Court File No. CV-22-00689565-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

BETWEEN:

BARRETT KUDLOW CAPITAL MANAGEMENT INC.

Applicant

- and -

SMS PROPERTY TRUST INC.

Respondent

APPLICATION UNDER SUBSECTION 47 (1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C. B-3, AS AMENDED

FIRST REPORT TO THE COURT OF GRANT THORNTON LIMITED IN ITS CAPACITY AS INTERIM RECEIVER OF THE RESPONDENT

NOVEMBER 28, 2022

Grant Thornton Limited
200 King Street, 11th Floor
Toronto, Ontario
M5H 3T4

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INTRODUCTION AND BACKGROUND

1. This report (the "**First Report**") is filed by Grant Thornton Limited ("**GTL**") in its capacity as the interim receiver (the "**Interim Receiver**") of the above-named Respondent (the "**Company**"). GTL was appointed as the Interim Receiver pursuant to the Order of the Honourable Justice Conway of the Ontario Superior Court of Justice (Commercial List) (the "**Court**") made on November 1, 2022 (the "**Order Appointing Interim Receiver**"). A copy of the Order Appointing Interim Receiver and endorsement (the "**Endorsement**") is attached hereto as **Appendix "A".**

2. Barrett Kudrow Capital Management Inc., as a secured creditor of the Company who also holds a first mortgage over the Company's primary asset, that being the property operating as McKellar Place Senior Living located in Thunder Bay, Ontario (the "**Property**"), initially brought a motion on a confidential basis for the appointment of GTL as the receiver over the assets and property of the Company. For the reason as set out in the Endorsement, the Court was not prepared to issue an order to appoint a receiver.

3. Shortly thereafter on that same day and on an *ex parte* basis, the applicant revised its materials and returned to Court and sought the appointment of an interim receiver pursuant to section 47(1) of the *Bankruptcy and Insolvency Act*, R.S.C 1985, c. B-3, as amended (the "**BIA"**). For the reasons as set out in the Endorsement, the Court issued the Order Appointing Interim Receiver.

4. The Order Appointing Interim Receiver and Endorsement is limited to the preservation and protection of the assets, undertakings and properties of the Company, and more specifically the Company's bank accounts.

5. The Order was promptly circulated to the stakeholders on or about November 2, 2022. Neither the Company nor any party served with the Appointment Order has taken any steps to oppose the appointment or terminate the Interim Receivership.

6. The Order Appointing Interim Receiver expires on November 30, 2022 absent a further order.

7. The Interim Receiver understands that the Applicant is in the process of negotiating the terms of a forbearance agreement with the Company, which provides for continued monitoring and oversight of receipts and disbursements by Grant Thornton Limited. Therein, the Applicant advises it will be seeking an order appointing Grant Thornton Limited as Monitor over the Respondent's receipts and disbursements, which mandate includes working with onsite management to collect receipts and process disbursements in line with the Company's Cash Flow (defined below), but otherwise, not take a managerial role with respect to the Respondent's operations. Grant Thornton Limited consents to such appointment.

RESTRICTIONS AND TERMS OF REFERENCE

8. In preparing this First Report, the Interim Receiver has relied upon certain audited and unaudited financial information, and other information contained in the books and records of the Company, as well as discussions with various interested parties (collectively, the "**Information**"). Except as described in this First Report, the Interim Receiver has not audited, reviewed or otherwise attempted to verify the accuracy or completeness of the Information in a manner that would comply with Canadian Generally Accepted Auditing Standards.

9. This First Report has been prepared for the use of this Court to provide general information and an update relating to the Interim Receivership proceedings (the "**IR Proceedings**"). This First Report should not be relied on for any other purpose. The Interim Receiver will not assume responsibility or liability for losses incurred as a result of the circulation, publication, reproduction or use of this First Report contrary to the provisions of this paragraph.

10. Capitalized terms not defined in this First Report are as defined in the Order Appointing Interim Receiver. All references to dollars are in Canadian currency unless otherwise noted.

11. Copies of materials filed in these IR Proceedings are available on the Interim Receiver's Case Website at: www.grantthornton.ca/mckellar.

PURPOSE OF THE FIRST REPORT

12. The purpose of this First Report is:

    a) to provide the Court with an update on the Interim Receiver's activities since the date of the Order Appointing Interim Receiver;

    b) to seek the approval of the Interim Receiver's conduct and fees; and

c) to seek the discharge of Grant Thornton Limited as Interim Receiver and recommend the appointment of Grant Thornton Limited as Monitor of the Company

ACTIVITIES OF THE INTERIM RECEIVER SINCE THE ORDER APPOINTING INTERIM RECEIVER

13. The Interim Receiver has performed the following activities:

<u>General</u>

a) Advised the Company's financial institution to freeze the Company's bank account and to mark as deposit only in order to facilitate the acceptance of monthly rent payments from the residential and commercial tenants;

b) Prior to the establishment of the Interim Receiver's trust account, coordinated with the third-party on-site management for payment of essential operating costs from the Company's bank account (the "**Operations Account**").

c) Established the Interim Receiver's trust account to establish the control and payment of operating costs once the transition from the Operations Account was complete;

d) Coordinated with Epireon Mortgage Capital Corporation, the service agent for the Lender ("**Epireon**"), interim receivership funding in the amount of $150,000 pursuant to the Order Appointing Interim Receiver (the "**Secured Advances**");

e) Worked collaboratively with the Company's controller and site supervisor to ensure that operating expenses being requested were required and proper;

f) Worked collaboratively with the Company and Epireon to ensure on-going operations were not interrupted and that the needs of the residential and commercial tenants were met;

g) Corresponded with Epireon in respect of the principal of the Company returning $200,000 representing some of the monies that were taken out of the Company's bank account prior to the IR Proceedings;

h) Discussed the possible continuation of the court appointment as a Monitorship combined with a forbearance arrangement with the Company; and,

i) Maintained the Interim Receiver's Case Website.

<u>Cash Flow</u>

14. The rent from the tenancy for October was collected and deposited into the Operations Account without interference from the Company following the appointment of the Interim Receiver. The funds in the Operations Account can now only be accessed by the Interim Receiver and as such there have been no further depletion of Company funds for purposes beyond the Company.

15. Upon the appointment of the Monitor, if that is approved by the Court, these funds, and control of this account, would be continued by the Monitor. If no Monitor or further receiver is appointed, these funds would be released to the Company.

16. In addition to the rent, following correspondence with the Company and its principals by the Receiver and the Lender, the Guarantor of the Company arranged for the deposit into the Operations Account of $200,000 of the funds previously taken from the Company for non-Company purposes.

17. The Company has prepared a detailed cash flow dated November 22, 2022 for the period ended March 14, 2023 (the "**Cash Flow**"). Therein, the Cash Flow demonstrates that the Company will maintain sufficient cash to cover its disbursements over the period set out in the Cash Flow, specifically due to the Secured Advances made and further Secured Advances to be made upon the appointment of the Monitor.

18. The Secured Advances were advanced that the same annual rate of interest (9.5%) as the original loan between the Lender and the Company notwithstanding

that the Bank of Canada Prime Rate of Interest has increased materially since the original loan was made in the Spring of 2022.

19. The Interim Receiver understands that the Lender is prepared to lend up to a further $150,000 to the Monitor, following its appointment, should the Monitor recommend it do so.

20. The Interim Receiver has reviewed the Cash Flow, and it appears to cover typical expenses that one would expect for operations of the Respondents.

21. The Interim Receiver notes that over $150,000 which was taken from the Company's Operations Account prior to the appointment of the Interim Receiver as described in the Lender's court materials seeking the Interim Receiver appointment, have not yet been returned or properly accounted for.

22. The Interim Receiver understands that the principal of the Company has agreed, as a provision of the forbearance agreement to repay those monies before the end of March 2023.

23. The Cash Flow does not account for the payment of all arrears which were identified as outstanding in the application for the Lender seeking the appointment of the Interim Receiver as it is anticipated that there will be a further stay of proceedings under the proposed Monitor order.

24. The Interim Receiver confirms that a material number of the residents of the McKellar Place retirement community rely on the provision of services, including meal services by the Company. Given the events leading up to the appointment of the Interim Receiver and the necessity of the continuation of these services, the continuation of a stay and court monitoring is reasonable.

25. The Interim Receiver has reviewed the draft forbearance agreement which is to be signed shortly and in any event prior to the return of the motion on November 30, 2022. The forbearance will appear in the affidavit of Charles Barrett in support of the discharge of the Interim Receiver and the appointment of the Monitor.

26. There has been no resistance or objection to the appointment of the Interim Receiver or its activities to date from the Company or anyone. The forbearance

terms include the approval of the conduct of the Interim Receiver (and Lender) to date and the release of any possible claims against them, and the consent of the Company to the appointment of the Interim Receiver as Monitor and to the Monitor.

27. The forbearance agreement also confirms that the Lender is to continue to work with the Company during the forbearance period, which is set to run for one year.

28. The Interim Receiver has developed a working relationship with the staff of the Company and with the Lender and believes that they can work together to maintain operations while the Company and the principal seek to meet the terms of the forbearance.

29. The Interim Receiver has incurred fees, including an estimate to complete its mandate, in the amount of $30,025.46 inclusive of HST. Attached as **Appendix "B"** is the affidavit of Jonathan Krieger with respect to those fees. The Interim Receiver believes the $5,000.00 estimate included therein to complete its administration is reasonable assuming the Interim Receiver is discharged on November 30, 2022.

30. The fees incurred by Blaney McMurtry LLP, in its capacity as counsel to the Interim Receiver, have been billed directly to the Lender and therefore are not being presented for approval. In the event Grant Thornton is appointed Monitor and Blaney McMurtry LLP continues as its counsel, future fees will be billed to the Company and taken from the Operations Account, subject to court approval in the ordinary course.

CONCLUSION

31. The Interim Receiver respectfully requests that the Court approve this First Report and the actions, fees and activities of the Interim Receiver described herein.

32. Provided the Forbearance is executed it is understood by the Interim Receiver that the Lender does not intend to seek the appointment of a Receiver and therefore mandate of Grant Thornton Limited as Interim Receiver shall end on November 30.

33. It is expected that the matter on November 30, 2022 will proceed on consent. However, in the event the Forbearance is not executed or a dispute arises between the Lender and the Applicants in respect to same or the terms of the Monitor's appointment, it is understood that the Lender may then ask the court to appoint Grant Thornton LLP as receiver to allow the parties further time to resolve the forbearance or next steps with the Company.

34. The Interim Receiver would recommend in that case a short continuation of the Interim Receiver's mandate as a Receiver for at least 45 days to ensure there is an orderly transfer of the banking and operations to the Company rather than abruptly ending any court oversight or the stay on November 30, 2022.

All of which is respectfully submitted,

GRANT THORNTON LIMITED,
IN ITS CAPACITY AS INTERIM RECEIVER
OF SMS PROPERTY TRUST INC.
AND NOT IN ITS PERSONAL OR
CORPORATE CAPACITY

Per:

____
Jonathan Krieger, CPA, CA, CIRP, LIT
Sr. Vice President

Appendix “A”

Court File No. CV-22-00689565-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE	)	TUESDAY, THE 1st
	)	
JUSTICE CONWAY	)	DAY OF NOVEMBER, 2022

B E T W E E N:

BARRETT KUDLOW CAPITAL MANAGEMENT INC.

Applicant

- and -

SMS PROPERTY TRUST INC.

Respondent

APPLICATION UNDER SUBSECTION 47 (1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C. B-3, AS AMENDED

ORDER
(Appointing Interim Receiver)

THIS APPLICATION, made by Barrett Kudlow Capital Management Inc. ("**BKCM**") for an Order pursuant to section 47 (1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "**BIA**") appointing Grant Thornton Limited ("**Grant Thornton**") as interim receiver (in such capacities, the "**Interim Receiver**") without security, of all of the assets, undertakings and properties of SMS Property Trust Inc. (the "**Debtor**" or "**SMS**") acquired for, or used in relation to a business carried on by the Debtor, was heard this day at 330 University Avenue, Toronto, ON, M5G 1R7.

ON READING the Affidavit of Charles Barrett sworn October 28, 2022 and the Exhibits thereto, and on hearing the submissions of counsel for BKCM, no one appearing for the Debtor, SMS, this matter being heard on an *ex parte* basis, and on reading the Consent of Grant Thornton to act as the Interim Receiver,

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Application and the Application Record of this *ex parte* matter are hereby abridged and validated so that this application is properly returnable today and hereby dispenses with further service thereof. The Applicant is ordered to send a copy of this Order and application materials forthwith to the Debtor by email to sothynath@gmail.com.

APPOINTMENT

2. **THIS COURT ORDERS** that pursuant to section 47(1) of the BIA, Grant Thornton is hereby appointed Interim Receiver, without security, of all of the assets, undertakings and properties of the Debtor acquired for, or used in relation to a business carried on by the Debtor, including all proceeds thereof (the "**Property**").

INTERIM RECEIVER'S POWERS

3. **THIS COURT ORDERS** that the Interim 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 Interim Receiver is hereby expressly empowered and authorized to do any of the following where the Interim Receiver considers it necessary or desirable:

(a) to take possession of and exercise control over any and all proceeds, receipts and disbursements arising out of or from or in respect of the Property;

(b) to manage, operate, and carry on the business of the Debtor, 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 Debtor but only to the extent determined necessary by the Interim Receiver to conserve or protect the Property and or to ensure the continuation of the Debtor's services to the residents of the McKellar Place Seniors Living;

(c) to contact any or all financial institutions holding bank accounts or assets on behalf of the Debtor and to require such financial institutions to place said accounts on deposit only and to direct such financial institutions to allow no withdrawals or payments from said accounts other than with the prior written consent of the Interim Receiver or a further order or of this Court;

(d) 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;

(e) to engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel, including without limitation BKCM, and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Interim Receiver's powers and duties, including without limitation those conferred by this Order;

(f) to receive and collect all monies and accounts now owed or hereafter owing to the Debtor, including without limitation rent, and to exercise all remedies of the Debtor in collecting such monies, including, without limitation, to enforce any security held by the Debtor;

(g) to execute, assign, issue and endorse documents of whatever nature in respect of any of the Property, whether in the Interim Receiver's name or in the name and on behalf of the Debtor, for any purpose pursuant to this Order;

(h) to report to, meet with and discuss with such affected Persons (as defined below) as the Interim 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 Interim Receiver deems advisable;

(i) to register a copy of this Order and any other Orders in respect of the Property against title to any of the Property; and

(j) 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 Interim 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 Debtor, and without interference from any other Person.

DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE RECEIVER

4. **THIS COURT ORDERS** that (i) the Debtor, (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 Interim 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 Interim Receiver, and shall deliver all such Property to the Interim Receiver upon the Interim Receiver's request.

5. **THIS COURT ORDERS** that all Persons shall forthwith advise the Interim 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 Debtor, 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 Interim Receiver or permit the Interim Receiver to make, retain and take away copies thereof and grant to the Interim 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 Interim 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 Interim Receiver for the purpose of allowing the Interim 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 Interim Receiver in its discretion deems expedient, and shall not alter, erase or destroy any Records without the prior written consent of the Interim Receiver. Further, for the purposes of this paragraph, all Persons shall provide the Interim Receiver with all such assistance in gaining immediate access to the information in the Records as the Interim Receiver may in its discretion require including providing the Interim Receiver with instructions on the use of any computer or other system and providing the Interim Receiver with any and all access codes, account names and account numbers that may be required to gain access to the information.

RESTRICTIONS ON OPERATING ACCOUNT OF RESPONDENT AND DISCLOSURE

7. **THIS COURT ORDERS** that any and all financial institutions, including banks, credit unions or any party holding assets of the Debtor, having received a copy of this Order from the Interim Receiver ("Banks"), shall restrict any such account to be a deposit only account and to not permit the removal or transfer of monies or assets of the Debtor from said accounts or on credit on behalf of the Debtor except with the written consent of the Interim Receiver hereafter or upon a further Order of the Court.

8. **THIS COURT ORDERS** that the Banks shall, upon receiving a written request from the Interim Receiver accompanied by a copy of this Order, forthwith disclose and deliver up to the Interim Receiver any and all records held by the Bank concerning the Debtor's assets and accounts, including the existence, nature, value and location of any monies or assets or credit, wherever situate, held on behalf of the Debtor by the Banks.

NO PROCEEDINGS AGAINST THE RECEIVER

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

NO PROCEEDINGS AGAINST THE DEBTOR OR THE PROPERTY

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

NO EXERCISE OF RIGHTS OR REMEDIES

11. **THIS COURT ORDERS** that all rights and remedies against the Debtor, the Interim Receiver, or affecting the Property, are hereby stayed and suspended except with the written consent of the Interim 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 Interim Receiver or the Debtor to carry on any business which the Debtor is not lawfully entitled to carry on, (ii) exempt the Interim Receiver or the Debtor 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

12. **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 Debtor, without written consent of the Interim Receiver or leave of this Court.

CONTINUATION OF SERVICES

13. **THIS COURT ORDERS** that all Persons having oral or written agreements with the Debtor 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, food services, food suppliers, transportation services, utility or other services to the Debtor 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 Interim Receiver, and that the Interim Receiver shall be entitled to the continued use of the Debtor's 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 Interim Receiver in accordance with normal payment practices of the Debtor or such other practices as may be agreed upon by the Supplier or service provider and the Interim Receiver, or as may be ordered by this Court.

RECEIVER TO HOLD FUNDS

14. **THIS COURT ORDERS** that all funds, monies, cheques, instruments, and other forms of payments received or collected by the Interim 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 Interim 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 Interim Receiver to be paid in accordance with the terms of this Order or any further Order of this Court. The Interim Receiver shall pay the go forward ordinary operating expenses of the Debtor from the Post Receivership Accounts to the extent funds are available in those accounts, including without limitation, the mortgage payment due to BCKM each month from the Debtor, from the Post Receivership Accounts.

EMPLOYEES

15. **THIS COURT ORDERS** that all employees of the Debtor shall remain the employees of the Debtor until such time as the Interim Receiver, on the Debtor's behalf, may terminate the employment of such employees. The Interim 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 Interim 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*.

LIMITATION ON ENVIRONMENTAL LIABILITIES

16. **THIS COURT ORDERS** that nothing herein contained shall require the Interim 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 Interim Receiver from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Interim Receiver shall not, as a result of this Order or anything done in pursuance of the Interim 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 INTERIM RECEIVER'S LIABILITY

17. **THIS COURT ORDERS** that the Interim 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 Interim Receiver by section 14.06 of the BIA or by any other applicable legislation.

INTERIM RECEIVER'S ACCOUNTS

18. **THIS COURT ORDERS** that the Interim Receiver and counsel to the Interim 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 Interim Receiver and counsel to the Interim Receiver shall be entitled to and are hereby granted a charge (the "**Interim 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 Interim 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.[1]

19. **THIS COURT ORDERS** that the Interim Receiver and its legal counsel shall pass its accounts from time to time, and for this purpose the accounts of the Interim 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 Interim 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 Interim 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 INTERIM RECEIVERSHIP

21. **THIS COURT ORDERS** that the Interim 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 $150,000 (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 Interim 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 "**Interim 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 Interim 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 Interim Receiver's Borrowings Charge nor any other security granted by the Interim Receiver in connection with its borrowings under this Order shall be enforced without leave of this Court.

23. **THIS COURT ORDERS** that the Interim Receiver is at liberty and authorized to issue certificates substantially in the form annexed as Schedule "A" hereto (the "**Interim 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 Interim Receiver pursuant to this Order or any further order of this Court and any and all Interim 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 Interim 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 www.grantthornton.ca/mckellar.

26. **THIS COURT ORDERS** that if the service or distribution of documents in accordance with the Protocol is not practicable, the Interim 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 Debtor's creditors or other interested parties at their respective addresses as last shown on the records of the Debtor 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.

RETENTION OF LAWYERS

27. **THIS COURT ORDERS** that the Interim Receiver may retain solicitors to represent and advise the Interim Receiver in connection with the exercise of the Interim Receiver's powers and duties, including without limitation, those conferred by this Order. The Interim Receiver is specifically authorized and permitted to use the solicitors for the Applicant herein as its own counsel in respect of any matter where there is no conflict of interest. In respect of any legal advice or issue where a conflict may exist or arise in respect of the Applicant and the Interim Receiver or a third party, the Interim Receiver shall utilize independent counsel.

GENERAL

28. **THIS COURT ORDERS** that the Interim 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 Interim Receiver from acting as a Trustee in bankruptcy of the Debtor.

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 Interim 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 Interim Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Interim Receiver and its agents in carrying out the terms of this Order.

31. **THIS COURT ORDERS** that the Interim 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 Interim 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 Plaintiff shall have its costs of this motion, up to and including entry and service of this Order, provided for by the terms of the Plaintiff's security or, if not so provided by the Plaintiff's security, then on a substantial indemnity basis to be paid by the

Interim Receiver from the Debtor's 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 five (5) days' notice to the Interim Receiver and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

Conway J.

Signature

SCHEDULE "A"

INTERIM RECEIVER CERTIFICATE

CERTIFICATE NO. [insert number]

AMOUNT $[insert amount]

1. THIS IS TO CERTIFY that [insert name of receiver], the receiver (the "Interim Receiver") of the assets, undertakings and properties [insert name of debtor] acquired for, or used in relation to a business carried on by the Debtor, including all proceeds thereof (collectively, the "Property") appointed by Order of the Ontario Superior Court of Justice (Commercial List) (the "Court") dated the [insert day] day of [insert month], 2022 (the "Order") made in an action having Court file number [insert court file number]-CL, has received as such Interim Receiver from the holder of this certificate (the "Lender") the principal sum of $[insert amount], being part of the total principal sum of $[insert amount] which the Interim 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 [insert day] day of each month] after the date hereof at a notional rate per annum equal to the rate of [insert rate] per cent above the prime commercial lending rate of Bank of [insert bank] 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 Interim 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 Interim Receiver to indemnify itself out of such Property in respect of its remuneration and expenses.

1. All sums payable in respect of principal and interest under this certificate are payable at the main office of the Lender at Toronto, Ontario.

2. 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 Interim Receiver to any person other than the holder of this certificate without the prior written consent of the holder of this certificate.

3. The charge securing this certificate shall operate so as to permit the Interim Receiver to deal with the Property as authorized by the Order and as authorized by any further or other order of the Court.

4. The Interim 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 October, 2022.

[insert name of receiver], solely in its capacity as Interim Receiver of the Property, and not in its personal capacity

Per: ____________________________________

Name: [insert name]
Title: [insert title]

Court File No.

BARRETT KUDLOW CAPITAL MANAGEMENT INC.
Applicant

and

SMS PROPERTY TRUST INC.
Respondent

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST
Proceeding commenced at Toronto

ORDER
(Appointing Interim Receiver)

BLANEY MCMURTRY LLP
Barristers & Solicitors
2 Queen Street East, Suite 1500
Toronto, ON, M5C 3G5

David T. Ullmann (LSO # 42357I)
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Counsel for the Applicant

SUPERIOR COURT OF JUSTICE

COUNSEL SLIP

COURT FILE NO.: **CV-22-00689565-00CL** **DATE:** **1 November 2022**

NO. ON LIST: **5**

TITLE OF PROCEEDING: **Barrett Kudlow vs SMS Property**

BEFORE JUSTICE: **CONWAY J.**

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party, Crown:

Name of Person Appearing	Name of Party	Contact Info
David T. Ullmann		416-596-4289
Lea Nebel		dullmann@blaney.com/ lnebel@blaney.com

For Defendant, Respondent, Responding Party, Defence:

Name of Person Appearing	Name of Party	Contact Info

For Other, Self-Represented:

Name of Person Appearing	Name of Party	Contact Info

ENDORSEMENT OF JUSTICE CONWAY:

The Applicant, Barrett Kudlow Capital Management Inc., brings this Application to appoint Grant Thornton Limited as the Receiver over the assets and property of SMS Property Trust Inc.

The Application was originally brought before this court on a confidential basis. I directed that the Application be issued with the style of cause and a court number assigned before I would consider granting any relief. The Applicant has now done so.

The Applicant sought the appointment of a Receiver under s. 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended ("**BIA**"). However, since the 10 day notice period under the BIA had not expired, I advised counsel that I was not prepared to appoint a Receiver under s. 243(1). The Applicant revised its materials and returned to court several hours later to seek the appointment of an Interim Receiver under s. 47(1) of the BIA.

The Application for an Interim Receiver is brought on an *ex parte* basis. I am prepared to grant the order *ex parte* given the evidence before me of serious concerns about the financial condition (and alleged irregularities) of SMS' operations. Among other things, SMS operates the McKellar Place Seniors Living in Thunder Bay, Ontario, with over 100 seniors living at the property. According to Mr. Barrett's affidavit, there are arrears of utilities and realty taxes for the property and insufficient funds to cover operating expenses (including food for the residents). Even more concerning, there appear to be unaccounted for withdrawals of over $400,000 from the SMS operations account. The Applicant's counsel sent a letter to SMS on October 18, 2022 requesting an explanation for these withdrawals. No satisfactory response has been provided.

Rent is due on November 1, 2022. The Applicant wishes to protect these funds and ensure that they are used properly for the expenses of the property and the services to the residents.

The appointment of an Interim Receiver is warranted under the circumstances. I am granting this order and have reviewed it carefully with counsel to ensure that it is not overreaching. The borrowing limit is reduced to $150,000; the powers of the Interim Receiver are appropriately restricted, and there is a comeback clause that permits any interested person to return to court on five days' notice. According to s. 47(1) of the BIA, the order will expire in 30 days at the latest.

All materials for today's hearing are to be uploaded to CaseLines forthwith.

I will hear any return of this matter, if I am available. If I am not available, it may be heard by any judge of the Commercial List.

Order to go as signed by me and attached to this endorsement. This order is effective from today's date and is enforceable without the need for entry and filing.

Conway J.

Appendix “B”

Court File No. CV-22-00689565-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

BETWEEN:

BARRETT KUDLOW CAPITAL MANAGEMENT INC.

Applicant

- and -

SMS PROPERTY TRUST INC.

Respondent

APPLICATION UNDER SUBSECTON 47 (1) OF THE *BANKRUPTCY AND INSOLVENCY ACT,* R.S.C. 1985, C. B-3, AS AMENDED

AFFIDAVIT OF JONATHAN KRIEGER

I, **JONATHAN KRIEGER**, of the City of Toronto, in the Province of Ontario, **MAKE OATH AND SAY** as follows:

1. I am a Senior Vice President of Grant Thornton Limited, ("GTL") which was appointed as Interim Receiver (the "**Interim Receiver**") pursuant to an Order in relation to these Interim Receiver proceedings. As such, I have knowledge of the matters hereinafter deposed to, except where stated to be on information and belief and where so stated I verily believe such to be true.

2. Attached and marked as Exhibit "**A**" to this my affidavit is a detailed billing setting out the fees and disbursements of GTL incurred in its role as Interim Receiver of the Respondent from November 1, 2022 to November 24, 2022 plus a provision for estimated fees to November 30, 2022 in the amount of $26,571.20 and HST of $3,454.26 for a total of $30,025.46. The average hourly rate is $487.54

3. Given the complexity of this insolvency matter, I believe the hourly rates and the total amount of fees are reasonable and comparable for insolvency services of this nature rendered by other firms in the Province of Ontario.

4. This affidavit is sworn in connection with the approval of the fees and disbursements of GTL and for no improper purpose.

SWORN BEFORE ME at the City of Toronto, in the Province of Ontario, this 28 day of November 2022. Commissioner for Taking Affidavits, etc. Daniel Kenneth Wootton, A Commissioner, etc. Province of Ontario for Grant Thornton Limited Expires April 06, 2025	JONATHAN KRIEGER

Exhibit "**A**" to the Affidavit of Jonathan Krieger,

sworn before me this 28th day of November, 2022.

Commissioner for Taking Affidavits, etc.

Daniel Kenneth Wootton,
A Commissioner, etc. Province of Ontario for
Grant Thornton Limited
Expires April 06, 2025

Court File No. CV-22-00689565-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE INTERIM RECEIVERSHIP OF
SMS PROPERTY TRUST INC.

APPLICATION UNDER SUBSECTION 47 (1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C.B-3, AS AMENDED

BILL OF COSTS

BN 12738 4717 RT0001
Client #335651
Invoice

To professional services rendered as Court-Appointed Interim Receiver of SMS Property Trust Inc. for the period from November 1, 2022 to November 24, 2022.

Date	Full Name	Hours	Detail
November 1, 2022	Bruce Bando	2.50	Amend and send notification letters to counsel; Various correspondence with counsel re: today's Court hearings; Review issued Order and endorsement; Banking notification matters to include amending letter to TD Bank and discussions thereof; Review and execute consent re: receivership.
November 1, 2022	David Collins	0.20	Brief meeting with B. Bando. Draft for case website.
November 1, 2022	Jonathan Krieger	1.50	Calls with Blaneys re: form of order, matters related to IR appointment; Review of draft order; Correspond re: relief requested; Correspond with Eperion; Correspond re: proposed meeting; Call thereto; Correspond re: case website requirements.
November 1, 2022	Rosa Wilford	2.00	Review various internal email instructions from team re Banking: Review Interim Court Order; Review statement of accounts; Locate three branches; Phone calls; Prepare Bank letter for freeze; Correspondences to Financial Institution; Faxes; Notify team; Save on server; Emails
November 2, 2022	Ada Shahini	0.30	Set up website and uploaded Interim receiver and endorsement documentation; Placed a ticket to request abbreviation of URL and redirection; Emailed team back.
November 2, 2022	Bruce Bando	0.30	Case website matters.
November 2, 2022	David Collins	0.20	Brief call with B. Bando. Coordinated with A. Shahini to set up the case website.

Date	Full Name	Hours	Detail
November 2, 2022	Jonathan Krieger	1.20	Call with Management and Eperion; Correspond from counsel; Correspond with banking group re; controls and review of letter; Review of matters related to account set up; Discussions thereto re; EFTs.
November 2, 2022	Rosa Wilford	3.40	Review internal instructions from team re Banking: Review Interim Court Order; Prepare Bank letters; Correspondences and phone calls to and from Bank; For directions on setting up new bank account.; For account on freeze; Correspondences to and from team on providing copies of items to clear; Virtual meeting with team; Various emails; Fax.
November 3, 2022	Ada Shahini	0.30	Uploaded Service List on website and Website folder on server; Request an update from IT on URL redirection; Emailed team back.
November 3, 2022	Bruce Bando	0.30	Various correspondence from counsel; Retrieve information.
November 3, 2022	Jonathan Krieger	0.90	Correspond with team re: banking matters; Correspond from management re; considerations on additional payments; Correspond with team re: case website; Call to Blaneys; Address banking matters.
November 3, 2022	Rosa Wilford	7.50	Various correspondences to and from bank/team re; New Account Application; Review documents; Fill and prepare various forms with detailed information with supporting backup for review and authorized signing; Meet with signing officers; Scan to server; Respond to Bank with relevant signed and requested documents; Emails. Review multiple correspondences and support re invoices / payments requested to be released by McKellar; Prepare bank letters and excel support; Correspondences to bank and team for review, directions, and confirmations; Revisions; Multiple phone calls with bank and McKellar re account on freeze; Emails.
November 4, 2022	Ada Shahini	0.10	Followed up with IT and closed ticket re: URL redirection.
November 4, 2022	Jonathan Krieger	0.20	Correspond with team re: banking matters.
November 4, 2022	Rosa Wilford	1.70	Review email correspondence from McKellar on revised amount to release for SYSCO. Revise bank letter; Notify bank; Correspondences to bank; Followed by voicemail re same; Update team; Emails. Discussion with McKellar on outstanding and future invoices to be paid; Provide format re same.Review further documents from bank for signing for opening new account; Notify team; Respond to bank.

Date	Full Name	Hours	Detail
November 7, 2022	Jonathan Krieger	0.70	Correspond with team re matters related to banking; Correspond re: matters related to account at TD considerations and requested disbursements.
November 7, 2022	Rosa Wilford	0.70	Follow-up correspondences with Bank and to provide updated print screens of account; Respond to phone call from McKellar re next payroll due.
November 8, 2022	Rosa Wilford	2.00	Review correspondences from McKellar followed by phone call; discussion on payments scheduled to clear account for Wednesday, November 9, 2022, and Thursday, November 10, 2022 (due to holiday on Friday, November 11, 2022) and expecting next rents for deposits; Review invoice payments; Prepare bank letter; Correspondences to Bank and Team; Save on server; Emails.
November 9, 2022	Jonathan Krieger	0.50	Discussion with team re; banking; Correspond thereto; Call with Blaneys; Correspond re: matters related to company requests.
November 9, 2022	Rosa Wilford	3.30	Review correspondences from McKellar followed by phone calls; discussion on payments scheduled to clear account for Thursday, November 10, 2022, and Monday, November 14, 2022, along with payments owing to SYSCP and Insurance company 2022. Review invoice payments; Prepare bank letter; Correspondences to Bank and Team; Save on server; Emails. Review documents received from bank; Prepare documents for review and authorized signing by signing officers; Meet with officers; Scan; Respond to bank via secured link provided; Emails to and from Bank.
November 10, 2022	Jonathan Krieger	0.80	Call with Eperion re; matters related to banking, proposed forbearance considerations; Correspond and call with banking team.
November 10, 2022	Rosa Wilford	3.80	Phone calls and emails with McKellar; Discussions on cleared items and print screens; Discussions on next payments to release for SYSCO; Prepare bank letters; Correspondences to and from Bank and with team; Review further correspondences from Bank and respond; Save on server; Update officer on file; Emails.
November 14, 2022	Ada Shahini	0.30	Returned CRA call; Received updated on status of file and request clarification; Spoke to team on file; Emailed team of status update and request for trust examination; Uploaded emails on server.

Date	Full Name	Hours	Detail
November 14, 2022	Rosa Wilford	0.50	Review correspondences from McKellar; Review payment requests; Prepare schedule and share with team; Respond; Emails.
November 15, 2022	Ada Shahini	0.30	Returned CRA call and left voicemail; Received updated contact details for trust examination and spoke to CRA and provided same; Emailed team back and uploaded emails on server.
November 15, 2022	Rosa Wilford	4.00	Various correspondences to and from bank/team re; Account Application; Setup account in Ascend; Prepare bank letter for wire instructions; Prepare bank letter for sweeping of funds; Scan to server; Respond to Bank for status on on-line banking; Notify team for preparation of folders; Emails. Various correspondences to and from McKellar team; on providing print screens of operating account; on providing outstanding invoices; assist with Excel schedule; Emails.
November 16, 2022	Rosa Wilford	4.00	Review various correspondences from McKellar, followed by phone calls; re Discussion on payments scheduled and supporting invoices; Setup multiple new vendors in ascend; Emails. Further correspondences with documents received from TD Bank on setting up new account; Notify team; Emails.
November 17, 2022	Jonathan Krieger	1.10	Review of matters with TD Bank re; account authorizations; Correspond with team re: requested payments.
November 17, 2022	Rosa Wilford	1.00	Review correspondences from McKellar; re payments scheduled to clear account for Friday, November 18, 2022. Meeting with team; Prepare bank letter; Correspondences to Bank and Team; Save on server; Emails.
November 18, 2022	Jonathan Krieger	0.90	Call with Eperion; Correspond with team re: banking matters; Discussions thereto.
November 18, 2022	Rosa Wilford	0.30	McKellar / Team meeting. Correspondences with McKellar; Emails.
November 21, 2022	Jonathan Krieger	0.20	Correspond with Eperion counsel.
November 22, 2022	Bruce Bando	3.20	Draft First Report; Internal discussions thereof.
November 22, 2022	Jonathan Krieger	0.80	Review of draft report; Correspond with team re: parameters thereto.
November 22, 2022	Rosa Wilford	1.50	Various correspondences to and from bank/team re; New Bank Account; Setup on-line access for team; Review secured documents; Phone calls; Team meeting. Respond to phone calls from Epireon and team; Prepare bank letter; Provide wire instructions.

Date	Full Name	Hours	Detail
November 23, 2022	Jonathan Krieger	0.50	Correspond with counsel re; report; Finalize draft report; Correspond with team re: banking matters.
November 23, 2022	Rosa Wilford	1.50	Review correspondences from McKellar followed by phone call from Epireon; Discussion on payments scheduled to clear account on Friday, November 23, 2022, and expecting funds; Review invoice payments; Prepare bank letter; Correspondences to Bank and Team; Save on server; Update team; Emails.

Time Summary

J. Krieger, Senior Vice President	9.30	hours @	$	695.00	$	6,463.50
B. Bando, Vice President	6.30	hours @	$	595.00	$	3,748.50
R. Wilford, Manager	37.20	hours @	$	295.00	$	10,974.00
D. Collins, Sr. Associate	0.40	hours @	$	245.00	$	98.00
A. Shahini, Sr. Associate	1.30	hours @	$	200.00	$	260.00
	54.50				$	21,544.00
Courtesy Discount					$	(1,000.00)
					$	20,544.00
5% Technology and Administration Fees					$	1,027.20
					$	21,571.20
Estimate fee for completion					$	5,000.00
Subtotal time and disbursements					$	26,571.20
HST (13%)					$	3,454.26
Total					**$**	**30,025.46**

Court File No: CV-22-00689565-00CL

BARRETT KUDLOW CAPITAL MANAGEMENT INC.
Applicant

and **SMS PROPERTY TRUST INC.**
Respondent

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

AFFIDAVIT OF JONATHAN KRIEGER

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