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| COURT FILE NUMBER | 2203-05923 |
| COURT | COURT OF QUEEN'S BENCH OF ALBERTA |
| JUDICIAL CENTRE | EDMONTON |
| PLAINTIFF | COBRA MORTGAGE SERVICES LTD. |
| DEFENDANTS | WOLF CREEK GOLF RESORT LTD., WOLF CREEK VILLAGE LTD. and RYAN VOLD |
| DOCUMENT | **PLAINTIFF'S WRITTEN SUBMISSIONS** |



ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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## A. INTRODUCTION

1. This is an application by Cobra Mortgage Services Ltd. ("**Cobra**") for an order appointing MNP Ltd. ("**MNP**") as Receiver or Receiver-Manager over all current and future assets, undertakings and property of Wolf Creek Golf Resort Ltd. ("**Resort**").

## B. FACTS

### I. Background:

2. Resort and the defendant Wolf Creek Village Ltd. ("**Village**") are corporations incorporated pursuant to the laws of the Province of Alberta.[1]

3. The defendant Ryan Vold ("**Ryan**") is a director and voting shareholder of both Resort and Village.[2]

4. Resort owns and operates two, 18-hole golf courses from the Cobra Mortgaged Lands (as hereinafter defined), which are located near Ponoka, Alberta (the "**Wolf Creek Courses**").[3]

5. As part of its operations in respect of the Wolf Creek Courses, Resort manages and maintains a practice facility and clubhouse.[4]

6. Additionally, Resort has developed an RV resort on a portion of the Cobra Mortgaged Lands (the "**RV Resort**").[5]

7. The RV Resort consists of 76 lots. Insofar as Cobra is aware, 41 of those lots are currently under lease to tenants.[6]

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[1] Affidavit sworn by Thomas Hazlett on September 27, 2022 ("**Hazlett Affidavit**") at para. 4 & 5.
[2] Hazlett Affidavit at para. 6.
[3] Hazlett Affidavit at para. 8.
[4] Hazlett Affidavit at para. 9.
[5] Hazlett Affidavit at para. 10.
[6] Hazlett Affidavit at para. 11.

8. Village is the developer of a residential subdivision located near the Wolf Creek Courses and known as "**The Village at Wolf Creek**".[7]

9. Insofar as Cobra is aware, Village has sold some of the lots within The Village at Wolf Creek and remains the owner of some of the lots within that subdivision (the "**Village-Owned Lots**").[8]

10. Cobra does not have a mortgage registered against title to the Village-Owned Lots.[9]

11. Resort has permitted Village to construct a water treatment facility and wastewater treatment facility on a portion of the Cobra Mortgaged Lands (collectively the "**Treatment Facility**").[10]

12. Insofar as Cobra is aware, the Treatment Facility primarily services the lots within The Village at Wolf Creek.[11]

13. Insofar as Cobra is aware, the Treatment Facility is operated by Village.[12]

14. The nature of the arrangements, if any, between Resort and Village that: (1) allowed for the construction of the Treatment Facility on land owned by Resort and (2) the operation of the Treatment Facility from land owned by Resort, are unclear to Cobra.[13]

## II. The Resort Credit Facility:

15. On application by Resort, Cobra agreed to provide to Resort a non-revolving loan in the principal amount $2,750,000.00, with interest thereon at the greater of 8.00% per annum and a variable rate per annum (in either case, both before and after maturity, default and judgment) equal to the rate established by the Royal Bank of Canada from time to time as

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[7] Hazlett Affidavit at para. 12.
[8] Hazlett Affidavit at para. 13.
[9] Hazlett Affidavit at para. 14.
[10] Hazlett Affidavit at para. 15.
[11] Hazlett Affidavit at para. 16.
[12] Hazlett Affidavit at para. 17.
[13] Hazlett Affidavit at para. 18.

the Royal Bank of Canada's prime lending rate for Canadian Dollar Loans, plus 4.30% on the outstanding balance of the principal sum owing from time to time, with such interest calculated daily and payable monthly (the "**Resort Credit Facility**").[14]

16. The terms of the Resort Credit Facility are set out in a written commitment dated August 27, 2018 (the "**Commitment**").[15]

17. The terms of repayment of the Resort Credit Facility were monthly, interest-only payments on any funds advanced by Cobra to Resort, commencing November 1, 2018 and continuing until October 1, 2019, at which time the balance of principal and interest then outstanding was due and payable.[16]

18. As of September 22, 2022, the indebtedness owed by Resort to Cobra pursuant to the Resort Credit Facility amounted to $2,985,617.57, inclusive of principal and interest, plus interest thereafter at the per diem rate of $583.69, plus all of Cobra's costs, including legal costs on a solicitor and own client, full indemnity basis (the "**Resort Indebtedness**").[17]

## III. The Guarantees:

19. To secure all indebtedness owing by Resort to Cobra, including the Resort Indebtedness, the following guarantees were executed in favor of Cobra:[18]

    a) A Guarantee dated September 12, 2018 and executed by Village in favor of Cobra, guaranteeing to Cobra the repayment of all debts and liabilities, present or future, direct or indirect, absolute or contingent, matured or not, at any time owing to Cobra by Resort, including all of Cobra's legal costs on a solicitor and own client, full indemnity basis (the "**Village Guarantee**").

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[14] Hazlett Affidavit at para. 19.
[15] Hazlett Affidavit at para. 20.
[16] Hazlett Affidavit at para. 21.
[17] Hazlett Affidavit at para. 22.
[18] Hazlett Affidavit at para. 23.

b) A Guarantee dated September 12, 2018 and executed by Ryan in favor of Cobra, guaranteeing to Cobra the repayment of all debts and liabilities, present or future, direct or indirect, absolute or contingent, matured or not, at any time owing to Cobra by Resort, including all of Cobra's legal costs on a solicitor and own client, full indemnity basis.

## IV. The Security:

20. To secure due payment of all present and future indebtedness and liabilities of Resort to Cobra, Resort and Village, as applicable, granted to Cobra the following:[19]

a) A promissory note dated September 12, 2018.

b) A collateral mortgage dated September 12, 2018 and registered in the Alberta Land Titles Office on October 2, 2018 as registration number 182 246 658 securing the principal amount of $2,750,000.00, plus interest as set out in the Commitment and legal costs on a solicitor and own client full indemnity basis (the "**Cobra Collateral Mortgage**").

c) An Assignment of Rents and Leases dated September 12, 2018 and registered in the Alberta Land Titles Office by way of caveat on October 2, 2018 as registration number 182 246 659.

d) General Security Agreement dated September 12, 2018 whereby Resort granted a security interest in favor of Cobra in all of its present and after-acquired personal property (the "**Resort GSA**").

e) General Security Agreement dated September 12, 2018, whereby Village granted a security interest in favor of Cobra in all of its present and after-acquired personal property (the "**Village GSA**").

f) Assignment of Lease Proceeds dated May 1, 2019.

[19] Hazlett Affidavit at para. 24.

21. The real property charged by the Cobra Collateral Mortgage will be referred to in these written submissions as the "**Cobra Mortgaged Lands**".

22. At all material times, the Resort GSA and the Village GSA have been perfected by registration at the Alberta Personal Property Registry.[20]

## V. The Initial Default:

23. Default was made by Resort in payment of the Resort Credit Facility on the terms provided for by the Commitment.[21]

24. Additionally, Cobra came to learn that Resort had permitted the registration of a subordinate mortgage against title to the Cobra Mortgage Lands in contravention of the terms of the Cobra Collateral Mortgage.[22]

25. Accordingly, by way of letter dated April 20, 2020, Cobra demanded payment of the Resort Credit Facility.[23]

26. Further, by way of letter dated April 20, 2020, Cobra demanded payment of the amounts owing to it by Village under the terms of the Village Guarantee.[24]

## VI. The Forbearance Agreement:

27. On or about April 20, 2020, a Forbearance Agreement was entered into by the parties (the "**Forbearance Agreement**").[25]

28. By the Forbearance Agreement, the Defendants, as applicable, acknowledged and agreed,

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[20] Hazlett Affidavit at para. 26.
[21] Hazlett Affidavit at para. 27.
[22] Hazlett Affidavit at para. 28.
[23] Hazlett Affidavit at para. 29.
[24] Hazlett Affidavit at para. 30.
[25] Hazlett Affidavit at para. 31.

amongst other things, that:[26]

a) They were in default of their obligations owed to Cobra.

b) Their liability to Cobra was joint and several.

c) They did not dispute their liability to Cobra and had no claims for set-off, counterclaim or damages as against Cobra.

d) The Security (as defined in the Forbearance Agreement) was binding upon them and enforceable against them in accordance with the terms thereof.

29. By the Forbearance Agreement, the Defendants agreed to the appointment of a Receiver of all of Resort and Village's current and future assets, undertakings and properties of every nature and kind whatsoever and wherever situate, including all proceeds thereof.[27]

30. By the Forbearance Agreement, the parties agreed that:[28]

a) The Forbearance Agreement constituted the entire agreement of the parties relating to the subject matter thereof and could not be amended or modified except by written consent executed by all parties.

b) No provision of the Forbearance Agreement would be deemed waived by any course of conduct unless such waiver was in writing and signed by all parties, specifically stating that it is intended to modify the Forbearance Agreement.

31. By the Forbearance Agreement, the Defendants agreed to pay all amounts owed by them to Cobra, as particularized in the Forbearance Agreement, no later than August 1, 2020, failing which Cobra would be at liberty to pursue all remedies available to it at law and in equity including, without limitation, the remedies available to it pursuant to the terms of

[26] Hazlett Affidavit at para. 32.
[27] Hazlett Affidavit at para. 33.
[28] Hazlett Affidavit at para. 34.

the Forbearance Agreement.[29]

32. The purpose of the formal forbearance period provided for by the Forbearance Agreement, and the informal forbearance period that followed, was to allow Resort time to pay the Resort Credit Facility by way of obtaining other financing or through a sale of some or all of its assets.[30]

33. Despite making efforts to do so, Resort has been unable to secure alternate financing or to otherwise pay the Resort Credit Facility and Cobra has lost any confidence it may have once had in Resort's ability to do so.[31]

## VII. The Post-Forbearance Default:

34. Default was made by the Defendants in terms of their payment obligations owed to Cobra pursuant to the Forbearance Agreement.[32]

35. Since April, 2020, Cobra has received limited and sporadic payments from Resort.[33]

36. At the same time, as of April, 2022, Resort had incurred payables exceeding $1,000,000.00, a significant portion of which related to construction of the RV Resort.[34]

37. Cobra has also learned that Resort obtained a Western Economic Diversification loan in the amount of $340,000.00.[35]

38. Further, Cobra recently discovered that NU Edge Construction Ltd. ("**NU Edge**") has obtained a judgment against Resort in the approximate amount of $564,000.00.[36]

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[29] Hazlett Affidavit at para. 35.
[30] Hazlett Affidavit at para. 36.
[31] Hazlett Affidavit at para. 37.
[32] Hazlett Affidavit at para. 38.
[33] Hazlett Affidavit at para. 39.
[34] Hazlett Affidavit at para. 40.
[35] Hazlett Affidavit at para. 41.
[36] Hazlett Affidavit at para. 42.

39. Cobra believes that the NU Edge judgment relates to services and/or materials provided by NU Edge to Resort in respect of the construction of the RV Resort and for which NU Edge has not been paid.[37]

40. Cobra understands that Resort's property tax accounts in relation to the Cobra Mortgaged Lands are in arrears of more than $160,000.00 Some of these arrears appear to date back more than 2 years.[38]

41. Cobra is concerned that during the last approximately 2.5 years, Resort has made only minimal payments to Cobra while at the same time incurring significant liabilities, which it seemingly lacks the capacity to service.[39]

42. Cobra is also concerned that Resort's property tax account remains in arrears, which is a situation that existed as of the date on which the Forbearance Agreement was entered into.[40]

43. For the reasons stated above, Cobra has lost confidence in the ability of Resort's management to operate Resort's business in a commercially reasonable manner and in compliance with its covenants made, and obligations owed, to Cobra.[41]

44. Accordingly, by way of letters dated March 28, 2022, Cobra again demanded payment of the Resort Credit Facility and the amounts owing to it under the Village Guarantee. Those demands have not been complied with.[42]

45. The most recent demands were made by Cobra shortly before the beginning of the 2022 golf season.[43]

46. Given Ryan's significant knowledge and expertise in the operation of golf courses, and in particular the Wolf Creek Courses, Cobra thought it prudent to permit Ryan and Resort to

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[37] Hazlett Affidavit at para. 43.
[38] Hazlett Affidavit at para. 44.
[39] Hazlett Affidavit at para. 45.
[40] Hazlett Affidavit at para. 46.
[41] Hazlett Affidavit at para. 47.
[42] Hazlett Affidavit at para. 48.
[43] Hazlett Affidavit at para. 49.

operate the Wolf Creek Courses for the 2022 season.[44]

47. The 2022 golf season is nearing its end and Cobra now wishes to move forward with the enforcement of its security.[45]

## C. ISSUES

48. Cobra submits that the following issues are to be resolved on this application:

    a) Should the Court order the appointment of a Receiver or Receiver-Manager in respect of Resort?

    b) To the extent a Receiver is appointed, should the Receiver have the power to assign Resort into bankruptcy?

## D. LAW AND ARGUMENT

### I. Should a Receiver be appointed?

49. Cobra satisfied the procedural prerequisite to seeking the appointment of a Receiver in April, 2020 and in March, 2022, when it served demands, which included the notice prescribed by section 244 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985 c. B-3 ("**BIA**"), on Resort.

50. Each of section 243 of the *BIA*[46], section 13 (2) of the *Judicature Act*, R.S.A. 2000, c. J-2[47] and section 65 (7) (a) of the *Personal Property Security Act*, R.S.A. 2000, c. P.7[48] permit for the appointment of a Receiver where it is "just or convenient" to do so.

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[44] Hazlett Affidavit at para. 50.
[45] Hazlett Affidavit at para. 51.
[46] *Bankruptcy and Insolvency Act*, R.S.C. 1985 c. B-3, s. 243 (2). **[Cobra Book of Authorities, Tab 1]**
[47] *Judicature Act*, R.S.A. 2000, c. J-2, s. 13 (2). **[Cobra Book of Authorities, Tab 2]**
[48] *Personal Property Security Act*, R.S.A. 2000, c. P.7, s. 67 (7) (a). **[Cobra Book of Authorities, Tab 2]**

51. The appointment of a Receiver is a discretionary remedy. In *Paragon*, Madam Justice Romaine noted that the factors a court may consider in determining whether it is appropriate to appoint a Receiver include the following[49]:

a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;

b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;

c) the nature of the property;

d) the apprehended or actual waste of the debtor's assets;

e) the preservation and protection of the property pending judicial resolution;

f) the balance of convenience to the parties;

g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;

h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;

i) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;

j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;

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[49] *Paragon Capital Corp. v. Merchants & Traders Assurance Co.*, [2002] CarswellAlta 1531, 2002 ABQB 430 (**"Paragon"**) at para. 27. **[Cobra Book of Authorities, Tab 4]**

k) the effect of the order upon the parties;

l) the conduct of the parties;

m) the length of time that a receiver may be in place;

n) the cost to the parties;

o) the likelihood of maximizing return to the parties; and

p) the goal of facilitating the duties of the receiver.

52. As indicated above, the terms of the Forbearance Agreement required the Defendants to provide a consent Receivership Order. That fact is critical in the analysis of whether the appointment of a Receiver is just or convenient.

53. Circumstances somewhat like those in the present case were considered by Justice Lema in *Proform*[50].

54. In that case, the applicant creditor sought the appointment of a Receiver over a group of companies collectively indebted to it in the approximate amount of $12,000,000.00. The creditor's application followed a significant period of forbearance, followed by a period of interim monitoring. The applicant held a consent receivership order granted at the onset of forbearance and submitted that the debtors' ongoing defaults allowed it to submit that consent order for entry.

55. In part, the debtors opposed the creditor's application on the basis that the appointment of a Receiver was not "just or convenient". Accordingly, one of the issues considered by Justice Lema on the application was whether the debtors were entitled, in the face of the consent receivership order, to raise any arguments on whether the granting of a receivership order was just or convenient.

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[50] *Servus Credit Union Ltd. v. Proform Management Inc.*, [2020] CarswellAlta 903, 2020 ABQB 316.
**[Cobra Book of Authorities, Tab 5]**

56. In dismissing the debtors' argument on this point, Justice Lema noted as follows:

> 50 By signing the consent receivership order, the debtors acknowledged their indebtedness to Servus, their default status, the triggering of Servus's enforcement options (which included applying for a receiver), and that the appointment of a receiver was warranted i.e. once the period of forbearance, purchased (in part) by the provision of the consent receivership order, had expired without clearance of Servus's debt.
>
> 51 The debtors effectively surrendered, on a contingent basis: "If we are not able to clear our defaults in full by the end of the forbearance period, you can enter this receivership order."
>
> 53 It is not open to the debtors or the guarantor, at this stage, to offer arguments about why the receivership order is not "just or convenient" in light of this agreement. Servus lived up to its end of the deal, forbearing from taking enforcement action, first (formally) for four months and then a further (formal) two and a half months, plus informally in the lead-ups to the two forbearance agreements. By the end of those periods, the debtors had not accomplished the one thing that could stave off enforcement action: clearing Servus's debt in full.
>
> 54 Then followed the Interim Monitoring Period, during which Servus consented to being stayed from enforcement, but the debtors' defaults, and Servus's associated enforcement rights, remained the same at its expiry.
>
> 55 Servus has not agreed to any further forbearance or stay period. The consequence that it could seek the receivership order in such circumstances is precisely what the debtors agreed to.
>
> 56 Having effectively conceded their default status and the triggering of Servus's enforcement options, and having expressly agreed that Servus could seek the entry of the consent receivership order in that circumstance, the debtors have blocked themselves from resisting the granting of the orders i.e. beyond forbearance-related arguments, as discussed further below.

57. As was the case in *Proform,* the Defendants here have acknowledged their indebtedness to Cobra, have acknowledged that they are in default of their obligations owed to Cobra and have acknowledged that the appointment of a Receiver is appropriate upon the occurrence of one or more triggering events, including non-payment of the Cobra indebtedness in full by the forbearance period end date.

58. Having conceded their default and effectively surrendered, Cobra submits that it is not open to the Defendants to offer substantive arguments as to why the granting of a Receivership Order is not just or convenient.

59. In *Proform*, Justice Lema also considered the court's duty when presented with a consent order and noted that "**many cases confirm that it is not simply to act as a rubber stamp.**"[51] Justice Lema went on to review the relevant case law, which he summarized as follows:

> On how to approach a consent order, the guiding principles are as follows:
>
> - the Court is not obliged, from the mere fact of consent, to grant a consent order; and
> - the Court must be satisfied (at minimum) that:
>   - it has the jurisdiction to grant the order;
>   - if it has the jurisdiction, any preconditions (statutory or common law) to the exercise of its jurisdiction are met;
>   - consent has actually been provided;
>   - the consent is not the product of fraud, duress, or undue influence or otherwise tainted;
>   - where the consent was provided on a conditional basis (e.g. order not to be entered unless certain conditions are satisfied), the condition(s) are satisfied;
>   - the proposed relief does not exceed that consented to; and
>   - consent aside, the ordered relief is warranted in the circumstances[52].

60. Clearly, this court has jurisdiction to grant a Receivership Order and, as noted above, Cobra has met the precondition to the exercise of the Court's jurisdiction.

61. Cobra submits that there is no question that the Defendants consented to a Receivership Order and there is nothing to suggest that the Defendants' consent was tainted in any way.

62. In that regard, Cobra notes that by the Forbearance Agreement, the Defendants acknowledged that they were given the opportunity to obtain independent legal advice with respect to the execution of the agreement and further acknowledged that they were

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[51] *Proform* at para. 57.
[52] *Proform* at para. 60.

executing the agreement of their own free will and without compulsion, pressure or undue influence by Cobra.

63. Finally, the conditional consent of the Defendants to the granting of a Receivership Order became unconditional when the forbearance period expired without the indebtedness owing to Cobra being paid in full.

64. With the above said, the question becomes whether it is indeed just or convenient to appoint a Receiver here.

65. As Justice Lema noted in *Proform,* it is at this stage that the Defendants' consent has its most critical effect. By giving that consent, the Defendants conceded that if and when the forbearance period ended, Cobra could move forward to seek the appointment of a Receiver without any substantive argument or objection by them.[53]

66. Accordingly, on the "merits" review (i.e. whether it is just or convenient to appoint a Receiver), Cobra submits that the focus should be on the circumstances identified in its application materials.[54]

67. The factors cited by Madam Justice Romaine in *Paragon* may be customized by the court to prioritize the facts that best articulate the interests at play[55].

68. A relevant instance of customization is found in *Paragon* itself, where Justice Romaine noted:

> In cases where the security documentation provides for the appointment of a receiver, which is the case here with respect to the General Security Agreement and the Extension Agreement, the extraordinary nature of the remedy sought is less essential to the inquiry[56].

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[53] *Proform* at para. 66.

[54] *Proform* at para. 69.

[55] *Re Alexis Paragon Limited Partnership*, [2014] CarswellAlta 165, 2014 ABQB 65 at para. 51.
**[Cobra Book of Authorities, Tab 6]**

[56] *Paragon* at para. 28.

69. The Paragon factors were similarly applied by this court in *Kasten*:

> The security documentation in the present case authorizes the appointment of a Receiver...Thus, even if I accept the argument that the Applicant Kasten has not been able to demonstrate irreparable harm, that itself would not be determinative of whether or not a Receiver should be appointed in this matter. It is not essential for a creditor to establish irreparable harm if a receiver is not appointed[57].

70. In *Can-Pacific Farms*, the British Columbia Supreme Court took this reasoning further, essentially reversing the onus as to whether a receiver should be appointed. The court confirmed that where a secured creditor is seeking a receivership order and default under the security is proven, a receiver should be granted as a right unless there are compelling commercial or other reasons to **not** grant the order.[58]

71. Of course, given their execution of the Forbearance Agreement, Cobra's position is that the Defendants are precluded from making substantive arguments against the appointment of a Receiver.

72. Having regard to the foregoing, Cobra submits that it is both just and convenient to appoint MNP Ltd. as Receiver in respect of both Resort and Village, for reasons including the following:

a) Cobra is Resort's first-ranking secured creditor, holding a mortgage against title to Resort's real property and a security interest in all of Resort's present and after-acquired personal property.

b) It is an express term of both the Cobra Collateral Mortgage and the Resort GSA that upon default, one of the remedies available to Cobra is the appointment of a Receiver.

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[57] *Kasten Energy Inc. v. Shamrock Oil & Gas Ltd.*, [2013] CarswellAlta 153, 2013 ABQB 63 at para. 21. **[Cobra Book of Authorities, Tab 7]**

[58] *Canadian Imperial Bank of Commerce v. Can-Pacific Farms Inc.*, [2012] CarswellBC 813, 2012 BCSC 437 at para. 14. **[Cobra Book of Authorities, Tab 8]**

c) The nature of the business carried on by Resort is such that it should be marketed and sold as a going concern. Cobra submits that a receivership is the only practical means by which to do so and further submits that an organized sale by a Receiver is likely to maximize recovery for creditors.

d) The Resort Credit Facility has been in default since at least April, 2020.

e) Formal forbearance arrangements were in place until August, 2020, with a significant period of informal forbearance after that.

f) The purpose of the forbearance, both formal and informal, was to allow Resort the opportunity to repay the Cobra indebtedness, through a sale of its assets, the procurement of replacement financing or otherwise. None of this has materialized.

g) Over the past 2 years, only sporadic payments have been made against the indebtedness, while Resort has continued to incur liabilities, including payables of approximately $1,000,000.00, a Western Economic Diversification loan of $340,000.00 and judgment debt of more than $560,000.00.

h) Resort's property tax accounts are in significant arrears, with some of those arrears dating back 2 or more years.

i) Cobra has lost confidence in the ability of Resort's management to operate its business in a competent and commercially reasonable manner and in compliance with the covenants and obligations owed by Resort to Cobra.

j) A court appointment is necessary to enable the Receiver to carry out its duties effectively and efficiently.

k) A Receivership Order would place all of Resort creditors and stakeholders on a level and transparent playing filed under the administration of the Court, which would ensure the consistent and lawful treatment of all stakeholders.

l) Cobra is acting in good faith and in a commercially reasonable manner in respect of the appointment of a Receiver.

73. Accordingly, Cobra submits that it is just and convenient for the Court to appoint a Receiver in respect of both Resort.

## II. If appointed, should the Receiver have the power to assign Resort into bankruptcy?

74. The form of Receivership Order sought by Cobra would empower the Receiver to assign Resort into bankruptcy with approval of the Court.

75. The template Receivership Order (the "**Template**") does not explicitly grant a Receiver the authority to assign a debtor into bankruptcy. The relevant explanatory notes to the Template provide as follows:

> There is no specific provision allowing the Receiver to make an assignment into bankruptcy or to consent to the making of a Bankruptcy Order under the BIA. While some case law permits Receivers to take such steps, typically Receivers seek prior Court approval even where the specific power to do so is included in the Order. Bankrupting the debtor may reverse priorities and prejudice or favour certain creditors over others. Bankruptcy is a sufficiently material substantive and final act that, if a Receiver is empowered to bankrupt the debtor, it should be expressly brought to the Court's attention[59].

76. As the relevant explanatory notes indicate, the Court has authority to empower the Receiver to assign the Resort into bankruptcy.

77. In *Gustin,* the Ontario Superior Court considered the question of whether a Receiver may assign a debtor into bankruptcy. In concluding that the court had such authority, Justice Rady remarked that:

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[59] Alberta Template Receivership Order Explanatory Notes, page 4. **[Cobra Book of Authorities, Tab 9]**

> Further, the Court is empowered to authorize the Receiver to file an assignment in bankruptcy. There is ample authority supporting that conclusion, including the decisions to which reference has been made, but also the cases cited in those decisions[60].

78. The decisions cited by Justice Rady in *Gustin* included *Sun Squeeze* and *Owen Sound.*

79. In *Sun Squeeze*, Justice Farley commented that he "**did not see that there is any dispute that this Court has the power to authorize the Court-appointed Receiver and Manager to either file an assignment in bankruptcy or consent to the Petition**"[61] and further remarked that: "**Courts in Canada have specifically held that the Court has jurisdiction to authorize and direct a Court-appointed [Receiver and Manager] or liquidator to put a debtor company into bankruptcy**"[62].

80. Justice Farley went on to quote the Manitoba Court of Appeal decision in *Re Brandon Packers Ltd.* as follows:

> Must the Court then close its eyes to the facts reported by its own officer? It is my feeling that no amount of bankruptcy or winding-up legislation can fetter the Court to the extent that it must remain blind to the reality of bankruptcy.
>
> In this case, the Court directed its appointee to make an assignment in bankruptcy. It is true the Court might have suggested to a creditor that he launch a petition to have the company declared bankrupt: but this, surely, is asking the Court to shirk its plain responsibility and place that responsibility on some third party. When the affairs of the company are under the jurisdiction of the Court, it must accept and fulfill its duty and give judgment "according to the very right and justice of the case"[63].

81. In *Owen Sound*, Justice Brown, in concluding that a receiver-manager had the authority to wind-up a debtor company, confirmed that "[i]t is well settled that a court possess the

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[60] *RBC v. Gustin*, [2019] CarswellOnt 14764, 2019 ONSC 5370 at para 15. **[Cobra Book of Authorities, Tab 10]**

[61] *Royal Bank v. Sun Squeeze Juices Inc.*, [1994] CarswellOnt 266, [1994] O.J. No. 567 (*"Sun Squeeze"*) at para. 6. **[Cobra Book of Authorities, Tab 11]**

[62] *Sun Squeeze* at para 10.

[63] *Sun Squeeze* at para. 10.

power to authorize a receiver to file an assignment in bankruptcy or consent to a bankruptcy order".[64]

82. The form of Receivership Order sought by Cobra would empower the Receiver to assign Resort into bankruptcy, with the approval of the Court.

83. As noted, although the Template does not specifically allow for the Receiver to assign the debtor into bankruptcy, Cobra submits that there is sufficient authority upon which the Court can rely to provide this power to the Receiver.

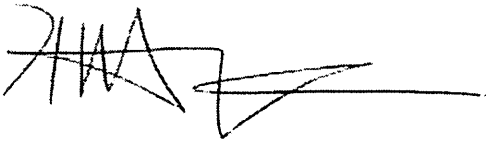
84. Cobra further submits that the Receiver, as an officer of the Court, is best positioned to determine whether an assignment into bankruptcy is in the best interests of all stakeholders and the circumstances surrounding the appropriateness of any future bankruptcy application and its merits can properly be addressed by the Court at that time.

## E. RELIEF SOUGHT

85. For the reasons set out above, Cobra seeks a Receivership Order in respect of Resort.

**ALL OF WHICH** is respectfully submitted this 30th day of September, 2022

**WARREN SINCLAIR LLP**



Per: _____
Matthew R. Park (counsel to the Plaintiff)

[64] *Bank of Montreal v. Owen Sound Golf & Country Club Ltd.*, [2012] CarswellOnt 911, 2012 ONSC 557 at para. 7. **[Cobra Book of Authorities, Tab 12]**

# LIST OF AUTHORITIES

| TAB | DOCUMENT |
|---|---|
| 1. | *Bankruptcy and Insolvency Act*, R.S.C. 1985 c. B-3, section 243. |
| 2. | *Judicature Act*, R.S.A. 2000, c. J-2, section 13 (2). |
| 3. | *Personal Property Security Act*, R.S.A. 2000, c. P.7, s. 67 (7) (a). |
| 4. | *Paragon Capital Corp. v. Merchants & Traders Assurance Co.*, [2002] CarswellAlta 1531, 2002 ABQB 430. |
| 5. | *Servus Credit Union Ltd. v. Proform Management Inc.*, [2020] CarswellAlta 903, 2020 ABQB 316. |
| 6. | *Re Alexis Paragon Limited Partnership*, [2014] CarswellAlta 165, 2014 ABQB 65. |
| 7. | *Kasten Energy Inc. v. Shamrock Oil & Gas Ltd.*, [2013] CarswellAlta 153, 2013 ABQB 63. |
| 8. | *Canadian Imperial Bank of Commerce v. Can-Pacific Farms Inc.*, [2012] CarswellBC813, 2012 BCSC 437. |
| 9. | Alberta Template Receivership Order Explanatory Notes, page 4. |
| 10. | *RBC v. Gustin*, [2019] CarswellOnt 14764, 2019 ONSC 5370. |
| 11. | *Royal Bank v. Sun Squeeze Juices Inc.*, [1994] CarswellOnt 266, [1994] O.J. No. 567 |
| 12. | *Bank of Montreal v. Owen Sound Golf & Country Club Ltd.*, [2012] CarswellOnt 911, 2012 ONSC 557. |