Court File No. CV-20-00649154-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

CLEARFLOW COMMERCIAL FINANCE CORP.

Applicant

-and-

TRIGGER WHOLESALE, INC., THE EN CADRE GROUP INC.,
MARK GDAK, JAIMEE LYNN GDAK and JAIMAK REAL PROPERTIES INC.

Respondents

APPLICATION UNDER Sections 243(1) and 47(1) of the *Bankruptcy and Insolvency Act*, R.S.C.1985, c. B-3, Section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 and Rule 40.01 of the *Rules of Civil Procedure*

FACTUM OF THE APPLICANT, CLEARFLOW COMMERCIAL FINANCE CORP.

(Motion Returnable March 17, 2021)

March 10, 2021

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TO: **THE SERVICE LIST**

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PART I - INTRODUCTION AND SUMMARY OF FACTS

<u>Nature of this Proceeding and Relief Requested by the Applicants</u>

1. In this Application, commenced in October, 2020, the Applicant ("**Clearflow**") requests a number of Orders arising from a massive, pre-meditated fraud perpetrated over a number of years against Clearflow by the Respondent Mark Gdak ("**Mark**" or "**Gdak**") and possibly others acting in concert with him. The extent of the fraud against Clearflow runs into the tens of millions of dollars.

2. On this particular Motion, Clearflow requests that the Court grant one element of the relief requested by Clearflow in the Notice of Application, namely, judgment against two of the Respondents, Mark, and his spouse Jaimee Gdak "**Jaimee**"), in respect of personal guarantees executed by them relating to certain indebtedness owed to Clearflow by the Respondent Trigger Wholesale, Inc. ("**Trigger**").

3. The allegations of fraud form a necessary part of the overall narrative, but the Court is not being asked to make a finding in that regard on this motion. Rather, this motion relates solely to liability pursuant to the personal guarantees.

<u>Introduction to the Parties</u>

4. Clearflow is a federally-incorporated Canadian company that has been in business for the past six years of providing financing to medium-sized businesses in Ontario, typically through factoring of accounts receivable, although Clearflow occasionally extends other types of credit facilities to its customers in addition to factoring of accounts receivable.[1]

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1 Affidavit of Martin Rees sworn October 9, 2020 (the "First Rees Affidavit"), para. 2.

5. The Respondent Trigger Wholesale, Inc. ("**Trigger**") is one of Clearflow's customers pursuant to three separate credit facilities, summarized below. Trigger is an Ontario-incorporated company that was in the business of importing and distributing firearms and associated ammunition to customers throughout Canada. Trigger's customers allegedly included small gun shops, the military, police forces and large retailers, specifically, Canadian Tire and Home Hardware.[2].

6. The Respondents The En Cadre Group Inc. ("**En Cadre**") Mark Gdak ("**Gdak**") and Jaimee Gdak ("**Jaimee**") have each executed continuing and unlimited guarantees of the indebtedness of Trigger in favour of Clearflow. Clearflow holds security against all of the personal property and assets of Trigger and En Cadre in the form of separate General Security Agreements over each company.[3]

7. Between April, 2015 and September, 2020, Clearflow was Trigger's primary operating lender and first-ranking secured creditor.[4] The financing provided by Clearflow to Trigger consisted of the purchase, or "factoring", of accounts receivable, purchase order financing and discrete advances made from time to time for alleged business purposes.

8. As of October 6, 2020, being the date referenced in the initial Affidavits of Clearflow personnel sworn in support of the Application, the total amount owed by Trigger in favour of Clearflow was, $48,543,931.75. This amount consists of the total of the purchased accounts

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2 The total amount of indebtedness shown on the Demands for Repayment to be served by Clearflow does not include any additional amounts due and owing to Clearflow pursuant to a separate Royalty Agreement, which Clearflow reserves its rights to claim at a later date.

[3] General Security Agreements and PPSA search, Exhibits "B" and "C", First Rees Affidavit.

[4] First Rees Affidavit, para. 3.

receivable and financed purchase orders, which is $42,943,731.75, which cannot be recovered by Clearflow (as a result of the fact that those invoices and purchase orders were fictitious forgeries).

9. The amount of the Judgment requested includes the total amount of a separate series of advances totalling $5,600,000. This additional financing was advanced, in part, based on forged land titles documents and a forged agreement of purchase and sale which made it appear that Trigger owned (and was about to monetize) considerable real estate assets, which, in reality, it did not own. [5]

10. As part of the overall package of loan and security documents executed by the parties in April, 2016, Mark and Jaimee, who are each officers and directors of Trigger,[6] executed separate, unlimited, continuing guarantees dated April 30, 2015 (the "**Guarantees**") of the full amount of the indebtedness of Trigger in favour of Clearflow.[7]

Introduction Regarding the Fraud

11. The fraud was perpetrated or supported, in part, through falsified invoices; a forged transfer of real property; fake email addresses; falsified emails allegedly sent by representatives of well-known, national Canadian retailers; falsified emails allegedly sent by Clearflow representatives to Bank of Montreal; falsified firearms storage inspection certificates allegedly issued by the Ontario Government; a falsified Real Property Agreement of Purchase and Sale; impersonations of executives employed by Canadian Tire and Home Hardware stores; and phony cheques.

[5] Affidavit of Sandy Kanichis sworn October 9, 2020 (the "First Kanichis Affidavit"), paras. 7 and 10.
[6] Corporation Profile Reports, Exhibits "E", "F" and "G", First Rees Affidavit.
[7] Guarantees, Exhibit "A", First Rees Affidavit.

12. Mark even went so far as to create an elaborate hoax in late 2019/early 2020 to the effect that his mother-in-law, Jaimee's mother, died after a lengthy illness and hospitalization, for the purpose of buying time to provide required financial reporting to Clearflow. To the best of Clearflow's knowledge, Jaimee's mother is alive and well.

13. Clearflow discovered the existence and the extent of the fraud starting in or about September, 2020 when Trigger failed a field audit conducted by an expert engaged by Clearflow to conduct a full field audit of the finances of Trigger. The field auditor discovered numerous inconsistencies and financial irregularities in the financial reporting made by Trigger to Clearflow.[8]

14. The Court-appointed Receiver over the assets and undertaking of Trigger has concluded, that Mark, and possibly other accomplices, personally orchestrated the fraud in an effort to induce Clearflow to advance millions of dollars to Trigger, which it did over a five-year period, in good faith reliance on the truthfulness of the representations made, and documentation supplied, by Mark [9]

15. Mark has not denied his involvement in the fraud or his liability pursuant to his Guarantee (in fact, he has never filed any materials whatsoever in this matter). It is respectfully submitted that Clearflow's request for judgment as against Mark is unopposed and judgment should be granted as requested by this Honourable Court.

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[8] Summary of Field Audit Report, Exhibit "J", First Rees Affidavit; First Rees Affidavit, paras. 36 – 41.
[9] First Report of the Interim Receiver, para. 49; Second Report of the Receiver, para. 15.

16. Jaimee, however, has denied under oath that she was involved in the fraud. She also takes the position that, for reasons outlined in the materials filed by her, Clearflow somehow released her from liability under her Guarantee.

17. There is no merit to Jaimee's position with respect to her liability under her Guarantee, which remains valid and outstanding. Clearflow respectfully requests that the Court grant judgment against both Mark and Jaimee in connection with their personal Guarantees, in the total amount of $48,543,931.75 each (not on a joint and several basis), plus costs.

Prior Orders Issued by the Court in this Matter

18. Immediately upon discovering the fraud, Clearflow issued written demand for repayment and Notices of Intention to Enforce Security ("**NITES**") to Trigger, En Cadre, Mark and Jaimee, and brought the within application for, among other things, the appointment of Grant Thornton Limited ("**GTL**") as interim receiver over the assets and undertaking of Trigger and En Cadre.[10]

19. On October 13, 2020, pursuant to the Order of the Honourable Madam Justice Gilmore, GTL was appointed as Interim Receiver over Trigger and En Cadre.[11]

20. In addition, Clearflow sought and obtained, as part of the Order issued by Justice Gilmore a Mareva injunction against Mark and Jaimee, which restricted their rights to deal with their personal assets pending final adjudication of this matter.[12]

[10] Demand and NITES, First Rees Affidavit, Exhibit "H".
11 Interim Receivership Order of Gilmore J. dated October 13, 2020, Second Report of the Receiver, Appendix 1 ["Interim Receivership Order of Gilmore J."].
[12] Interim Receivership Order of Gilmore J., paras. 8-11.

21. On October 22, 2020, the Honourable Mr. Justice McEwen appointed GTL as a full, National Receiver over Trigger and En Cadre pursuant to s. 243 of the *Bankruptcy and Insolvency Act* with all of the usual powers granted to a Receiver in such circumstances.[13] The Mareva provisions included in the Order of Gilmore J. were incorporated into Justice McEwen's October 22, 2020 Order.[14] The Mareva Injunction continues in force.

The Investigations of the Receiver

22. Since its appointment, the Receiver has investigated various issues, including the disposition or location of millions of dollars defrauded from Clearflow. The Receiver has discovered that Jaimee and Jaimak Real Properties Inc. ("**Jaimak**"), a real estate holding company owned and operated by Jaimee, hold title to high-end watercraft and motor vehicles, expensive jewellery and five separate real properties located in Waterloo Ontario, and in Huron County, Ontario, all of which were directly acquired by Trigger with moneys advanced by Clearflow to Trigger (based on the fraudulent claims and forgeries). These assets are the subject of a separate Motion, brought by the Receiver to be heard at the same time as the within Motion.

Background Regarding the Credit Facilities Extended by Clearflow

23. In 2014, Clearflow partner (and Affiant in this Application) Martin Rees, who has over 35 years experience in banking in the U.K. and Canada, was introduced to Gdak by a common contact person who was familiar with Trigger's business potential. Gdak subsequently discussed with Mr.

13 Receivership Order of McEwen J. dated October 22, 2020, Second Report of the Receiver, Appendix 4 [Receivership Order of McEwan J.].
14 Receivership Order of McEwan J., paras. 8 -11.

Rees the possibility of Clearflow extending credit facilities to Trigger, partly to retire prior indebtedness of Trigger in favour of another lender.[15]

24. Mr. Rees took the lead in conducting due diligence in respect of Trigger on behalf of Clearflow. He learned that Gdak had commenced the business as a sole proprietorship in 2012 and incorporated 2014 and that the firearms distribution business in Canada is heavily regulated by both the federal and provincial governments, as well as the OPP and the RCMP, as one might expect. It typically takes a 2-year period to acquire and establish the necessary licenses, distribution agreements and delivery channels before one can commence business as a firearms distributor in Canada.[16]

25. Given the specialized and heavily-regulated nature of this business, Clearflow was attracted to Trigger on the basis that the barriers to entry in this industry are considerable, and Trigger had spent the time and money to gain the required licenses, approvals relationships and experience necessary to rapidly become a profitable company with positive long-term prospects. A committee consisting of all partners of Clearflow decided to put forward an offer of financing to Trigger.

Details of The Credit Facilities

26. The credit facilities extended by Clearflow to Trigger were summarized in an Offer letter dated April 23, 2015 (the "**Offer Letter**"), and consisted of:

(a) a Master Purchase and Sale Agreement dated April 30, 2015 (the "MPSA");

[15] First Rees Affidavit, paras. 9 and 20.
[16] First Rees Affidavit, para. 21.

(b) a Master Purchase Order Financing Agreement dated April 30, 2015 (the "**PO Financing Agreement**"); and

(c) a Royalty Agreement dated April 30, 2015 (the "**Royalty Agreement**").[17]

27. Pursuant to the terms of the MPSA and the standard terms which form part thereof, Trigger is required to provide Clearflow with a monthly list of all outstanding invoices issued by it to its customers. Clearflow then has the option to purchase all or a portion of these accounts receivable based on a payment to Trigger of 85% of the amounts shown as due and outstanding.

28. Clearflow then collects those receivables in the ordinary course as they are paid by Trigger's customers. These customers supposedly remitted payment to Trigger on 30-60 day payment terms from the invoice date in respect of products ordered and delivered (in fact, most of these "customers" were not customers of Trigger at all and the factored invoices rendered to them, and purchase orders received from them, were faked by Gdak and possible others). Unless and until Clearflow receives payment in respect of its financed purchase orders, any funds advanced to Trigger are considered loans outstanding from Clearflow to Trigger.

29. As of October 6, 2020, Clearflow had purchased almost-entirely phoney accounts from Trigger or extended financing based on mainly fake purchase orders allegedly placed by customers of Trigger, with a total value of $42,943,931.75, which it obviously can never collect upon. In addition, the occasional advances to Trigger based on discrete requests for specific financing for various business purposes totalled $5,600,000.00.

[17] First Kanichis Affidavit, Exhibits "A", "B" and "C".

30. In 2019, Trigger represented to Clearflow that the total AR owed to it by all of its customers was, collectively, $64,074,258.69.[18] Trigger's obviously-false 2019 financial statement indicated that Trigger's total sales in 2019 were in excess of $78 million.[19] As Gdak later admitted to the Receiver, the actual total accounts receivable owed by customers to Trigger was closer to $1.4 million.

Details Regarding the Fraud

31. At the request of Gdak, Clearflow did not follow its usual procedure for collection of accounts receivable, which is specifically provided for in the MPSA, Gdak's stated reason for this request is that the regulations imposed by the RCMP and other federal agencies, require that only Gdak could collect and handle the payments received from customers in respect of sales of firearms.[20] . This arrangement enabled Gdak to carry out the fraud.

32. The fraud involved a form of cheque kiting against Clearflow, in which invoices were forged and presented to Clearflow for purchase. The proceeds of each batch of falsified invoices purchased by Clearflow were deposited into an account held by Trigger, which then drew cheques against that account in favour of itself, and deposited those cheques into a "blocked" account in the name of Trigger. The Gdaks would then provide periodic update emails to Clearflow, falsely advising Clearflow that the blocked account contained funds that constituted payments received from its false customers.[21] The funds in this blocked account were then swept by Clearflow and applied against the outstanding invoices that it had purchased.[22]

[18] First Kanichis Affidavit, para. 7.
[19] Trigger 2019 Financial Statement, First Kanichis Affidavit, Exhibit "D"; Second Report of the Receiver, para. 15.
[20] First Kanichis Affidavit, para. 8.
[21] Affidavit of Martin Rees sworn November 26, 2020 (the "Second Rees Affidavit"), para. 8.
[22] Second Rees Affidavit,, para. 9.

33. In reality, none, or very little, of the funds deposited into the blocked account originated from customers. The vast majority, if not all, of the funds deposited by representatives of Trigger (including Jaimee) into the blocked account consisted of funds received from Clearflow representing the purchase of the next batch of invoices or purchase orders, and transferred by cheque into the blocked account.[23]

34. Thus, the entire fraud depended on Clearflow always purchasing an ever-growing value of accounts receivable, the proceeds of which were simply re-circulated back to Clearflow, less a substantial sweep off the top which permitted the Gdaks to enjoy a substantial lifestyle, that included a Range Rover automobile, expensive jewellery, multiple watercraft with a value over $800,000, a cottage, several investment properties, and multiple all terrain vehicles.[24]

Transactional Validity of the Guarantees

35. Neither Jaimee nor Mark deny signing the Guarantees. They do not take the position that the signatures that appear on the Guarantees are not theirs, nor do they claim that the Guarantees were signed under duress. There is no evidence to suggest, nor does Jaimee claim, that she did not know what she was signing or the legal effect of her Guarantee.

36. The Court should note that Trigger, Mark and Jaimee were represented by legal counsel, Brian Kelly, in respect of the transaction (Mr. Kelly's signature appears on the Guarantees themselves as "witness"). In addition, the evidence demonstrates that Jaimee was not a stranger to the business, nor does she fit into the trope of the hapless, unsophisticated housewife who signs

[23] Second Rees Affidavit, para. 10.
[24] Second Rees Affidavit, para. 11.

a personal guarantee of the debts of her husband's business, in which she has no involvement, with no benefit or consideration to her whatsoever. Specifically:

(a) Jaimee was involved with the day to day accounting operations of Trigger. Literally thousands of emails have been exchanged[25] between Jaimee and the Clearflow administration team with respect to[26]:

  (i) processing credit card payments;

  (ii) deposits made into the Trigger Ops Account and the Trigger Blocked Account;

  (iii) deposits made into BMO Bank Trigger Ops Account that consisted of non factored payments;

  (iv) funding requests to Clearflow.[27]

(b) Jaimee had cheque-signing authority for Trigger[28]

(c) A Google search against "Jaimee Gdak" results in a Zoom info page in the name of Trigger. In other words, if one Googles Jaimee, a Trigger Zoom info page comes up as one of the first entries if one "Googles" Jaimee;[29]

(d) a corporate and organizational chart provided by Trigger to Clearflow shows Jaimee as the "Co-owner and SVP" of Trigger, on the same management level as Mark Gdak himself. These charts show that Jamie was the sole owner of the Gdak real estate company, one of the main components of the Trigger corporate structure. In Mr. Gdak's words: "Jaimee Gdak is my wife and business partner. She is 50% co-owner of the company (the new operations company and holding company)." [30]

(e) In addition to her account-collection and banking functions, Jaimee played a major role in the operations of company, at a very senior and "hands on" level. Jaimee attended meetings and was present for numerous conference calls with Clearflow personnel during which she participated directly in discussions of high-level, operational issues[31].

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[25] Affidavit of Sandy Kanichis (the "Second Kanichis Affidavit") sworn November 26, 2020, para. 4.
[26] Second Rees Affidavit, para. 27.
[27] First Kanichis Affidavit, para. 21.
[28] Second Kanichis Affidavit, para. 13.
[29] First Kanichis Affidavit, para. 23.
[30] Second Rees Affidavit, para. 26, and corporate organizational chart, Exhibit "H", Second Rees Affidavit.
[31] Second Rees Affidavit, para. 26 and emails attached as Exhibit "L" to the Second Rees Affidavit.

Alleged Release of the Guarantee

37. As a starting point, it should be noted that Jaimee's Guarantee contains the following language: "No alteration or waiver of this Guarantee or any of its terms or conditions shall be binding on us unless expressly made in writing by us".[32] Accordingly, unless the evidence contains an express, written waiver or alteration of Jaimee's Guarantee, that Guarantee has never been released or waived and continues in force. The evidence contains no such written waiver or alteration.

The May 2, 2019 Conditional Proposal

38. In spring, 2019, Mark Gdak requested that Clearflow consider restructuring the existing 2015 credit facilities, a concept that Clearflow was prepared to discuss, given that expiry date of the term of the original credit facilities was approaching. Clearflow noted later that Mark pushed very hard over the course of 13 months to have Clearflow confirm that Jaimee had been released from her Guarantee, which now appears to have been motivated by the desire to put assets in her name out of the reach of Clearflow.[33]

39. These discussions culminated in Clearflow issuing a non-binding, conditional, proposal (the "**Proposal**") dated May 2, 2019. [34]

40. The first indication that the Proposal is not a binding agreement on the parties can be found by review of the document itself:

(a) First line, page 1: "I wish to confirm that Clearflow….is pleased to present the following proposal to renew the Master Purchase Agreement dated April 30, 2015 and to terminate and replace the Royalty Agreement dated April 30, 2015…" The

[32] Guarantee, Exhibit "A", First Rees Affidavit, s.17.
[33] Second Rees Affidavit, paras. 6 and 13.
[34] Financing Proposal, Exhibit "A", Second Rees Affidavit.

document is expressed from the outset as a proposal, rather than an agreement or a commitment letter;

(b) Page 4, paragraph 10: "The foregoing does not constitute an offer, commitment of binding agreement to enter [into] the Amended Credit Facilities unless and until approved by Clearflow's Credit Committee and/or Board in writing and execution of Documentation as described herein". Neither the Credit Committee (which consists of Mr. Rees, Ms. Kanichis and the Directors of Clearflow, Mr. Petersen and Randy Rutherford), nor the Board, of Clearflow ever approved the restructuring or authorized anyone on behalf of Clearflow to sign the amended credit facility documents;

(c) Further, the "Documentation" referenced at page 4, paragraph 10 consisted of an Amended Master Purchase and Sale Agreement and an Amended Master Purchase Order Financing Agreement. Neither document was ever signed by Clearflow, indicating that the overall restructuring of the credit facilities was never completed (although Clearflow did ultimately make over-advances to Trigger, in excess of the original credit limit contained in the 2015 MPSA);

(d) For greater certainty, the Proposal provides, under the heading "Coterminus" on page 3, that: "The Master Purchase and Sale Agreement and the Master Purchase Order Financing Agreement will be written on a coterminous basis" reinforcing the concept that no one part of the proposed restructuring was effective until all of the required documents had been signed by both parties.

41. None of the documents proposed as part of the restructuring was ever signed by Clearflow. In particular, no specific release of the guarantee was ever signed by Clearflow. The form of the release document itself was not even agreed to by the parties.

42. In addition to the conditions precedent that are evident from the wording of the Proposal itself, Mr. Rees made it abundantly clear to Trigger and its principals from the outset of the discussions that no restructuring would be agreed to or implemented (including the specific release of Jaimee's Guarantee) until certain conditions precedent were satisfied.

43. On April 9, 2019, Mr. Rees emailed Mike Nero, a member of the senior management team at Trigger, and advised that "I shall need to have the partners [of] Clearflow agree to any amendments to the Offer Letter of April 5, 2019 [being a prior interaction of the April 9, 2019

Proposal]. As I stressed yesterday, the deadline of April 15 for financial information is looming, and I truly need something as a guide as to the financial standing of the entity." [35]

44. Discussions ensued between the parties and it became clear that the parties were not in agreement on all terms of the Proposal. This is reflected in an email Mr. Rees sent to Mark Gdak on June 27, 2019, in which he made it clear that certain changes to Clearflow's standard form documents that had been requested by Trigger could not be accommodated. More importantly, he stressed in this letter, once again: "**the receipt of Review Engagement Financial Statements is a requirement** and I seek a timeframe for these outstanding Statements." (emphasis added).[36]

45. By July, 2019, the parties were still engaged in discussions regarding the proposed restructuring of the credit facilities. Interestingly, Mark seemed more concerned with obtaining a release letter in respect of Jaimee's guarantee than in the restructuring of the credit facilities themselves. This is reflected in an exchange of emails between Mr. Rees Mr. Gdak and Mike Nero, another member of the Trigger management team, dated July 3, 2019. In this email exchange, Mr. Rees specifically stated that: "**We do need the Financial Statements to implement the documents – it's a condition**" (emphasis added).[37]

46. It is also important to note that the various exchanges of emails between the parties makes it clear that the Gdaks were seeking a specific form of release letter from Clearflow in respect of the Guarantee. Trigger was invited to provide the wording of such a letter, which it ultimately did, but critically, this form of release letter was neither agreed to, nor signed by Clearflow. Clearflow

[35] Second Rees Affidavit, Exhibit "D".
[36] Second Rees Affidavit, Exhibit "E".
[37] Second Rees Affidavit, Exhibit "F".

would not have executed any such specific release letter in any event, until the conditions precedent had been satisfied, but the lack of any agreed-upon wording for the release letter shows how far apart the parties were from being in agreement that the Guarantee would be released.[38]

47. A year later, in June, 2020, the restructuring was still being discussed. The documents had not been executed, Clearflow's Credit Committee had not authorized the restructuring, and the financial statements remained outstanding. In fact, by June, 2020, not only were the Trigger 2019 financial statements outstanding, the 2020 financial year had ended, and Clearflow required delivery of the 2020 financial statements as well. As time wore on, additional conditions precedent were imposed by Clearflow, the most significant of which was a satisfactory result of the field audit commissioned by Clearflow in respect of Trigger's finances, which is referenced above. These additional due diligence items were summarized in a due diligence checklist, provided to Trigger by Mr. Rees, of items that would need to be satisfied before Clearflow would even consider renewing/restructuring the facility. The results of the field audit were not in any way satisfactory and these due diligence items were never properly addressed.[39]

48. In an email to Mr. Rees dated June 11, 2020, Mark specifically acknowledged the three conditions precedent that had been imposed by Clearflow with respect to the restructuring. To summarize Gdak's words, the conditions precedent consisted of: (1) Review engagement financial statements for 2019; (2) management-prepared financial statements for 2020; (3) satisfactory results of the field audit.[40]

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[38] Second Rees Affidavit, para. 19.
[39] Second Rees Affidavit, para. 20; Petersen Affidavit sworn November 26, 2020 (the "Second Petersen Affidavit"), Exhibit "B".
[40] Second Rees Affidavit, Exhibit "G".

49. The email from Mark Gdak of June 11, 2020 is important in contextualizing the three emails from Mr. Rees that Jaimee relies on in her second Affidavit for the proposition that Mr. Rees had clearly and unequivocally indicated to Mark that Jaimee's Guarantee would be released. Although it is not strictly relevant, it bears observing that there is no allegation or even an insinuation that Trigger or Jaimee relied to their detriment in any way on these emails specifically, or, more generally, on her having been "released" from the Guarantee. There is no corroborating evidence that would even indicate Jaimee thought she had been released.

50. The emails relied upon by Jaimee in her Affidavits all date from early summer, 2019. A full year later, on June 11, 2020, Mark acknowledged in his email referenced above that three conditions precedent to the overall restructuring, which included the release of the Guarantee, remained outstanding. Surely, if the parties were operating on the common understanding that Clearflow's Board or credit committee had agreed to the restructuring and released the Guarantee in summer, 2019, there is no reason why Mark would still be acknowledging outstanding conditions precedent a full year later.

51. In addition, Glenn Petersen, one of the Directors of Clearflow, states in one of his Affidavits filed in support of this Motion, that he personally participated in multiple conversations with Mark in which the importance of the conditions precedent were emphasized by Clearflow.[41] During a conference call in May, 2020, which call included Martin and a partner from Trigger's accounting firm, Mr. Petersen specifically advised that Clearflow would need at least a week or

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[41] Second Petersen Affidavit, para.12.

two after receipt of the financial statements to be in a position to approve the new, expanded credit facility.

52. On or about June 19, 2020, Mark returned to Clearflow one of the documents involved in his requested renewal of the Clearflow credit facilities, namely, the MPSA.[42] Clearflow did not at the time and never has considered that this constituted a legally-binding agreement. The evidence of Glenn Peteresen, a member of Clearflow's Credit Committee and a Director of Clearflow is clear on this point[43]:

(a) Clearflow never signed this document, nor did Clearflow's Board or Credit Committee at any time authorize its execution.

(b) None of the other documents that were part and parcel and necessary components of the restructuring (as set out in the original Proposal signed by Martin on behalf of Clearflow) were signed by either party at this time, or any time (including, for example, the Special Provisions to the Master Purchase and Sale Agreement);

(c) Mark had not initialled the addendum page of the agreement (although he subsequently did so);

(d) The MPSA was backdated by an entire year to July 3, 2019, which was not acceptable to Clearflow; and

(e) The field audit had not yet been completed.

53. Mark was advised by telephone shortly thereafter that the MPSA was not satisfactory and that Clearflow would not sign it in the form signed by Gdak.[44]

54. Mark finally provided 2019 Review Engagement statements (which are fraudulent) on June 25, 2020, 86 days after the 2020 fiscal year end. The following day, June 26, Clearflow received internally-generated, 2020 monthly statements. This was a case of "too little, too late", however.

[42] Second Petersen Affidavit, para. 11 and altered MPSA signed by Mark Gdak (but not Clearflow), Exhibit "C".
[43] Second Petersen Affidavit, para. 11.
[44] Second Petersen Affidavit, para.13.

Even if the financial statements had been accurate, and they were nowhere near accurate or remotely truthful, Clearflow required to time to review and assess those financial statements. Simply providing the financial statement in and of themselves would not result in Clearflow automatically renewing the credit facilities or entering into the revised credit facilities without some further action on Clearflow's part..

55. While the financial statements were an important component of the due diligence process involved in the proposed renewal/restructuring, they were not the only condition precedent. Clearflow still did not have the new MPSA documents in an acceptable form to Clearflow, nor had they been signed back by Clearflow. Clearflow also did not have a satisfactory result the Adler field audit. Also, the documents were never approved by Clearflow's credit committee or Board and were never signed back to Trigger.[45]

Conclusion

56. It is submitted that the evidence shows that Clearflow's conduct, as summarized in the seven separate Affidavits filed in support of this Motion, is consistent with normal lending procedures. The allegations made by Jaimee to the effect that the Guarantee was released defy any notion of commercial reasonableness, and, to put it bluntly, make no sense. There is no reason why Clearflow would have released the Guarantee in the circumstances of this case. Similarly, given Trigger's chronic failure to provide financial statements and other required financial disclosure, or to respond to respond adequately to due diligence requests, no reasonable lender

[45] Second Petersen Affidavit, paras. 15 and 16.

would have restructured the credit facilities and released the Guarantee unless and until Trigger addressed the significant due diligence issues and achieved a passing grade from the field audit.

PART II - STATEMENT OF ISSUES, LAW & AUTHORITIES

57. It is respectfully submitted that the sole issue on this particular Motion is whether this Honourable Court should also issue judgment against Jaimee for the same amount in connection with her Guarantee, or was Jaimee released from the Guarantee as a result of any conduct on the part of Clearflow?

Jaimee was an Officer and Director at the time of the Execution of the Guarantee

58. It is respectfully submitted that the fact that Jaimee did not obtain independent legal advice in respect of the Guarantee is irrelevant with respect to determining the validity of the Guarantee. Jaimee was an officer and a director of Trigger at the time that she executed the Guarantee. Over the past 30 years, Canadian Courts, including the Supreme Court of Canada, have consistently held that an officer or director of a borrower company is not entitled to rely on the defence of lack of independent legal advice in resisting liability pursuant to a personal guarantee executed by that officer or director in respect of the liabilities to a third party of the company in which he or she serves as an officer or director.[46] The Guarantee in this case was not an "accommodation guarantee" signed by Jaimee for the benefit of her husband.

Clearflow was not in a Fiduciary Position with Respect to Jaimee at any time

59. There is no evidence that Clearflow was in a fiduciary relationship (which may, in certain circumstances, give rise to a duty on the part of lender to recommend independent legal advice to

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[46] *Meridian Credit Union v 2428128 Ontario Limited*, 2017 ONSC 4578 at para 23; *Toronto-Dominion Bank v 1503345 Ontario Ltd.*, [2006] O.J. No. 1960 at para 22 (Sup Ct J).

a guarantor) with respect to Jaimee; either at the time that the Guarantee was signed or at any point thereafter.[47] In fact, Jaimee took an active and senior role in managing the company at the highest levels and was aware at al material times of exactly where she stood with respect to Clearflow. She received a direct benefit from the execution of the Guarantee insofar as it induced Clearflow to do business with Trigger, and the success of Trigger directly benefited her.

60. The Court of Appeal has reaffirmed the principle that, generally speaking, the relationship between a financial institution lender and its customer borrower is a purely commercial relationship of creditor and debtor. Absent any special relationship or exceptional circumstances such as would give rise to a fiduciary duty, the courts have consistently held that a lender owes no duty to the borrower in connection with the making of the loan. In particular, the bank owes no duty to its customer to advise the customer not to undertake the loan.[48]

There has been no Undisclosed Material Change to the Principal Debt that Would Prejudice the Position of Jaimee with Respect to Clearflow and Result in the Discharge of her Liability Thereunder

61. In a series of cases starting with *Conlin*, the Courts have found that a material change to the terms between a creditor and principal debtor without the consent of the guarantor can, in certain circumstances, void a guarantee.[49]

62. The starting point for this analysis is the fact that over the six-year period during which Clearflow provided financing to Trigger, the terms and conditions of the credit facilities extended by Clearflow never changed in any material way. For example, guarantees of other guarantors

[47] *Bank of Montreal v. 1480863 Ontario Inc.*, 2007 CanLII 13359 at paras 37-38 (Sup Ct J)
[48] *Baldwin v. Daubney*, 2006 CanLII 32901 at para 12 (ON CA).
[49] *Manulife Bank of Canada* v. *Conlin*, [1996] 3 SCR 415 at para 76 [*Conlin*].

were not released (thereby increasing Jaimee's risk), and security for the debt was never released (which would also have increased Jaimee's risk). The only material alteration to the strict wording of the April, 2015 credit facilities was a gradual increase in the total amount of the loan, such that by 2020, the total amount advanced to Trigger considerably exceeded the total loan limit specified in the April, 2015 loan documentation.

63. The definition of the "Obligations" guaranteed contained in paragraph 1 of the Guarantee makes it clear that it is intended to be a "continuing guarantee", for all obligations and indebtedness of Trigger owed in favour of Clearflow. Other relevant paragraphs include paras. 3 (general provisions), 4 (Clearflow not liable), 5 (no set-off or counterclaim), 7 (reinstatement of Guarantee even if loan Obligations are reduced to zero at any one time, 8 (application of monies by Clearflow), and 17 (General provisions).

64. In fact, paragraph 10 of the Guarantee contains a separate indemnity, in addition to the other obligations contained in the Guarantee, pursuant to which Jaimee is liable to Clearflow for the full amount of any Obligations that are not paid in full by the principal debtor, Trigger. This indemnity alone is sufficient for the Court to find liability in the full amount on the part of Jaimee.

65. Unlike the situation in *Conlin*, the Guarantee in this case is not specifically tied to any one document or loan limit. In fact, there is no monetary limit contained anywhere in the Guarantees, and in s.3 of the Guarantee, Jaimee specifically acknowledged that she would remain liable under the Guarantee for any obligations of Trigger, howsoever arising, notwithstanding any change to the "terms, **<u>or the amount</u>**, or the existence" of the guaranteed obligations. [emphasis added]

66. As the Court stated in *Samson Management*, "the purpose of a continuing all accounts guarantee is to allow the customer and the lender to alter their business arrangements without having to involve the guarantor."[50]

67. In addition, in *Samson Management*, the Hon. Justice Lauwers of the Ontario Court of Appeal made the following statement:

> In my view, while the subsequent advances by RBC to Samson were material alterations to the principal loan contract, they were contemplated by the parties, permitted by the clear language of the guarantee, and inherent in a continuing all accounts guarantee that contemplates increases in the size of the underlying indebtedness. Further, clause (1) of the guarantee expressly permitted RBC to change the terms of the borrowing, which would include changes in performance standards…Thus, despite the material alterations in the underlying loan arrangements, Ms. Cusack's personal guarantee remains enforceable given the clear and unambiguous language of the guarantee and the factual context.[51]

68. It is respectfully submitted that the same arguments apply in the case at bar, particularly in view of the wording of para. 3 of the subject Guarantee.[52]

69. In *Adecon Transport,* cited with approval in *Samson Management*, Echlin J. considered a form of guarantee that is materially similar to the one in the case at bar and found that the defendants had provided personal "continuing all accounts guarantees."[53] The Court further found, that the creditor in that case, Royal Bank of Canada, had no duty to inform the guarantor about future credit facilities, and that the onus was on the guarantor to inquire about the state of accounts.[54] Subsequent, additional loan obligations were not "material alterations to the principal

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[50] *Royal Bank of Canada v. Samson Management & Solutions Ltd.*, 2013 ONCA 313 at para 32 [*Samson Management*].

[51] *Samson Management*, *supra* at para 63.

[52] *See also*, Daniel P. Cipollone, *The Liability of Sureties* (2014) Western Journal of Legal Studies, Volume 4, Issue 2, pp.1-19

[53] *Royal Bank of Canada v. Adecon Transport Inc.*, [2004] O.J. No. 6249 at paras 11-12 (Sup Ct J) [*Adecon Transport*].

[54] *Adecon Transport*, *supra*. at para 14.

contract" in the sense that the Court found in *Conlin*, but were contemplated by the parties in the Guarantee itself.[55]

70. In addition, the evidence in the form of Jaimee's February 21, 2018 access to the Cadence system makes it clear that, as of that date she was unequivocally aware that the amount of the factored invoices totalled in excess of $8 million, meaning she was well aware that her liability under her Guarantee was no longer limited to the total loan amount set out in the 2015 loan documents, signed three years earlier.[56]

71. Second, the 2019 Trigger financial statements for the year ending March 31, 2019 that was delivered to Clearflow show a debt owed to Clerarflow in the form of "Loan Payable" in the amount of $21,362,343. Note 5 to the 2019 Financial Statement provides:

> Advances calculated on accounts receivable are based on a rate of up to 85% of the aggregate net face value of identified accounts. Clearflow has the option to factor receivable with recourse. Balance outstanding a year end totalled $21, 362, 343 on eleigible accounts receivable of $26,438,422…**Clearflow and the Company continued to re-evaluate and increase the respective threshold for lending on an ongoing basis**"[57] (Emphasis added)

72. Jaimee was a director of Trigger at all material times. It is respectfully submitted that the Board of Directors of Trigger, like any company, must have reviewed, considered, and voted to approve the annual financial statements. There can be, it is submitted, no more basic duty for a director that to take part in the consideration and approval of annual financial statements. The 2019 Financial Statements of Trigger are additional, direct evidence of the fact that Jaimee was well aware of exactly where she stood in terms of her exposure under her Guarantee. Not only did

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[55] *Adecon Transport, supra* at para 15.
56 Further Reply Affidavit of Sandy Kanichis sworn March 9, 2021 (the "Third Kanichis Affidavit"), pages 1-3, Cadence Opening Screen Printout, Third Kanichis Affidavit, Exhibit "B", confirmatory email that Jaimee had logged onto Cadence, Third Kanichis Affidavit, Exhibit "A"
[57] 2019 Trigger Financial Statement, First Kanichis Affidavit, Exhibit "D".

Jaimee make no attempt to determine her liability under the Guarantee or otherwise protest, but she specifically approved of the periodic increases in the overall loan limit.

73. Finally, more generally, Jaimee took a direct role in the deposit of cheques, collection of accounts receivable and funding requests from Clearflow. She was a senior executive and member of the management team of Trigger. She was, at times, the point person for Trigger in dealing with funding requests from Clearflow. She signed cheques from Trigger to be deposited into the Clearflow sweep account amounting to millions of dollars.

74. It is submitted that it is impossible that Jaimee was not aware that the original loan limit had long since been exceeded, by many millions of dollars and was no longer applicable or relevant. It is further submitted that the proposition that Jaimee's risk pursuant to her Guarantee was increased without her knowledge, and indeed, without her clear consent, is inconsistent with the evidence. In point of fact, Jaimee was aware of the exact amount of the indebtedness owed to Trigger at any one time, and of her risk if the Guarantee was ever called upon.

Clearflow has Never Released Jaimee's Guarantee

75. It is assumed that the truthfulness of the testimony of Messrs. Rees and Petersen and Ms. Kanichis is not challenged in this regard: Clearflow never intended to release the Guarantee. Accordingly, Jaimee must take the position that, by its conduct, or as a result of some communication or document, Clearflow unintentionally led Jaimee to believe she had been released from her Guarantee, and therefore, that she must be released from her Guarantee.

76. As a starting point, any such release of the Guarantee would need to be in writing, as required pursuant s.17 of the Guarantee excerpted above. Further, anything short of a clear and

unequivocal release of the Guarantee would not comply with the "complete agreement" clause contained in s. 17 of the Guarantee, which provides: "There are no representations, collateral agreements, warranties or conditions with respect to, or affecting, your liability under this Guarantee, other than as contained in this Guarantee".

77. Further, it is submitted that the very idea of Clearflow releasing Jaimee from her Guarantee in the overall circumstances (financial statements provided years late, no specific release of Guarantee, no specific sign-off from the Board or credit committee, the failed field audit) is so unusual and so at odds with normal procedure and commercial reasonableness, that it reinforces the requirement that any such unintentional release would need to be absolutely clear and unequivocal. Mere hints, innuendo or indications of future intent are not sufficient, it is respectfully submitted, for this Court to make a finding that Jaimee was actually released from her Guarantee.

78. The evidence, it is submitted, falls significantly short of establishing the type of clear and unequivocal, written release that would be required by the terms of the Guarantee itself.

PART III - ORDER REQUESTED

79. For the reasons set out above, Clearflow requests that this Honourable Court grant separate Judgments in its favour against each of Jaimee and Mark in the amount of $48,625,279.75 (each).

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of March, 2021.

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SCHEDULE “A”

LIST OF AUTHORITIES

1. *Baldwin v. Daubney*, 2006 CanLII 32901 (ON CA)
2. *Bank of Montreal v. 1480863 Ontario Inc*., 2007 CanLII 13359 (Supt Ct J)
3. *Manulife Bank of Canada v. Conlin*, [1996] 3 SCR 415
4. *Meridian Credit Union v 2428128 Ontario Limited*, 2017 ONSC 4578
5. *Royal Bank of Canada v. Adecon Transport Inc*., [2004] O.J. No. 6249 (Sup Ct J)
6. *Royal Bank of Canada v. Samson Management & Solutions Ltd*., 2013 ONCA 313
7. *Toronto-Dominion Bank v 1503345 Ontario Ltd*., [2006] O.J. No. 1960 (Sup Ct J)

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY - LAWSN/A

CLEARFLOW COMMERCIAL FINANCE CORP. -and- TRIGGER WHOLESALE, INC. et al.
Applicant Respondents

Court File No. CV-20-00649154-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT
TORONTO

FACTUM OF THE APPLICANT,
CLEARFLOW COMMERCIAL FINANCE CORP.
(Motion Returnable March 17, 2021)

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RCP-E 4C (May 1, 2016)