Court File No. CV-18-00608086-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N :

ONTARIO SECURITIES COMMISSION

Applicant

- and -

MONEY GATE MORTGAGE INVESTMENT CORPORATION

Respondent

APPLICATION UNDER
Sections 126 and 129 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended

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FACTUM
OF THE ONTARIO SECURITIES COMMISSION
(Receivership Application and Continuation of Freeze Direction)

November 5, 2018

ONTARIO SECURITIES COMMISSION
20 Queen Street West
22nd Floor
Toronto, Ontario M5H 3S8

Jamie Gibson
Litigation Counsel
LSO No. 62858O

Tel: 416-263-3783
Fax: 416-593-8321

Dihim Emami
Senior Litigation Counsel
LSO No. 57402S

Tel: 416-596-4253
Fax: 416-593-2319

Counsel for the Ontario Securities Commission

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FACTUM OF THE APPLICANT, ONTARIO SECURITIES COMMISSION

PART I – OVERVIEW

1. The applicant Ontario Securities Commission (the "**Commission**") brings this application for orders:

(a) pursuant to section 129 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "***Securities Act***"), appointing Grant Thornton Limited ("**GTL**") as receiver and manager (in such capacities, the "**Receiver**"), without security, of all the assets, undertakings and property of Money Gate Mortgage Investment Corporation ("**MGMIC**"), including all proceeds thereof (the "**Property**");

(b) if necessary, pursuant to subsections 126(5) and 126(5.1) of the *Securities Act*, continuing the Freeze Direction (as defined below) until further order of the Court; and

(c) if necessary, appointing GTL as interim receiver over all of the Property.

2. MGMIC is a mortgage investment corporation that lends money to borrowers which loans are secured by residential and commercial mortgages. Between August 2014 and April 2017, MGMIC raised approximately $11 million from approximately 155 investors through the sale of its preferred shares.

3. Morteza Katebian ("**Ben**") and his son Payam Katebian ("**Payam**") are the principals of MGMIC (the "**Principals**") and a related company Money Gate Mortgage Corp. ("**MGC**"). MGMIC, MGC and the Principals are respondents in an enforcement proceeding before the Commission, in which it is alleged that they defrauded investors through misrepresentations contained in disclosure documents and committed other violations of Ontario securities law.

4. On April 27, 2017, Staff of the Commission ("**Staff**") obtained a temporary cease trade order, which is still in effect and which prevents MGMIC from raising any more capital. In November 2017, MGMIC advised investors that it was winding down its operations and suspending payment of dividends to the investors.

5. Following this announcement, MGMIC continued to make loans and the Principals diverted corporate funds for their personal benefit. Staff have recently uncovered evidence that the Principals diverted over $1.3 million for their personal benefit through transactions carried out off the books of the company, both before and after their announcement that MGMIC was winding down.

6. As a result of the recently discovered evidence, the allegations in the proceedings before the Commission have been expanded to include fraud through the diversion of corporate funds for the

Principals' personal benefit. In addition, a Freeze Direction was obtained on October 29, 2018, from the Commission freezing MGMIC's bank account.

7. Given the misconduct referred to above including the diversion of corporate funds, the Commission seeks the appointment of GTL as a receiver over the Property. The appointment of a receiver is in the best interests of MGMIC's investors and other stakeholders. A receivership is necessary to secure and ensure an orderly realization of the Property under supervision of the Court and distribution of proceeds on an equitable basis.

8. Pursuant to section 126(5) of the *Securities Act*, the Commission must serve and file a notice of application to continue the Freeze Direction within 10 days after the direction being issued. If the Commission's receivership application is not granted for any reason on the original return date, the Commission requests an order continuing the Freeze Direction and/or appointing GTL as Interim Receiver in order to protect the Property.

PART II – FACTS

<u>The Respondent and Key Individuals</u>

9. MGMIC is an Ontario mortgage investment corporation that lends money to borrowers which loans are secured by residential and commercial mortgages. The current mortgage portfolio of MGMIC involves properties located in Ontario.

> Affidavit of Louisa Fiorini sworn November 2, 2018 [**Fiorini Affidavit**], at para 4; Application Record of the Commission [**Application Record**], at Tab 4

10. MGC operated as a mortgage administrator for MGMIC, servicing the MGMIC mortgages and receiving a fee in exchange for its services. MGC is licensed by the Financial Services Commission of Ontario ("**FSCO**") as a mortgage brokerage and mortgage administrator.

Fiorini Affidavit, at para 5; Application Record, Tab 4

11. Ben is a resident of Ontario. Ben is a director, officer, and directing mind of MGMIC and the sole director of MGC.

Fiorini Affidavit, at para 6; Application Record, Tab 4

12. Payam is a resident of Ontario and is Ben's son. Payam is a director, officer, and a directing mind of MGMIC.

Fiorini Affidavit, at para 7; Application Record, Tab 4

Proceedings against MGMIC

13. Between August 2014 and April 2017, MGMIC raised approximately $11 million from approximately 155 investors through the sale of preferred shares of MGMIC. Those investments were pooled and loaned to borrowers, which loans were secured by residential and commercial mortgages.

Fiorini Affidavit, at para 8; Application Record, Tab 4

14. Disclosure and other relevant documents provided to investors outlined various business practices and lending policies, which provided safeguards to reduce risks for investors. MGMIC was supposed to abide by these practices and policies in its operation as a mortgage investment corporation.

Fiorini Affidavit, at paras 9-10; Application Record, Tab 4

15. In fact, between August 2014 and December 2017, MGMIC was not following these practices and policies and MGMIC was operating a far riskier mortgage investment business than the one represented to investors.

Fiorini Affidavit, at paras 15-16; Application Record, Tab 4

Affidavit of Louisa Fiorini sworn April 4, 2017; Application Record, Tab 4H

16. On April 27, 2017, Staff obtained a temporary cease trade order, which is still in effect and which prevents MGMIC from raising any more capital. In November 2017, MGMIC advised investors that it was winding down its operations and suspending payment of dividends to the investors.

Fiorini Affidavit, at paras 13-14; Application Record, Tab 4

17. In December 2017, Staff commenced an enforcement proceeding before the Commission alleging that MGMIC and the Principals had defrauded investors through misrepresentations contained in disclosure documents. Staff also allege that they engaged in unregistered trading and carried out illegal distributions, contrary to sections 25 and 53 of the *Securities Act*.

Fiorini Affidavit, at para 15; Application Record, Tab 4

18. Staff have recently amended their allegations to include fraud through the diversion of corporate funds described below, which was recently discovered by Staff. A merits hearing has been scheduled to begin on January 9, 2019.

Fiorini Affidavit, at para 17; Application Record, Tab 4
Amended Statement of Allegations of Staff; Application Record, Tab 4I

Diversion of Corporate Funds

19. In July 2018, Staff was provided with information indicating that Ben and/or Payam may have caused the diversion of corporate funds from MGMIC for their personal benefit. Between the end of August and October 2018, Staff obtained evidence confirming that such diversions took place, which are described below.

Fiorini Affidavit, at para 18; Application Record, Tab 4

20. These diversions involve transfers to the account of 2399029 Ontario Inc. ("**239 Inc.**"), which is controlled by Ben. Both Ben and Payam are authorized signatories for the bank account of 239 Inc. in which these transfers occurred. This diversion of funds was done in concert with the MGMIC borrowers identified below.

Fiorini Affidavit, at para 19; Application Record, Tab 4

The Mansteel Advance

21. In January 2017, MGMIC purported to make an advance of $445,000 on a second mortgage to a borrower, Mansteel New Liskeard Inc. ("**Mansteel**"). This company is controlled by Arash Missaghi ("**Missaghi**"), who faces criminal charges for fraud and is connected to a number of the properties on which MGMIC held or holds mortgages.

Fiorini Affidavit, at paras 22-25; Application Record, Tab 4

22. Instead of being advanced to Mansteel, $435,196 in loan funds were transferred from Mansteel's solicitor to 239 Inc. (the "**Mansteel Diverted Funds**").

Fiorini Affidavit, at paras 22, 25-27; Application Record, Tab 4

23. The Principals have claimed that 239 Inc. used these funds to make interest payments on behalf of Mansteel and other borrowers. In fact, $208,874 of these funds were transferred to 2450531 Ontario Inc., a company controlled by Ben's common law spouse, Pantea Sahebdivani. Ben and Payam had signing authority over the 2450531 Ontario Inc. account that received these funds.

Fiorini Affidavit, at paras 25-27; Application Record, Tab 4

24. The Mansteel mortgage is now in default and the full principal of $3.9 million remains owing.

Staff Summary of the State of MGMIC's Loan Portfolio; Application Record, Tab 4Z

The Birchmount Advance

25. In December 2017, after the Principals advised Staff and investors that they would wind up the company, MGMIC purported to make advances of $1.6 million to a borrower, World Finance Corporation ("**WFC**"), secured by an interest in a third mortgage on a property located at 4 Birchmount Road in Toronto (the "**Birchmount Mortgage**"). WFC is controlled by Missaghi.

Fiorini Affidavit, at paras 28-32, 37; Application Record, Tab 4

26. From these loan advances, $1,115,000 was transferred from MGMIC to Ben's personal bank account through the following series of intermediaries:

(a) to MGMIC's solicitor in trust;

(b) to WFC's solicitor, in trust, in accordance with the direction of WFC;

(c) to Canadian Business Consultation Inc.;

(d) to 239 Inc.; and

(e) to Ben Katebian's personal bank account.

Fiorini Affidavit, at paras 33-35; Application Record, Tab 4
Staff's Summary of Transfers Related to the Birchmount Mortgage; Application Record, Tab 4U

27. On April 13, 2018, a receiver was appointed by the second mortgagee over the Birchmount Property. The Birchmount Property was sold by the receiver with the approval of the Court. The purchase price for the Birchmount Property was less than the amount claimed to be owing under prior encumbrances. The distribution of the proceeds from the sale of this property is the subject matter of a contested motion in the Birchmount receivership proceeding. To date, MGMIC has not recovered any of the $1.6 million owing under the Birchmount Mortgage.

Fiorini Affidavit, at paras 36-37; Application Record, Tab 4

Current State of MGMIC

28. Ben and Payam continue to be the sole directors and officers of MGMIC and remain in control of the company.

Fiorini Affidavit, para 38; Application Record, Tab 4

29. As of November 2, 2018, MGMIC held nine outstanding loans with a total principal amount owing of approximately $10.5 million. Of these nine loans, at least seven loans are in default. Two loans were made to companies related to Payam.

Fiorini Affidavit, paras 39, 41; Application Record, Tab 4
Staff Schedule on the Status of Outstanding MGMIC Mortgages; Application Record, Tab 4Z

30. Based on the information available to Staff, it appears that the realizable value of MGMIC's loan portfolio is significantly lower than the $10.5 million in principal owing under these loans and the $11 million raised by MGMIC from investors.

Fiorini Affidavit, at para 40; Application Record, Tab 4

31. As at August 2018, MGMIC held approximately $1.16 million in its operating account. On October 18, 2018, MGMIC invested $760,045 in a first mortgage on a property on which it already holds a second mortgage. As a result of that investment and payments to law firms, MGMIC operating account balance as at October 26, 2018 was only $193,330.

Fiorini Affidavit, at paras 42-44; Application Record, Tab 4

32. Due to the conduct of MGMIC and the Principals as described above, including the diversion of corporate funds, Staff sought and were granted a Freeze Direction pursuant to section 126(1)(a) of the *Securities Act*, freezing the funds in MGMIC account # 5407640 held at the Toronto Dominion

Bank at 220 Commerce Valley Drive (the "**Freeze Direction**"). The Freeze Direction was issued by the Commission on October 29, 2018. The balance in MGMIC's operating account on the date of the Freeze Direction was approximately $164,000.

Fiorini Affidavit, at paras 45-46; Application Record, Tab 4
Freeze Direction issued October 29, 2018; Application Record, Tab 4FF

PART III – THE ISSUE

33. The issues for this Honourable Court to consider are as follows:

(a) whether the requirements for the appointment of the Receiver under section 129 of the *Securities Act* have been met; and

(b) if a continuation of the Freeze Direction is necessary, whether the requirements for such continuation under section 126 of the *Securities Act* have been met.

PART IV – LAW AND ARGUMENT

Appointment of a Receiver

34. Section 129 of the *Securities Act* permits the Commission to apply to the Court for an order appointing, among other things, a receiver and manager of all of the property, assets and undertakings of a person or company. Such an order shall be made where the Court is satisfied that such an appointment is:

(a) in the best interests of the company's creditors or the security holders of or subscribers to the company; or

(b) appropriate for the due administration of Ontario securities law.

Securities Act, R.S.O. 1990, c. S.5, as amended [*Securities Act*], s. 129; Schedule "B"

35. Although either one of these conditions is sufficient to permit the Court to appoint a receiver and manager, the Commission submits that both conditions are met in this case.

A Receiver is in the Best Interest of Stakeholders

36. The criteria for determining the best interests of security holders or subscribers for the purpose of the appointment of a receiver under securities legislation are broader than a solvency test. In *Ontario Securities Commission v Sextant Strategic Opportunities Hedge Fund LP*, the Honourable Justice Morowitz held that:

> 54 The criteria for determining what is in the best interests of creditors, security holders or subscribers for the purpose of the appointment of a receiver under the Act is broader than a solvency trust [sic]. The criteria should take into consideration all the circumstances and whether, in the context of those circumstances, it is in the best interest of creditors that a receiver be appointed. The criteria should also take into account the interests of all stakeholders.
>
> 55 Further, where there is a history of mismanagement, no evidence of a tangible alternative resolution, evidence that investors' interests will not be served by maintaining the status quo and evidence that the company is not in a better position than a receiver to protect investors' interests, it is appropriate to appoint a receiver.
>
> 56 In addition, where there is evidence of regulatory breaches and evidence that the value and integrity of assets purchased with investor funds has been compromised, it is in investors' best interests, that a receiver be appointed so that such investors are provided with an independent and verifiable review and analysis. Investors deserve treatment they can rely upon. (citations omitted)

Ontario (Securities Commission) v Factorcorp Inc., [2007] OJ No 4496, 2007 CarswellOnt, paras 47-48 [***Factorcorp***] (SCJ [Comm List]); Brief of Authorities at Tab 1

Ontario Securities Commission v Sextant Strategic Opportunities Hedge Fund LP et al., [2009] OJ No 3063, 2009 CarswellOnt 4241, para 54-56 (SCJ [Comm List]) [***Sextant***]; Brief of Authorities at Tab 2

37. Where there is evidence of fraud by management, the appointment of a receiver is especially needed to protect the best interests of securityholders. As described in *Securities and Exchange Commission v. Wencke*, a receiver may carry out a number of functions to protect innocent investors:

> The ultimate goals of [security regulator] intervention were protection of innocent shareholders and enhancement of investor confidence in the securities markets. Appointment of the receiver in this case furthered several subsidiary policies of the securities laws. The assets of the corporate entities were marshalled and preserved against further misappropriation and dissipation; the financial affairs of the entities needed to be clarified for the benefit of innocent shareholders; the receiver and his staff could conduct independent investigation of claims the entities might have against former management or other parties, prosecution of which would benefit investors and deter future violations; and defenses against possibly fraudulent or collusive actions brought against the entities could be discovered and asserted.

Securities and Exchange Commission v. Wencke, (1980) 622 F. 2d 1363, Court of Appeals, 9th Circuit, at p. 1372 [WL, p. 6]; Brief of Authorities, Tab 3

38. Each of the factors identified in *Sextant* is present in this case.

Significant Regulatory Non-Compliance

39. The Principals have diverted over $1.3 million in funds from advances on the Mansteel and Birchmount mortgages for their personal benefit. They did so in concert with MGMIC's borrowers through transactions carried out off the books of MGMIC, in an apparent effort to shield them from scrutiny.

40. The diversion of corporate funds is a serious contravention of the anti-fraud provisions set out in section 126.1(1)(b) of the *Securities Act*. Both the Commission and criminal courts have previously made findings of fraud based on the use of corporate funds for personal purposes, the unauthorized diversion of funds, or the unauthorized appropriation of funds or property. In this case, there is strong evidence that Ben and Payam participated in the diversion of corporate funds, which ultimately originated from investors.

Quaddrexx (Re), 2017 ONSEC 3, ¶17-20; Brief of Authorities, Tab 4, citing *R v Théroux*, 1993 CanLII 134 (SCC), [1993] 2 SCR 5

Impairment of Assets

41. As of October 2018, MGMIC held nine outstanding mortgage loans with a total principal of $10.5 million owing. At least seven of those loans are in default.

42. MGMIC's assets have been significantly impaired under the management of the Principals and these assets are not sufficient to satisfy approximately $11 million owing to investors on account of outstanding preferred shares.

History of Mismanagement

43. In addition to the misconduct described above, MGMIC has made little progress in realizing on outstanding mortgages despite its professed intention to wind up its affairs. Much of MGMIC's mortgage portfolio has been in default since 2017. MGMIC has not completed enforcement proceedings to realize on those mortgages. Moreover, instead of realizing on the outstanding mortgages for the benefit of investors, the Principals invested in the Birchmount Mortgage in December 2017, from which they derived a personal benefit.

44. Furthermore, despite having advised investors that they are winding down, in October 2018, MGMIC used $760,000 of investor funds to take an assignment of a first mortgage on a property against which MGMIC held a second mortgage.

Lack of Independent, Verifiable Review and Analysis

45. The Principals' diversion of corporate funds to their own benefit, carried out off the books of MGMIC, gives rise to an urgent need for an independent review and analysis that investors can rely

upon. A receiver is needed to clarify the financial affairs of MGMIC for the benefit of innocent preferred shareholders.

<u>The Appointment of a Receiver Supports the Due Administration of Ontario Securities Law</u>

46. The goal of securities legislation is to protect the investing public and to protect the integrity of capital markets. An assessment of whether the appointment of a receiver is appropriate for the "due administration of Ontario securities law" must therefore be animated by, and consistent with, these purposes:

(a) Section 1.1 of the Act provides that the purposes of the Act are:

1. to provide protection to investors from unfair, improper or fraudulent practices; and

2. to foster fair and efficient capital markets and confidence in capital markets.

(b) Section 2.1(2) of the Act states that the primary means of achieving the purposes of the Act are:

1. requirements for timely, accurate and efficient disclosure of information,

2. restrictions on fraudulent and unfair market practices and procedures, and

3. requirements for the maintenance of high standards of fitness and business conduct to ensure honest and responsible conduct by market participants.

Securities Act, section 1.1 and 2.1(2), Schedule "B";

Pezim v British Columbia (Superintendent of Brokers), (1994) 2 SCR 557 at para 68, Brief of Authorities at Tab 5

47. In an application under section 129 of the Act, the Commission does not have to prove a breach of the *Securities Act*; rather, it is sufficient for the Commission to raise serious concerns with respect to possible breaches of the Act.

> *Ontario Securities Commission v Sbaraglia* (23 December 2010), Toronto, Ont, Court File No CV-10-883-00CL (unreported) at pg 21, Brief of Authorities at Tab 6

48. As described above, the diversion of corporate funds gives rise to a serious concern that MGMIC and/or the Principals have breached the anti-fraud provisions of the *Securities Act*.

49. In addition, the Commission has raised the following serious concerns regarding other possible breaches of the *Securities Act*:

(a) *Misrepresentations to investors*: breaching prohibitions against false or misleading statements to investors that are relevant to their investment decisions.

(b) *Illegal unregistered trading:* Breaching requirements for those in the business of trading securities to be registered with Commission unless an exemption is available; and

(c) *Illegal distributions:* Breaching requirements for disclosure in a prospectus receipted by the Commission in order to distribute securities unless an exemption is available and, if so, the exemption is used appropriately.

<u>Conclusion as to the Need for a Receiver</u>

50. Given the misconduct of MGMIC and the Principals, including the diversion of corporate funds, the appointment of a receiver over the Property is in the best interests of the investors and other stakeholders. GTL has consented to being appointed as the Receiver.

51. The interests of existing investors will not be served by maintaining the status quo. A receivership is necessary to ensure an orderly wind-down of the Property under supervision of the Court and distribution of proceeds on an equitable basis.

52. A receiver with control of MGMIC would be able to carry out an orderly wind up and proper distribution of the Property to creditors and investors. In the circumstances, anything less than the

appointment of a receiver would not provide the necessary oversight or control to properly marshal and distribute the Property to MGMIC's stakeholders.

Continuation of the Freeze Direction

53. Where the Commission has issued a freeze direction, the Commission may apply to this Court for an order pursuant to subsection 126(5.1) of the *Securities Act* to continue the freeze direction. Under that provision, a freeze direction is to be continued if this Court is satisfied that the order would be reasonable and expedient in the circumstances, having due regard to the public interest and either (a) the due administration of Ontario securities law or the securities laws of another jurisdiction; or (b) the regulation of capital markets in Ontario or another jurisdiction.

> *Securities Act*, s. 126(5.1); Schedule "B"

54. In *Ontario Securities Commission v. Future Solar Developments Inc.*, Justice Pattillo summarized the requirements that must be met for the Court to continue a Commission freeze direction:

> (a) there is a serious issue to be tried in respect of the respondents' breaches of the *Securities Act* or other securities laws in another jurisdiction;
>
> (b) there is a basis to suspect, suggest or prove a connection between the frozen assets and the conduct at issue; and
>
> (c) the freeze directions are necessary for the due administration of securities laws or the regulation of capital markets, in Ontario or elsewhere.

> *Ontario Securities Commission v. Future Solar Developments Inc.*, 2015 ONSC 2334 [***Future Solar***], at para 31; Brief of Authorities, Tab 7

55. Section 126 of the *Securities Act* was amended in July 2014 to include, among other things, the addition of subsection (5.1). This amendment [subsection 126(5.1)] changed the test to be applied by the Court when considering an application for continuation of an OSC freeze direction. The new test under subsection 126(5.1) is the "reasonable and expedient test". In *Future Solar*, Justice Patillo explained the effect of this amendment, holding that:

(a) The previous test applicable under the pre-amendment provisions is no longer applicable;

(b) The addition of subsection 126(5.1) of the Act has lowered the threshold of the test required to continue a freeze direction from a test akin to a *Mareva* injunction;

(c) Subsection 126(5.1) requires that the Court consider all the circumstances and in considering the circumstances, the Court must have regard to the public interest; and

(d) The Commission is not required to establish dissipation of assets. A Commission freeze direction may be used to address dissipation of assets, preservation of assets, inappropriate use of investor funds, and other situations where freeze directions are necessary to protect the investing public or capital markets.

Future Solar, at paras 22 to 30; Brief of Authorities, Tab 7

Ontario Securities Commission v. Sextant Capital Management Inc., 2010 ONCA 228 (March 3, 2010); Brief of Authorities, Tab 8

56. In *Ontario Securities Commission v. Haiyan (Helen) Gao Jordan*, Justice Conway affirmed the test set out in *Future Solar* and addressed the necessary connection between the frozen assets and the conduct at issue for the continuation of a freeze direction. *Jordan* involved the potential misappropriation of investor funds to the benefit of Ms. Jordan. Staff alleged that approximately $230,000 of investor funds were applied towards the mortgage on Ms. Jordan's matrimonial home.

Ms. Jordan's main defence to the continuation of the freeze direction issued by the Commission focused on Staff's inability to prove that the mortgage payments came from investor funds.

> *Ontario Securities Commission v. Haiyan (Helen) Gao Jordan*, 2016 CarswellOnt 14615, at paras 1-3 [***Jordan***]; Brief of Authorities, Tab 9

57. Justice Conway ordered a continuation of the freeze direction. On the issue raised by Ms. Jordan, the Court held:

> However, I am satisfied that the evidence gives rise to a basis to suspect, suggest or prove a connection between the house & the investor funds. It is clear that the $330,00 went into the account from which the mortgage payments were made. At this stage of the proceeding I do not agree that the OSC must demonstrate with certainty precisely which of those co-mingled funds actually were used to pay the mortgage. There is a sufficient connection between the inflow to that account from investor funds and outflow to the mortgage on that house that the protective device of the freeze direction is to be continued. I also consider the free direction to be necessary having regard to the public interest. The issue of whether investor funds made their way into Ms s [sic] residence raises & engages issues of public confidence in the administration of securities laws & the regulation of capital markets.

> *Jordan*, at para. 5; Brief of Authorities, Tab 9

58. The Commission submits that the evidentiary record before this Honourable Court satisfies all three parts of the test as set out in *Future Solar*.

59. There is a serious case that MGMIC and the Principals raised $11 million in violation of the registration and prospectus requirements of the *Securities Act* and that they breached the fraud provision of the *Securities Act*.

60. The funds subject to the Commission's freeze direction are the funds of MGMIC, which ultimately originated from funds raised from investors in violation of the *Securities Act*. Moreover, the Principals' past diversion of corporate funds gives rise to a risk of further dissipation of the investor funds subject to the Freeze Direction. As set out by this Court in *Jordan*, the Commission

does not need to demonstrate with any certainty that the co-mingled funds from the MGMIC account that were diverted were investor funds.

61. With respect to the third part, the Commission submits that the Freeze Direction is necessary for the due administration of securities law or the regulation of capital markets in Ontario. The due administration of securities law and the regulation of capital markets concerns important issues such as registration, disclosure and reporting requirements. The effective investigation of, enforcement and sanctions (in the event of a finding of a breach) for misconduct by market participants are also fundamental to the due administration of securities laws and the regulation of capital markets. In this regard, the continuation of the Freeze Direction would prevent any further dissipation of funds, preserve funds for the benefit of investors and/or otherwise halt the inappropriate use of investor funds.

PART V – RELIEF SOUGHT

62. The Commission has included in its materials, a proposed Receivership Order to ensure that investors' interests are protected.

> Draft Receivership Order; Application Record, Tab 2
> Blackline of the Draft Receivership Order to the Model Receivership Order; Application Record, Tab 3

63. It is respectfully submitted that it is in the best interest of investors and appropriate for the due administration of Ontario securities law that this Honourable Court grant the relief sought in the proposed Receivership Order and that GTL be appointed as Receiver over MGMIC's Property.

64. If the Commission's receivership application is not granted for any reason on the initial return date, the Commission requests an order continuing the Freeze Direction and/or appointing GTL as Interim Receiver, in order to protect the Property and the interests of investors and other stakeholders.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of November, 2018

Jamie Gibson

Dihim Emami

Litigation Counsel, Enforcement Branch
Ontario Securities Commission

Schedule "A" – Cases and Authorities Cited

1. *Ontario (Securities Commission) v Factorcorp Inc.*, [2007] OJ No 4496, 2007 CarswellOnt, paras 47-48 [*Factorcorp*] (SCJ [Comm List])

2. *Ontario Securities Commission v Sextant Strategic Opportunitites Hedge Fund LP et al.*, [2009] OJ No 3063, 2009 CarswellOnt 4241, para 54 (SCJ [Comm List]) [*Sextant*]

3. *Securities and Exchange Commission v. Wencke*, (1980) 622 F. 2d 1363, Court of Appeals, 9th Circuit

4. *Quaddrexx (Re)*, 2017 ONSEC 3

5. *Pezim v British Columbia (Superintendent of Brokers)*, (1994) 2 SCR 557

6. *Ontario Securities Commission v Sbaraglia* (23 December 2010), Toronto, Ont, Court File No CV-10-883-00CL (unreported) (S.C.)

7. *Ontario Securities Commission v. Future Solar Developments Inc.*, 2015 ONSC 2334

8. *Ontario Securities Commission v. Sextant Capital Management Inc.*, 2010 ONCA 228 (March 3, 2010)

9. *Ontario Securities Commission v. Haiyan (Helen) Gao Jordan*, 2016 CarswellOnt 14615 (S.C.)

Schedule "B" – Statutory Provisions

Securities Act, RSO 1990, c. S.5

Purposes of Act

1.1 The purposes of this Act are,

(a) to provide protection to investors from unfair, improper or fraudulent practices;

(b) to foster fair and efficient capital markets and confidence in capital markets; and

(c) to contribute to the stability of the financial system and the reduction of systemic risk. 1994, c. 33, s. 2; 2017, c. 34, Sched. 37, s. 2.

. . .

Principles to consider

2.1 In pursuing the purposes of this Act, the Commission shall have regard to the following fundamental principles:

1. Balancing the importance to be given to each of the purposes of this Act may be required in specific cases.
2. The primary means for achieving the purposes of this Act are,
   i. requirements for timely, accurate and efficient disclosure of information,
   ii. restrictions on fraudulent and unfair market practices and procedures, and
   iii. requirements for the maintenance of high standards of fitness and business conduct to ensure honest and responsible conduct by market participants.
3. Effective and responsive securities regulation requires timely, open and efficient administration and enforcement of this Act by the Commission.
4. The Commission should, subject to an appropriate system of supervision, use the enforcement capability and regulatory expertise of recognized self-regulatory organizations.
5. The integration of capital markets is supported and promoted by the sound and responsible harmonization and co-ordination of securities regulation regimes.
6. Business and regulatory costs and other restrictions on the business and investment activities of market participants should be proportionate to the significance of the regulatory objectives sought to be realized. 1994, c. 33, s. 2.

. . .

Registration

Dealers

25 (1) Unless a person or company is exempt under Ontario securities law from the requirement to comply with this subsection, the person or company shall not engage in or hold himself, herself or itself out as engaging in the business of trading in securities unless the person or company,

(a) is registered in accordance with Ontario securities law as a dealer; or

(b) is a representative registered in accordance with Ontario securities law as a dealing representative of a registered dealer and is acting on behalf of the registered dealer. 2009, c. 18, Sched. 26, s. 4.

. . .

Prospectus required

53 (1) No person or company shall trade in a security on his, her or its own account or on behalf of any other person or company if the trade would be a distribution of the security, unless a preliminary prospectus and a prospectus have been filed and receipts have been issued for them by the Director. 2006, c. 33, Sched. Z.5, s. 2.

Filing without distribution

(2) A preliminary prospectus and a prospectus may be filed in accordance with this Part to enable the issuer to become a reporting issuer, despite the fact that no distribution is contemplated. R.S.O. 1990, c. S.5, s. 53 (2).

. . .

Freeze direction

126 (1) If the Commission considers it expedient for the due administration of Ontario securities law or the regulation of the capital markets in Ontario or expedient to assist in the due administration of the securities laws or the regulation of the capital markets in another jurisdiction, the Commission may,

(a) direct a person or company having on deposit or under its control or for safekeeping any funds, securities or property of any person or company to retain those funds, securities or property;

(b) direct a person or company to refrain from withdrawing any funds, securities or property from another person or company who has them on deposit, under control or for safekeeping; or

(c) direct a person or company to maintain funds, securities or property, and to refrain from disposing of, transferring, dissipating or otherwise dealing with or diminishing the value of those funds, securities or property. 2014, c. 7, Sched. 28, s. 13 (1).

Duration

(1.1) A direction under subsection (1) applies until the Commission in writing revokes the direction or consents to release funds, securities or property from the direction, or until the Superior Court of Justice orders otherwise. 2014, c. 7, Sched. 28, s. 13 (1).

Application

(2) A direction under subsection (1) that names a bank or other financial institution shall apply only to the branches of the bank or other financial institution identified in the direction. 1994, c. 11, s. 375.

Exclusions

(3) A direction under subsection (1) shall not apply to funds, securities or property in a recognized clearing agency or to securities in process of transfer by a transfer agent unless the direction so states. 1994, c. 11, s. 375.

Certificate of pending litigation

(4) The Commission may order that a direction under subsection (1) be certified to a land registrar or mining recorder and that it be registered or recorded against the lands or claims identified in the direction, and on registration or recording of the certificate it shall have the same effect as a certificate of pending litigation. 1994, c. 11, s. 375.

Review by court

(5) As soon as practicable, but not later than 10 days after a direction is issued under subsection (1), the Commission shall serve and file a notice of application in the Superior Court of Justice to continue the direction or for such other order as the court considers appropriate. 2010, c. 26, Sched. 18, s. 32.

Grounds for continuance or other order

(5.1) An order may be made under subsection (5) if the court is satisfied that the order would be reasonable and expedient in the circumstances, having due regard to the public interest and,

(a) the due administration of Ontario securities law or the securities laws of another jurisdiction; or

(b) the regulation of capital markets in Ontario or another jurisdiction. 2014, c. 7, Sched. 28, s. 13 (2).

Notice

(6) A direction under subsection (1) may be made without notice but, in that event, copies of the direction shall be sent forthwith by such means as the Commission may determine to all persons and companies named in the direction. 1994, c. 11, s. 375.

Clarification or revocation

(7) A person or company directly affected by a direction may apply to the Commission for clarification or to have the direction varied or revoked. 1994, c. 11, s. 375.

Fraud and market manipulation

126.1 (1) A person or company shall not, directly or indirectly, engage or participate in any act, practice or course of conduct relating to securities, derivatives or the underlying interest of a derivative that the person or company knows or reasonably ought to know,

(a) results in or contributes to a misleading appearance of trading activity in, or an artificial price for, a security, derivative or underlying interest of a derivative; or

(b) perpetrates a fraud on any person or company. 2010, c. 26, Sched. 18, s. 33.

Attempts

(2) A person or company shall not, directly or indirectly, attempt to engage or participate in any act, practice or course of conduct that is contrary to subsection (1). 2013, c. 2, Sched. 13, s. 3.

. . .

Appointment of receiver, etc.

129 (1) The Commission may apply to the Superior Court of Justice for an order appointing a receiver, receiver and manager, trustee or liquidator of all or any part of the property of any person or company. 1994, c. 11, s. 375; 2006, c. 19, Sched. C, s. 1 (1).

Grounds

(2) No order shall be made under subsection (1) unless the court is satisfied that,

(a) the appointment of a receiver, receiver and manager, trustee or liquidator of all or any part of the property of the person or company is in the best interests of the creditors of the person or company or of persons or companies any of whose property is in the possession or under the control of the person or company or the security holders of or subscribers to the person or company; or

(b) it is appropriate for the due administration of Ontario securities law. 1994, c. 11, s. 375.

Application without notice

(3) The court may make an order under subsection (1) on an application without notice, but the period of appointment shall not exceed fifteen days. 1994, c. 11, s. 375.

Motion to continue order

(4) If an order is made without notice under subsection (3), the Commission may make a motion to the court within fifteen days after the date of the order to continue the order or for the issuance of such other order as the court considers appropriate. 1994, c. 11, s. 375.

Powers of receiver, etc.

(5) A receiver, receiver and manager, trustee or liquidator of the property of a person or company appointed under this section shall be the receiver, receiver and manager, trustee or liquidator of all or any part of the property belonging to the person or company or held by the person or company on behalf of or in trust for any other person or company, and, if so directed by the court, the receiver, receiver and manager, trustee or liquidator has the authority to wind up or manage the business and affairs of the person or company and has all powers necessary or incidental to that authority. 1994, c. 11, s. 375.

Directors' powers cease

(6) If an order is made appointing a receiver, receiver and manager, trustee or liquidator of the property of a person or company under this section, the powers of the directors of the company that the receiver, receiver and manager, trustee or liquidator is authorized to exercise may not be exercised by the directors until the receiver, receiver and manager, trustee or liquidator is discharged by the court. 1994, c. 11, s. 375.

Fees and expenses

(7) The fees charged and expenses incurred by a receiver, receiver and manager, trustee or liquidator appointed under this section in relation to the exercise of powers pursuant to the appointment shall be in the discretion of the court. 1994, c. 11, s. 375.

Variation or discharge of order

(8) An order made under this section may be varied or discharged by the court on motion. 1994, c. 11, s. 375.

ONTARIO SECURITIES COMMISSION
Applicant

- AND -

MONEY GATE MORTGAGE INVESTMENT CORPORATION
Respondent

Court File No. CV-18-00608086-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

FACTUM OF THE ONTARIO SECURITIES COMMISSION
(Application under Sections 126 and 129 of the *Securities Act*)

Ontario Securities Commission
20 Queen Street West
22nd Floor
Toronto, ON M5H 3S8

Jamie Gibson (LSO 62858O)
Tel: 416-263-3783

Dihim Emami (LSO 57402S)
Tel: 416-596-4253
Fax: 416-593-2319

Counsel for the Ontario Securities Commission