**Re: Firepower Debt GP Inc., As Agent v. TheRedPin, Inc. et al.
Our File No. 50859
Court File No. C66336**

I have your emails with regard to the timing of the appeal. I apologize for any typos in this letter as I am on vacation.

I do not accept that the appeal is out of time. In particular:

- The Court rendering the Order was not sitting as a bankruptcy court, but rather as a commercial list court. None of the court filings stated “*In the matter of the Receivership of*” or similar words;
- The issue determined by the Court was not one that was determined with reference to the *Bankruptcy and Insolvency Act* (“BIA”). No remedies under the BIA were sought;
- The Order granted by the Court was not one made under the BIA; and
- The Receiver’s appointment was at least in part under the *Courts of Justice Act*, and the powers derived by Court Order, not the BIA.

Still, even were the BIA Rules to apply, I note s. 31(1) of the *General Rules* permits the Court of Appeal to extend the time frame to appeal. Recently, in *Industrial Alliance Insurance and Financial Services Inc. v. Wedgemount Power Limited Partnership*, 2018 BCCA 283, the British Columbia Court of Appeal set out a non-exhaustive list of factors that might be considered in respect of extending the time to deliver a notice of appeal. In my view, the appellants easily meet these criteria. Unlike in *Wedgemount*, however, leave is not required, and the appellants can bring themselves under s. 193(a), (b), and (c) of the BIA.

In the circumstance, rather than having a preliminary motion in regard to whether the appeal is under the BIA or the *Courts of Justice Act*, the appellants are prepared to deliver an

amended Notice of Appeal seeking an Order under s. 31(1) of the *General Rules* for an extension of time provided that we have your consent to same.

I look forward to hearing from you.

Yours very truly,



Jordan Goldblatt

JG/mpe

cc. Clients

Alex Fidler-Wener, Adair Goldblatt Bieber LLP

Jeffrey Klein, Klein & Schonblum Associates

Harry Fogul, Aird & Berlis LLP

This is **Exhibit "L"** referred to in the
Affidavit of Service of Jordan Goldblatt
sworn January 31, 2019

Molly Warwick

Commissioner for Taking Affidavits (or as may be)

MOLLY CATHERINE WARWICK,
a Commissioner, etc., Province of Ontario,
for Adair Goldblatt Bieber LLP,
Barristers and Solicitors.
Expires June 7, 2021.



REPLY TO: HARVEY G. CHAITON
FILE NO.: 42597
DIRECT: 416-218-1129
FAX: 416-218-1849
EMAIL: harvey@chaitons.com

December 28, 2018

VIA EMAIL

Jordan Goldblatt
Adair Goldblatt Bieber LLP
95 Wellington St. W., Suite 1830
Toronto, Ontario M5J 2N7

**Re: FirePower Debt GP Inc., As Agent v. TheRedPin, Inc. et al.
Court File No. C66336**

Dear Mr. Goldblatt,

I am responding to your letter of today's date as I will be away on Monday and given the time sensitive nature of the matter, I wanted you to know my position as soon as possible.

Section 193 of the *Bankruptcy and Insolvency Act* ("BIA") provides that an appeal lies to the Court of Appeal from any order or decision of a judge of the Court in the specified cases. In Ontario, the term judge means a judge of the Superior Court of Justice exercising jurisdiction in bankruptcy and in other proceedings authorized by the Act. This includes these receivership proceedings commenced under section 243 of the BIA and section 101 of the *Courts of Justice Act* ("CJA"). A review of the cases decided under section 193 will confirm it applies to receivership orders made under both the BIA and CJA. Indeed, this was precisely the circumstances in the case you rely on.

The receiver's motion for advice and directions was brought in the receivership proceeding and specifically relied on the terms of the receivership order and section 249 of the BIA as authority for the court's jurisdiction.

I also disagree with your position that the Agents are entitled to appeal as of right from an order made on a motion by a receiver for advice and directions.

Accordingly, it will be necessary for the Agents to seek an extension of time to appeal and leave to appeal, which I am instructed to oppose.

Yours truly,
CHAITONS LLP

A handwritten signature in black ink, appearing to read "Harvey Chaiton". The signature is fluid and cursive, written over a light background.

Harvey G. Chaiton
PARTNER

HGC/lc
c. FirePower Debt GP Inc.
Aubrey Kauffman, Fasken Martineau DuMoulin LLP
Harry Fogul, Aird & Berlis LLP
Jeffrey Klein, Klein & Schonblum Associates
Doc#4361733v1

This is **Exhibit "M"** referred to in the
Affidavit of Service of Jordan Goldblatt
sworn January 31, 2019

Molly Warwick

Commissioner for Taking Affidavits (or as may be)

MOLLY CATHERINE WARWICK,
a Commissioner, etc., Province of Ontario,
for Adair Goldblatt Steber LLP,
Barristers and Solicitors,
Expires June 7, 2021.

Court of Appeal File No. C66336
Court File No. CV-18-599644CL

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

FIREPOWER DEBT GP INC., AS AGENT

Applicant (Respondent)

and

THEREDPIN, INC. and THEREDPIN.COM REALTY INC.

Respondents

AMENDED NOTICE OF APPEAL

The Appellants, the former real estate agents of the respondent The RedPin.com Realty Inc. (the “TRP Agents”) and Certain Underwriters of Lloyds of London, appeal to the Court of Appeal from the Order of the Honourable Justice M. Penny (the “Motion Judge”) dated November 30, 2018, made at Toronto.

THE APPELLANTS ASK that the Order be set aside and that an Order be granted as follows:

- a. declaring that commissions earned and payable to the TRP Agents are impressed with a trust in their favour, and do not form part of the assets of the TRP Realty that are subject to any security interest;

a.1 an Order, as may be necessary, extending the time for bringing this appeal;

a.2 an Order as may be required, granting the appellants leave to appeal to this Honourable Court;

- b. awarding the appellants their costs of the appeal; and
- c. such further and other relief as counsel may advise and this Honourable Court may permit.

THE GROUNDS OF APPEAL are as follows:

The Parties

- a. on June 14, 2018, by Order of the Honourable Justice Hainey, MNP Ltd. (the “Receiver”) was appointed as receiver over the assets, undertakings and properties of TheRedPin Inc. and The RedPin.com Realty Inc. (“TRP Realty”);
- b. TRP Realty was a real estate brokerage until the appointment of the Receiver;
- c. the appellants, the TRP Agents, are the former real estate agents of TRP Realty who contracted with TRP Realty to provide it with real estate services;
- d. the appellant, Certain Underwrites of Lloyds of London, insures portions of the TRP Agents’ commissions;
- e. the respondents, Firepower Debt GP Inc. and Trilogy Growth Fund LP, are the secured creditors of TRP Realty (the “Secured Creditors”);

The Issue

- f. the *Real Estate and Business Brokers Act, 2002* (“REBBA”) requires that real estate agents conduct their business through licensed real estate brokerages. Accordingly, while it is the real estate agents who perform the listing and selling activities that generate real estate transactions, those transactions are carried out through the brokerage, in this case, TRP Realty;
- g. commissions owed to real estate agents are therefore first paid to the agent’s brokerage, who then is obliged to pay the commission to the agent;
- h. at the time of the receivership order, the TRP Agents were owed approximately \$3.7 million in commissions;
- i. a dispute emerged between the TRP Agents and the Secured Creditors regarding whether the commissions were impressed with a trust in favour of the TRP Agents, or, were part of the general property of TRP Realty subject to the Secured Creditors’ security;
- j. the Receiver brought a motion for direction that was heard by the Motion Judge on October 22, 2018, a decision reserved to November 18, 2018. The Motion Judge determined that the TRP Agents had established that they were the beneficiaries of a trust over the commissions;

The Motion Judge’s Errors

- k. the Motion Judge made a number of reviewable errors in finding as he did. In particular, the Motion Judge:
- a. erred in law by conflating the indicia of an express trust with evidence supporting an implied trust. In particular, the Motion Judge held that the absence of a trust clause in the TRP Agents' contracts with TRP Realty significantly undermined the TRP Agents' trust claim. A trust clause in the contracts would have created an express trust, which was not the TRP Agents' submissions;
 - b. erred in law and in fact by disregarding evidence from TRP Realty's founder regarding his intention in setting up the brokerage. Specifically, TRP Realty's founder swore that he set up a specific banking structure to segregate agents' commissions from TRP Realty's other assets, precisely because he recognized that the commissions did not belong to TRP Realty;
 - c. erred in law and in fact by permitting the Secured Creditors to secure their advances over assets that TRP Realty considered as not belonging to it prior to the receivership;
 - d. erred in fact and in law in respect of the import, evidentiary value, and weight to be given to TRP Realty's 2016 audited financial statements. The Motion Judge made the following errors in this regard:
 - i. while finding as a fact that "balances on deposit in TRP Realty's.... commission account are included as cash and cash equivalents in the

audited financial statements”, and, that the restrictions on cash included “only the amounts representing buyer deposits”, he ignored that there were amounts in the commission account that were admittedly impressed with a trust in favour of co-operating brokerages. Accordingly, the audited financial statements necessarily included as revenue moneys that were impressed with a trust;

- ii. failed to consider that even if the 2016 audited financials did pledge the commissions as security, that TRP Realty could not revoke a trust that it had already constituted;
- iii. failed to consider that the 2016 audited financials could only speak to the state of affairs in 2016, and provided no evidence regarding TRP Realty’s practice and operations at any point prior;
- iv. erred in regard to the weight he afforded to the financial statements, especially as compared to other documents and processes put in place by TRP Realty’s management;
- e. erred in finding there was an “absence of evidence that the commission account at TD/Comerica/RBC was, in fact a trust account”. The Motion Judge reached this conclusion in spite of finding as a fact that the commission account had the word “trust” as part of its nomenclature, and that this was “most likely” “requested by the client, TRP Realty, since the bank does not normally assign nomenclature of this kind to any account”;

- f. erred in finding that the commission account could be a trust account for certain purposes but not with respect to other purposes; ~~and~~

Other

- 1.1 after service of the Notice of Appeal in this matter, certain respondents took the position that the delivery of the Notice of Appeal was out of time, and that it ought to have been delivered within a ten day appeal period set out under s. 31(1) of the *Bankruptcy and Insolvency General Rules* (the “BIA Rules”);
- 1.2 while the appellants do not admit that the BIA Rules govern the herein appeal, which concerns matters of trust law not matters provided for under the *Bankruptcy and Insolvency Act* (the “BIA”), in the event that the BIA Rules govern this appeal, then s. 31(1) of the BIA Rules permit this Court to extend the time for delivery of a Notice of Appeal.
- 1.3 in the circumstance, if the BIA Rules apply, it is just in all circumstances for the time frame for delivery of the Notice of Appeal to be extended;
- 1.4 further, certain respondents have also asserted that this appeal may not be brought as of right, and that leave is required.
- 1.5 the appellants submit that leave is not required, and that this appeal may be brought as of right under s. 193(a) of the BIA (the point at issue involves future rights, to wit, the determination of commissions to be paid), s. 193(b) of the BIA (the point at issue is likely to affect other cases), or s. 193(c) (the property in the appeal exceeds ten thousand dollars);

1.6 in the alternative, if leave to appeal is required, s. 31(2) of the BIA Rules requires the Notice of Appeal to include the request for leave to appeal;

1.7 if leave is required, then this is an appropriate case where leave to appeal ought to be granted; and

1. such further and other grounds as counsel may advise and this Honourable Court may permit.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS:

- (a) section 6(1)(b) of the *Courts of Justice Act*;
- (b) the Order appealed from is final; and
- (c) leave to appeal is not required;
- (d) in the alternative, Rule 31(1) of the BIA Rules and s. 183(2), 193 of the BIA; and
- (e) in the further alternative, Rule 31(2) of the BIA Rules and s. 193(e) of the BIA.

Date: December ~~27~~31, 2018

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Lawyers for Underwriters of Lloyds

TO: SERVICE LIST

RCP-E 61A (November 1, 2005)

Firepower Debt GP Inc.
Applicant
(Respondent)

-and- The RedPin Inc.
Respondent
(Respondents)

Court File No.

COURT OF APPEAL FOR ONTARIO
PROCEEDING COMMENCED AT
TORONTO

NOTICE OF APPEAL

ADAIR GOLDBLATT BIEBER LLP
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Email: jklein@ksalaw.com
Lawyers for Underwriters of Lloyds

This is **Exhibit "N"** referred to in the
Affidavit of Service of Jordan Goldblatt
sworn January 31, 2019

Molly Warwick

Commissioner for Taking Affidavits (or as may be)

MOLLY CATHERINE WARWICK,
a Commissioner, etc., Province of Ontario,
for Adair Goldblatt Bisler LLP,
Barristers and Solicitors,
Expires June 7, 2021.

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

BETWEEN:

FIREPOWER DEBT GP INC., AS AGENT

Applicant

and

THEREDPIN, INC. and THEREDPIN.COM REALTY INC.

Respondents

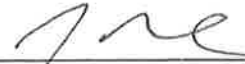
CONSENT

The parties, by their respective lawyers, consent to an Order in the form as attached as **Schedule "A"** and certify that no party affected by the Order is under disability.

DATED AT TORONTO, ONTARIO this 31st day of January, 2019

ADAIR GOLDBLATT BIEBER LLP

Per:




Jordan Goldblatt
Lawyer for the TRP Agents

DATED AT TORONTO, ONTARIO this 31st day of January, 2019

CHAITONS LLP

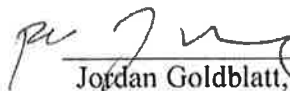
Per:



Jordan Goldblatt, as duly authorized agent
for Harvey Chaiton, Lawyer for FirePower
Debt GP Inc., as Agent Firepower GAP Debt
LP, by its general partner FirePower Debt
GP Inc. FirePower Asset Management Inc.

DATED AT TORONTO, ONTARIO this 31st day of January, 2019

AIRD & BERLIS LLP



Jordan Goldblatt, as duly authorized agent
for Harry Fogul, Lawyer for MNP Ltd.,
Court Appointed Receiver of
TheRedPin, Inc. and TheRedPin.com
Realty Inc.

DATED AT TORONTO, ONTARIO this 31st day of January, 2019

**FASKEN MARTINEAU DuMOULIN
LLP**



Jordan Goldblatt, as duly authorized agent
for Aubrey E. Kauffman, Lawyer for
Trilogy Growth Fund LP, by its general
partner, Trilogy Growth Inc.

DATED AT TORONTO, ONTARIO this 31st day of January, 2019

**KLEIN & SCHONBLUM
ASSOCIATES**



Jordan Goldblatt, as duly authorized agent
for Jeffrey S. Klein, Lawyer for
Underwriters of Lloyds

Schedule "A"

Court File No. CV-18-59964400CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE)	FRIDAY, THE 30TH
)	
JUSTICE PENNY)	DAY OF NOVEMBER, 2018

B E T W E E N:

FIREPOWER DEBT GP INC., AS AGENT

Applicant

and

THEREDPIN, INC. and THEREDPIN.COM REALTY INC.

Respondents

ORDER

THIS MOTION, brought by MNP Ltd. in its capacity as Court-appointed receiver (the “**Receiver**”) of the undertaking, property and assets of TheRedPin, Inc. and The RedPin.Com Realty Inc. (“**TRP Realty**”), for advice and direction, was heard October 22, 2018 at the Court House, 330 University Ave., Toronto, Ontario, with a decision rendered on November 30, 2018, and a supplementary decision on costs rendered on January 2, 2019,

ON READING the Second Report of the Receiver dated September 10, 2018, the Supplement to the Second Report of the Receiver dated September 28, 2018, the Second Supplement to the Second Report of the Receiver dated October 11, 2018, the Third Supplement to the Second Report of the Receiver dated October 19, 2018, the Affidavit of Tarik Gidamy sworn

September 19, 2018; the Transcript of the Cross-Examination of Tarik Gidamy taken October 11, 2018, the Affidavit of Dennise Paccione sworn September 19, 2018, the Transcript of the Cross-Examination of Dennise Paccione taken October 4, 2018, the Affidavit of William Durrell sworn October 3, 2018, the Affidavit of Jared Kalish sworn October 9, 2018, and the Transcript of the Cross-Examination of Jared Kalish taken October 11, 2018, and on hearing submissions from counsel for the Receiver, counsel for the Applicants, counsel for Trilogy Growth Fund LP, counsel for the Court-appointed representatives of all real estate agents who contracted with TRP Realty for the provision of realtor services prior to June 14, 2018 (the “**TRP Agents**”), and counsel for certain underwriters of Lloyd’s of London (“**Lloyd’s**”),

1. **THIS COURT ORDERS AND DECLARES** that none of the commissions receivable due to TRP Realty and payable to the TRP Agents that have been collected by the Receiver or are to be collected by the Receiver are held in trust or are to be held in trust for the benefit of the TRP Agents.

2. **THIS COURT ORDERS** that no determination is made as to whether any commissions receivable due to TRP Realty and payable to outside brokers, assignees or “cashback buyers” that have been collected by the Receiver or are to be collected by the Receiver are held in trust or are to be held in trust for the benefit of such parties.

3. **THIS COURT ORDERS** that the TRP Agents shall be paid \$45,000.00 in costs from the assets of TRP Realty.

4. **THIS COURT ORDERS** that Lloyd’s shall pay \$16,000 in costs to FirePowerDebt GP Inc.

5. **THIS COURT ORDERS** that Lloyd's shall pay \$6,000 in costs to Trilogy Growth Fund LP.

6. **THIS COURT ORDERS** that the Receiver may seek its costs by way of further application.

FIREPOWER DEBT GP INC., AS AGENT
Applicant

-and- **THEREDPIN, INC. et al.**
Respondents

Court File No. CV-18-59964400CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT
TORONTO

CONSENT

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Lawyers for the TRP Agents

FIREPOWER DEBT GP INC., AS AGENT
Applicant (Respondent)

-and- **THEREDPIN, INC. et al.**
Respondents

Court of Appeal File No. C66336

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT
TORONTO

MOTION RECORD
(Returnable February 11, 2019)

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Lawyers for the TRP Agents