Court File No. CV-12-9930-00CL

**ONTARIO**
**SUPERIOR COURT OF JUSTICE**
**(COMMERCIAL LIST)**

**IN THE MATTER OF THE RECEIERSHIP OF First Leaside Wealth Management Inc. and the Applicants listed on Schedule "A"** (collectively, **"FIRST LEASIDE"**)

# FACTUM OF THE RECEIVER
**(Re: Approval of Settlement Agreement)**
**(Returnable July 10, 2019)**

**July 5, 2019**


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Lawyers for the Receiver

## Schedule A – List of Additional Receivership Applicants

First Leaside Finance Inc.
First Leaside Securities Inc.
FL Securities Inc.
Mill Street Limited Partnership
Harmony Townhomes Limited Partnership
First Leaside Management Inc.
Development Notes Limited Partnership
Special Notes Limited Partnership
First Leaside Accounting and Tax Services Inc.
First Leaside Realty Inc.
First Leaside Realty Limited Partnership
First Leaside Realty II Inc.
First Leaside Investors Limited Partnership
First Leaside Premier Limited Partnership
First Leaside Progressive Limited Partnership
First Leaside Realty II Limited Partnership
First Leaside Ultimate Limited Partnership
First Leaside Universal Limited Partnership
Uxbridge Development Limited Partnership
First Leaside Retirement Residences Limited Partnership
First Leaside Venture Limited Partnership
965010 Ontario Inc.
Wimberly Apartments Limited Partnership
1045517 Ontario Inc.
The Shores Limited Partnership
1024919 Ontario Inc.
Old Mill Pond Apartments Limited Partnership
1031628 Ontario Inc.
1056971 Ontario Inc.
The Bluffs of Lakewood Limited Partnership
1376095 Ontario Inc.
F.L. Spring Valley Limited Partnership
1437290 Ontario Ltd.
First Leaside Partners Limited Partnership
First Leaside Opportunities Limited Partnership
1244428 Ontario Ltd.
Preston Racquet Club Real Estate Limited Partnership Series 910PA
Preston Racquet Club Real Estate Limited Partnership Series 910PB
Preston Racquet Club Real Estate Limited Partnership Series 910PC
Preston Racquet Club Real Estate Limited Partnership Series 910PD
PrestonOne Development (Canada) Inc.
PrestonTwo Development (Canada) Inc.
PrestonThree Development (Canada) Inc.

PrestonFour Development (Canada) Inc.
1331607 Ontario Inc.
First Leaside Acquisitions Limited Partnership
Queenston Manor General Partner Inc.
Queenston Manor Limited Partnership
2107738 Ontario Inc.
First Leaside Advantage Limited Partnership
2128054 Ontario Inc.
First Leaside Elite Limited Partnership
1132413 Ontario Inc.
First Leaside Entities Limited Partnership
2067171 Ontario Inc.
First Leaside Expansion Limited Partnership
2085306 Ontario Inc.
First Leaside Growth Limited Partnership
2086218 Ontario Inc.
First Leaside Unity Limited Partnership
First Leaside Visions Management Inc.
2007804 Ontario Inc.
First Leaside Wealth Management Limited Partnership
First Leaside Fund Management Inc.
F.L. Beverages Group Limited Partnership
First Leaside Global Limited Partnership
Special U.S. Notes Limited Partnership
FLWM Holdings Limited Partnership
First Leaside Select Limited Partnership
Cherry Park Retirement Residences Limited Partnership
First Leaside Retirement Residences (Okanagan) Limited Partnership
Orchard Valley Retirement Residences Limited Partnership
The Shores Retirement Residences Limited Partnership
F.L. PrimeTime Living Limited Partnership
2004516 Ontario Inc.

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## PART I – OVERVIEW

1. The First Leaside group of companies structured, marketed and sold investments in various proprietary investment products, primarily in the real estate sector. Following an investigation by the Ontario Securities Commission ("**OSC**") in early 2012, First Leaside commenced proceedings under the *Companies' Creditors Arrangement Act*. In late 2012, these proceedings were converted into the present receivership proceedings, and Grant Thornton Limited was appointed as receiver and manager (in such capacity, the "**Receiver**") to liquidate First Leaside's remaining assets and make distributions to Creditors and Investors.

2. All of the material assets of First Leaside have been realized, other than a claim by the Receiver against First Leaside's principals, David Phillips ("**Mr. Phillips**") and John Wilson ("**Mr. Wilson**"), and Mr. Phillips' wife, Margaret Davis ("**Ms. Davis**").

3. During the course of these Receivership Proceedings, precipitated by the claims by the Receiver and a substantial sanctions order by the OSC, Mr. Phillips and Mr. Wilson made an unsuccessful proposal under the *Bankruptcy and Insolvency Act*, and were subsequently each

deemed to have made an assignment into bankruptcy. A. Farber & Partners Inc. was appointed as trustee in bankruptcy of both men (in such capacity, the "**Trustee**").

4. The Receiver, Mr. Phillips, Ms. Davis, Mr. Wilson, the Trustee and other interested parties have negotiated and settled the Receiver's claims against Mr. Phillips, Ms. Davis, Mr. Wilson and other parties, in consultation with the OSC and certain other key creditors of Mr. Phillips and Mr. Wilson.

5. The only remaining condition of the Settlement is Court Approval. If such Court Approval is granted, the Receiver will be in a position to seek a subsequent order authorizing a final distribution to First Leaside Creditors and Investors, and these Receivership Proceedings can be brought to a conclusion.

6. The Receiver is accordingly seeking an order approving the Settlement, together with certain incidental relief.

## PART II – THE FACTS

7. The facts underlying this motion are more fully set out in the Sixth Report of the Receiver, dated June 27, 2019 (the "**Sixth Report**"). Further information with respect to First Leaside, the events leading up to the Receivership Proceedings and the circumstances leading to the claims settled in the Settlement can be found in the Fourth Report of the Receiver, dated May 25, 2017. Capitalized terms not otherwise defined in this Factum have the meanings ascribed to them in the Sixth Report.

*Background Leading to the Settlement*

8. In its CCAA Proceedings, First Leaside commenced a civil action against Mr. Phillips, Ms. Davis and 970, seeking approximately $6.5 million from Mr. Phillips and 970, and approximately $2.7 million from Ms. Davis in respect of unpaid loans and improper payments of funds out of First Leaside entities (the "**Civil Action**"). The Civil Action has been continued by the Receiver.[1]

9. In addition to the Civil Action, Mr. Phillips was being prosecuted by the OSC, along with Mr. Wilson, which prosecution culminated in a sanctions order in January 2015 requiring:

a) the payment by Mr. Phillips of:

   i. an administrative penalty in the amount of $700,000;

   ii. disgorgement of $8,779,515;

   iii. disgorgement of $7,817,739, jointly and severally with Mr. Wilson;

   iv. the payment of costs in the amount of $340,867.50, jointly and severally with Mr. Wilson;

b) the payment by Mr. Wilson of:

   i. an administrative penalty in the amount of $400,000;

   ii. disgorgement of $7,817,739, jointly and severally with Mr. Phillips;

   iii. the payment of costs in the amount of $340,867.50, jointly and severally with Mr. Phillips. [2]

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[1] Sixth Report at para.21.

[2] Sixth Report at para.22.

10. As a result of the sanctions order, the OSC is the largest creditor of both Mr. Phillips and Mr. Wilson. The Receiver is the second largest creditor of Mr. Phillips.[3]

11. On June 5, 2017, Mr. Phillips and Mr. Wilson each filed a notice of intention to make a proposal. Proposals for each of Mr. Phillips and Mr. Wilson were subsequently filed on July 4, 2017.[4]

12. Both proposals were rejected by creditors at the first meetings of creditors on July 24, 2017, and both men were deemed to have made an assignment in bankruptcy. The Trustee was appointed as trustee in bankruptcy of both bankrupt estates.[5]

13. One of the assets of Mr. Phillips' bankruptcy was a collection of claims that Mr. Phillips had made against First Leaside in the Receivership Proceedings in the aggregate amount of $3,384,425, on account of various unsecured claims (the "**Phillips Claim**"). The Receiver partially disallowed the Phillips Claims, which partial disallowance was disputed by Mr. Phillips.[6]

14. The Receiver submitted a proof of claim in Mr. Phillips' bankruptcy, which included the amounts claimed in the Civil Action (the "**Receiver's Claim**"). The Trustee accepted a portion of the Receiver's Claim and disallowed the other porition.[7]

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[3] Sixth Report at para.23.
[4] Sixth Report at para.24.
[5] Sixth Report at para.25.
[6] Sixth Report at para.26.
[7] Sixth Report at para.27.

15. On February 24, 2017, the Court approved a settlement between the Receiver and the Trustee in respect of the Receiver's Claim and the Phillips Claim, which included the following terms, and which left the Receiver with a substantial claim in Mr. Phillips' bankruptcy:

a) The Trustee withdrew the Phillips Claim and related disputes filed in respect of the Receiver's disallowance of the Phillips Claim;

b) The Receiver and the Trustee agreed that the Receiver's Claim in respect of the Civil Action was accepted as a provable claim in Mr. Phillips' bankruptcy estate and valued at $4,847,132.67;

c) The Receiver paid to the Trustee the amount of $77,534, representing an amount owing to Mr. Phillips as part of the First Interim Distribution.[8]

*The Settlement*

16. Over the past twelve months, settlement discussions took place between the Receiver, the Trustee, and the FL Settlement Parties. The OSC, as Mr. Phillips' and Mr. Wilson's largest creditor, has been consulted by the Receiver throughout the discussions.[9]

17. After protracted negotiations, the Receiver, the Trustee and the FL Settlement Parties have agreed to the Settlement, the material terms of which are set out in the Settlement Agreement and may be summarized as follows:[10]

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[8] Sixth Report at paras.28 and 29.

[9] Sixth Report at para.30.

[10] The following summary is provided for instructive purposes only. Readers are referred to, and encouraged to review, the terms of the Settlement Agreement itself, attached as Appendix "*'. In the event of any inconsistencies between the summary in this Sixth Report and the terms of the Settlement Agreement, the terms of the Settlement Agreement shall prevail in all circumstances.

a) collectively, Mr. Phillips, Ms. Davis, 970, 234 and FL Research agree to pay $450,000 to the Receiver's counsel in trust, for the benefit of the Trustee and the Receiver (the "**Phillips Payment**");

b) collectively, Mr. Wilson, Walker-Wilson and 149 agree to pay $175,000 to the Receiver's counsel, in trust, for the benefit of the Trustee and the Receiver (the "**Wilson Payment**");

c) all distribution holdback amounts held by the Receiver on account of Ms. Davis, being approximately $53,000 (the "**Davis Funds**", together with the Phillips Payment and the Wilson Payment, the "**Settlement Funds**") shall be retained by the Receiver for distribution;

d) the Settlement Funds shall be allocated as between the Receiver and the Trustee, in their sole discretion, provided that the Settlement Agreement requires that the Trustee must receive a minimum of $150,000 in respect of the conditional discharge of Mr. Phillips and $100,000 in respect of the conditional discharge of Mr. Wilson;

e) Mr. Phillips and Mr. Wilson agree to deliver sworn statutory declarations to the Trustee (the "**Statutory Declarations**"), attesting to the limited assets of both parties;

f) upon receipt of the Settlement Funds, the Trustee agrees to immediately seek the written approval of the terms of the Settlement Agreement from certain specified creditors of Mr. Wilson and Mr. Phillips (the "**Creditor Pre-Approvals**");

g) provided the Settlement Funds have been paid and the Creditor Pre-Approvals have been obtained, the Receiver shall, within 60 days of the effective date of the Settlement Agreement, seek the Court's approval of the Settlement Agreement and an order dismissing the action by certain of the Applicants against the FL Settlement Parties ("**Court Approval**");

h) each of the FL Settlement Parties grant comprehensive releases of each other, and of GTL in its corporate capacity, together with undertakings not to sue parties who may pursue subrogated claims against any of the Settlement Parties, and the FL Settlement Parties agree to deliver mutual full and final releases, to be held in escrow (the "**Releases**"); and

i) the Trustee agrees that is will not reference section 173(1)(k) of the BIA in the discharges of Mr. Phillips and Mr. Wilson, which subsection provides that a discharge from bankruptcy may be refused, suspended or granted conditionally if facts related to a bankrupt's fraud or fraudulent breach of trust are brought to the attention of the bankruptcy court.[11]

18. The Phillips Payment and the Wilson Payment have been made and are being held in trust by the Receiver, the Statutory Declarations have been sworn and delivered, the Trustee has advised the Receiver that it has obtained all of the Creditor Pre-Approvals, and the Releases have been executed and delivered in escrow.[12]

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[11] Sixth Report at para.31.

[12] Sixth Report at para.32.

19. The Receiver and the Trustee have determined that the Settlement Funds will be allocated in the following manner:[13]

(i) The entire Davis Funds to the Receiver;

(ii) Of the $425,000 Phillips Payment and $175,000 Wilson Payment, a combined $100,000 will be paid to the Receiver and $525,000 paid to the Trustee.[14]

20. Accordingly, the final condition precedent to the closing of the Settlement Agreement is Court Approval, which the Receiver is seeking at this time.

## PART III – ISSUES AND THE LAW

21. This Factum addresses the sole issue of whether this Court should approve the Settlement.

*This Court has the Jurisdiction to Approve the Settlement*

23. The Ontario Superior Court has held that when assessing a settlement under the *Companies' Creditors Arrangement Act*, Courts should consider the following three factors:

(a) Whether the settlement is fair and reasonable;

(b) Whether the settlement provides substantial benefit to other stakeholders; and

(c) Whether the settlement is consistent with the purpose and spirit of the *Companies' Creditors Arrangement Act.*[15]

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[13] Sixth Report at para.33.

[14] Because the OSC and the Receiver are the largest creditors of Mr. Phillips and Mr. Wilson, the majority of the Trustee's payment under the Settlement Agreement will be distributed to the Receiver and the OSC on account of their proven claims. The OSC has directed that its distribution be paid to the Receiver, for redistribution by the Receiver to Investors. The OSC's contribution to the Receiver will be discussed in further detail in the Receiver's Seventh Report, to be filed in connection with its motion seeking approval of a final distribution.

[15] *Labourers' Pension Fund of Central and Eastern Canada v Sino-Forest Corp.* 2013 ONSC 1078 at para 49, aff'd 2013 ONCA 456, Book of Authorities of the Receiver ("**BOA**") Tab 1.

24. In the context of a receivership, Justice Farley in *Ravelston Corp. Re.* found that the Court must weigh the strengths and weaknesses of the case, including the certainty of settlement in comparison to the uncertainty of litigation and avoidance of delay, in order to determine whether the proposed settlement falls within the range of what is fair and commercially reasonable.[16]

25. This Court considered similar factors in the context of a receivership in *Canadian Microtunneling Ltd. Re.*. In approving the settlement, the Court found the amount of time and expense that would be generated by further litigation to be relevant factors weighing in favour of approving settlement. The main consideration was, ultimately, whether the settlement fell within the range of what is fair and reasonable.[17]

*This Court Ought to Exercise its Discretion to Approve the Settlement*

26. The multi-party Settlement is the result of significant hours of work by numerous parties over the course of several months. It is supported by all of the material creditors of Mr. Phillips and Mr. Wilson, including their largest creditor, the OSC; the settlement is also supported by their trustees in bankruptcy, and the inspectors of their estates.

27. The Receiver has overseen and participated in many of the key stages of the long dispute resolution process with the FL Settlement Parties, and believes that the Settlement is fair and in the best interest of First Leaside stakeholders because, among other reasons:

   a) The Settlement will bring to a conclusion the final material remaining open issue in the Receivership Proceedings, enabling the Receiver to:

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[16] *Ravelston Corp. Re.* 2005 CarswellOnt 4267 at para 3, 142 ACWS (3d) 18, BOA Tab 2.

[17] *Canadian Microtunneling Ltd. Re*, 2010 ONSC 6171 at paras 18 and 21, BOA Tab 3.

i. realize on and recover a material contingent asset of the First Leaside estate;

ii. cease expending estate resources on litigation, which would otherwise be available to stakeholders;

iii. discontinue ongoing administrative expenses incurred in the Receivership Proceedings that are unrelated to the claims;

iv. make a final distribution to Investors; and

v. seek its discharge;

b) The Settlement Funds represent the highest likely realization achievable for the estate, particularly given Mr. Phillip's and Mr. Wilson's bankruptcies and the state of their financial affairs;

c) Although the OSC is not a party to the Settlement Agreement, it was negotiated in consultation with the OSC, and the Settlement will resolve the OSC's extensive claims against Mr. Phillips and Mr. Wilson; and

d) The Settlement will have many of the same benefits in Mr. Phillips' and Mr. Wilson's bankruptcy proceedings as it will in the Receivership Proceedings.

28. In the Receiver's view, the facts of this case therefore satisfy the elements a Court must be satisfied of when approving a settlement: (i) the transaction is fair and reasonable; (ii) the transaction will be beneficial to the debtor and its stakeholders generally; and (iii) the settlement is consistent with the spirit and purpose of the Receivership Proceedings.

**PART IV – RELIEF REQUESTED**

29. For the reasons set out above, the Receiver requests that the Court grant an order approving the Settlement.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 5th day of July, 2019

CHRIS BURR per Caitlin McIntyre

**SCHEDULE "A" – LIST OF AUTHORITIES**

| **Cases** | |
|---|---|
| 1 | *Labourers' Pension Fund of Central and Eastern Canada v Sino-Forest Corp.* 2013 ONSC 1078, aff'd 2013 ONCA 456 |
| 2 | *Ravelston Corp. Re.* 2005 CarswellOnt 4267, 142 ACWS (3d) 18 |
| 3 | *Canadian Microtunneling Ltd. Re*, 2010 ONSC 6171 |

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Proceeding commenced at Toronto

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