

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

THE HONOURABLE) WEDNESDAY, THE 16TH
)
JUSTICE PENNY) DAY OF OCTOBER, 2024
)

BETWEEN:

MCAP FINANCIAL CORPORATION

Applicant

- and -

**VANDYK-BACKYARD KINGS MILL LIMITED AND VANDYK-BACKYARD
HUMBERSIDE LIMITED**

Respondents

**APPLICATION UNDER SUBSECTION 243(1) OF THE *BANKRUPTCY AND
INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED, SECTION 101 OF THE
COURTS OF JUSTICE ACT, R.S.O. 1990, c. C.43, AS AMENDED, AND SECTION 68 OF
THE *CONSTRUCTION ACT*, R.S.O. 1990, c. C.30**

PRIORITY CLAIMS PROCEDURE ORDER

THIS MOTION, made by KSV Restructuring Inc. in its capacity as receiver and manager pursuant to section 243 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 (the “**BIA**”) and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 without security, over all property, assets and undertakings of Vandyk-Backyard Kings Mill Limited (“**Vandyk-Kings Mill**”) acquired for or used in relation to the Vandyk-Kings Mill’s business and the Project, including the proceeds thereof (collectively, the “**Vandyk-Kings Mill Property**”), and the beneficial title to the Real Property of Vandyk-Backyard Humberside Limited (“**Vandyk Humberside**”, together with Vandyk-Kings Mill, the “**Debtors**”), and Construction Lien Trustee,

pursuant to section 68 of the *Construction Act*, R.S.O. 1990, c. C.30, without security, over the Vandyk-Kings Mill Property (in such capacities, collectively, the “**Receiver**”) for an order, among other things approving a procedure for the identification and resolution of applicable priority claims against the Debtors, along with distributions in connection therewith, was heard by judicial videoconference via Zoom in Toronto, Ontario.

ON READING the Notice of Motion of the Receiver, the Second Report of the Receiver dated October 8, 2024 (the “**Second Report**”), and on hearing the submissions of counsel for the Receiver and the other parties listed on the Participant Information Form, no one appearing for any other party although duly served as appears from the affidavit of service of Marleigh Dick affirmed October 15, 2024:

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

DEFINITIONS

2. **THIS COURT ORDERS** that all terms not otherwise defined herein shall have the meaning ascribed thereto in the Second Report.
3. **THIS COURT ORDERS** that, for the purposes of this Order, the following terms shall have the following meanings
 - (a) “**Claims Bar Date**” means 5:00 p.m. (Toronto time) on November 15, 2024.
 - (b) “**Notice of Dispute**” means a notice delivered to the Receiver by a Priority Creditor disputing a Notice of Revision or Disallowance, which notice shall be substantially

in the form attached hereto as Schedule “B” and shall set out the reasons for the dispute.

- (c) “**Priority Claim**” means a claim for a statutory holdback, in relation to a valid and properly registered construction lien against the Property, pursuant to Section 78 of the *Construction Act* (Ontario).
- (d) “**Priority Creditor**” means a party asserting a Priority Claim.
- (e) “**Proof of Claim**” means a Proof of Claim to be completed and filed by a Priority Creditor, which shall be substantially in the form attached as Schedule “A” and include such items as are prescribed therein.
- (f) “**Proven Claim**” means the amount and classification of any Priority Creditor’s Priority Claim as finally determined in accordance with this Order.

PROOF OF CLAIM

- 4. **THIS COURT ORDERS** that any Priority Creditor wishing to assert a Priority Claim shall file with the Receiver a Proof of Claim by the Claims Bar Date in accordance with the terms of this Order.
- 5. **THIS COURT ORDERS** that all Proofs of Claim, together with supporting documentation, must be filed with the Receiver by prepaid ordinary mail, courier, personal delivery or electronic or digital transmission, so that such Proof of Claim is received by the Receiver by no later than the Claims Bar Date.
- 6. **THIS COURT ORDERS** that any Priority Creditor who does not file a Proof of Claim, together with supporting documentation, by the Claims Bar Date:

- (a) shall be and is hereby forever barred from asserting or enforcing any such Priority Claim; and
- (b) shall not be entitled to receive any distributions in respect of such Priority Claim.

DETERMINATION OF CLAIMS

7. **THIS COURT ORDERS** that the Receiver shall review all Proofs of Claim and supporting documentation filed on or before the Claims Bar Date and may accept, revise or disallow (in whole or in part) the amount and/or status of a Priority Claim set out in any Proof of Claim. At any time, the Receiver may request additional information or documentation with respect to any Priority Claim, and may request that the Priority Creditor file a revised Proof of Claim.
8. **THIS COURT ORDERS** that if the Receiver determines to revise or disallow a Proof of Claim, then the Receiver shall notify the applicable claimant of such revision or disallowance and the basis for same in writing (a “**Notice of Revision or Disallowance**”).
9. **THIS COURT ORDERS** that the Receiver may attempt to resolve the validity, amount and/or status of any Priority Claim with the Priority Creditor on a consensual basis prior to or after accepting, revising or disallowing such Claim.
10. **THIS COURT ORDERS** that where a Proof of Claim has been revised or disallowed (in whole or in part) by a Notice of Revision or Disallowance, the revised or disallowed portion of that Priority Claim shall not establish a Proven Claim unless the Priority Creditor has disputed the revision or disallowance in accordance with this Claims Process Order, and proven the revised or disallowed Priority Claim (or portion thereof) in accordance with this Order.

NOTICES OF DISPUTE

11. **THIS COURT ORDERS** that if a Priority Creditor disputes a Notice of Revision or Disallowance received by it and intends to contest the Notice of Revision or Disallowance, then such Priority Creditor shall deliver a Notice of Dispute by prepaid ordinary mail, courier, personal delivery or electronic or digital transmission so that such Notice of Dispute is received by the Receiver by no later than 5:00 p.m. (Toronto time) on the business day which is seven (7) days after delivery of the Notice of Revision or Disallowance or such later date as the Receiver may agree in writing.

12. **THIS COURT ORDERS** that if a Person who receives a Notice of Revision or Disallowance fails to file a Notice of Dispute with the Receiver within the time limit required by paragraph 11 of this Order, then the validity, amount and status of such person's Priority Claim shall be deemed to be as set out in the Notice of Revision or Disallowance and such amount and status, if any, shall constitute such Priority Creditor's Proven Claim.

RESOLUTION OF CLAIMS

13. **THIS COURT ORDERS** that as soon as practicable after the delivery of the Notice of Dispute to the Receiver, the Receiver may:
 - (a) attempt to resolve the validity, status and amount of the Priority Claim with the Priority Creditor on a consensual basis; and/or
 - (b) schedule an appointment with the Court for the purpose of scheduling a motion to have the validity, status and/or amount of the Priority Claim determined by the Court.

14. **THIS COURT ORDERS** that, notwithstanding the other provisions of this Order, the Receiver may make a motion to the Court for a final determination of the validity, status and/or amount of a Priority Claim at any time, whether or not a Notice of Revision or Disallowance has been sent by the Receiver, on full notice to the applicable Priority Creditor.

15. **THIS COURT ORDERS** that the Receiver may, where it is satisfied that a Priority Claim has been adequately proven, waive strict compliance with the requirements of this Order as to completion and execution of Proofs of Claim.

NOTICE OF TRANSFEREES

16. **THIS COURT ORDERS** that the Receiver shall not be obligated to give notice to or otherwise deal with a transferee or assignee of a Priority Claim as the Priority Creditor in respect thereof unless:
 - (a) actual written notice of the transfer or assignment, together with satisfactory evidence of a valid transfer or assignment of the Priority Claim, has been received by the Receiver; and
 - (b) the Receiver has acknowledged in writing such transfer or assignment,and thereafter such transferee or assignee shall for the purposes hereof constitute the “Priority Creditor” in respect of such Priority Claim. Any such transferee or assignee of a Priority Claim, and such Priority Claim, shall be bound by any notices given or steps taken in respect of such Priority Claim in accordance with this Order prior to the written acknowledgement by the Receiver of such transfer or assignment.

17. **THIS COURT ORDERS** that the Receiver is under no obligation to give notice of a valid transfer or assignment made pursuant to this Order to any Person other than the Priority Creditor holding the Priority Claim and shall, without limitation, have no obligation to give notice to any Person holding a security interest, lien, or charge in, or a pledge or assignment by way of security in, a Priority Claim.

18. **THIS COURT ORDERS** that the transferee or assignee of any Priority Claim:
 - (a) shall take the Priority Claim subject to the rights and obligations of the transferor/assignor of the Priority Claim, and subject to the rights of the Debtor(s) against any such transferor or assignor, including any rights of set-off which the Debtor(s) had against such transferor or assignor, and

 - (b) cannot use any transferred or assigned Priority Claim to reduce any amount owing by the transferee or assignee to a Debtor, whether by way of set-off, application, merger, consolidation or otherwise.

PROTECTIONS FOR THE RECEIVER

19. **THIS COURT ORDERS** that the Receiver, in addition to its prescribed rights, duties, responsibilities and obligations under: (i) the BIA, (ii) the Receivership Order, and/or (iii) any other Order of the Court, is hereby directed and empowered to take such other actions and fulfill such other roles as are contemplated by this Order or incidental thereto.

20. **THIS COURT ORDERS** that in carrying out the terms of this Order:
 - (a) the Receiver shall have all the protections given to it by the BIA, the Receivership Order, any other Order of this Court, and as an officer of this Court, as applicable;

- (b) the Receiver shall incur no liability or obligation as a result of the carrying out of the provisions of this Order save and except for any gross negligence or willful misconduct on its part;
- (c) the Receiver shall be entitled to rely on the books and records and any information provided by the Debtors as well as documentation and information provided by others, including information and documentation provided by Priority Creditors pursuant to this Order, which the Receiver believes to be accurate and true, without independent investigation; and
- (d) the Receiver shall not be liable for any claims or damages resulting from any errors or omissions in such books and records or information.

DISTRIBUTIONS

21. **THIS COURT ORDERS** that the Receiver is hereby authorized, without further order of the Court, to distribute proceeds from the Sale Transaction to holders of Proven Claims, in the amount of such Proven Claims (such distributions collectively referred to herein as the “**Distributions**”).
22. **THIS COURT ORDERS** that the Receiver is hereby authorized to take all reasonably necessary steps and actions to effect the Distributions in accordance with the provisions of this Order, and shall not incur any liability as a result of making the Distributions.
23. **THIS COURT ORDERS** that the Distributions to holders of Proven Claims in accordance with this Order shall be permanent and indefeasible payments of such Proven Claims.

DIRECTIONS

24. **THIS COURT ORDERS** that the Receiver may, at any time, and with such notice as this Court may require, seek directions from this Court with respect to this Order.

MISCELLANEOUS

25. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in any other foreign jurisdiction to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.
26. **THIS COURT ORDERS** that this Order and all of its provisions are effective as of 12:01 a.m. Toronto Time on the date of this Order and are enforceable without the need for entry and filing.

A handwritten signature in blue ink, appearing to read "Perry J.", is written above a horizontal line.

SCHEDULE "A"

PROOF OF CLAIM

PARTICULARS OF CREDITOR:

1. Full Legal Name of Priority Creditor: _____
2. Full Mailing Address of the Priority Creditor (the original Priority Creditor and not the Assignee):

3. Telephone number: _____
4. E-mail address: _____
5. Attention (Contact Person): _____
6. Has the Priority Claim been sold or assigned by the Priority Creditor to another party [check (✓) one]?

Yes: _____ No: _____

A. PARTICULARS OF ASSIGNEE(S) (IF ANSWER TO QUESTION 6 IS YES):

7. Full Legal Name of Assignee(s): _____

(If Priority Claim has been assigned, insert full legal name of assignee(s) of Priority Claim (if all or a portion of the Priority Claim has been sold). If there is more than one assignee, please attach a separate sheet with the required information)
8. Full Mailing Address of Assignee(s):

9. Telephone number of Assignee(s): _____
10. E-mail address: _____
11. Attention (Contact Person): _____

B. PROOF OF CLAIM:

I, _____
[name of Priority Creditor or representative of the Priority Creditor],
of _____ do hereby certify that:
[City and Province]

- (a) I [check (✓) one]
- am the Priority Creditor of _____; OR
- am ___(state position or title) of the Priority Creditor of _____
- (b) I have knowledge of all the circumstances connected with the Priority Claim referred to below;
- (c) the Priority Creditor has a Priority Claim as follows:

TOTAL PRIORITY CLAIM: CDN\$ _____
Note: This should only include Priority Claims.

C. EVIDENCE OF PRIORITY AND PARTICULARS OF CLAIM:

In order to file your Proof of Claim, evidence of the security or basis for making a Priority Claim are required. Provide all particulars of the Priority Claim and supporting documentation, including any document(s) or information you wish to bring to the Receiver's attention with respect to the Priority Claim. At a minimum, you must provide the following for this to constitute a valid Proof of Claim:

- (1) An accounting of the state of accounts as between the Priority Creditor and the applicable Debtor on the project at 15 Neighbourhood Lane (the "**Project**"), including: (a) a list of all invoices rendered on the Project and the date of each invoice; (ii) an indication of which invoices have been paid and any that remain unpaid; and (iii) copies of all invoices.
- (2) Any written agreements or contracts between your company and a Debtor on the Project.
- (3) Any change orders.
- (4) Any payment certificates, completion certificates or certificates of substantial completion.
- (5) The Priority Creditor's ledger demonstrating the relevant amounts paid to date in relation to the Priority Creditor's work on the Project.

This Proof of Claim must be received by the Receiver by no later than 5:00 p.m. (Toronto time) on November 15, 2024 (“Claims Bar Date”) by prepaid ordinary mail, courier, personal delivery or electronic or digital transmission at the following address:

KSV Restructuring Inc., in its capacity as Receiver
220 Bay St., Suite 1300
Toronto, ON M5J 2W4

Attention: Murtaza Tallat
E-mail: mtallat@ksvadvisory.com

With an e-mail copy to the Receiver’s counsel at emsmith@osler.com

Dated at _____ this _____ day of _____, 2024.

Signature of Priority Creditor

SCHEDULE "B"

NOTICE OF DISPUTE

We hereby give you notice of our intention to dispute the Notice of Revision or Disallowance dated _____ issued in respect of our Priority Claim.

Reasons for Dispute (attach extra sheets and copies of all supporting documentation if necessary):

Name of Priority Creditor: _____

(Signature of individual completing this Dispute)

(Please print name)

Telephone Number:

Email address: _____

Full Mailing Address: _____

THIS FORM IS TO BE RETURNED BY PREPAID ORDINARY MAIL, COURIER, PERSONAL DELIVERY OR ELECTRONIC OR DIGITAL TRANSMISSION AND MUST BE RECEIVED NO LATER THAN 5:00 P.M. (TORONTO TIME) ON _____, BEING THE BUSINESS DAY WHICH IS SEVEN CALENDAR DAYS AFTER THE NOTICE OF REVISION OR DISALLOWANCE IS DELIVERED BY THE RECEIVER TO:

KSV Restructuring Inc., in its capacity as Receiver
220 Bay St., Suite 1300
Toronto, ON M5J 2W4

Attention: Murtaza Tallat
E-mail: mtallat@ksvadvisory.com

With an e-mail copy to the Receiver's counsel at emsmith@osler.com

IN THE MATTER OF AN APPLICATION UNDER SUBSECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED; SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED; AND SECTION 68 OF THE *CONSTRUCTION ACT*, R.S.O. 1990, c. C.30

**MCAP FINANCIAL
CORPORATION**
Applicant

and

**VANDYK-BACKYARD KINGS MILL
LIMITED AND VANDYK-BACKYARD
HUMBERSIDE LIMITED**
Respondents

Court File No: CV-23-00710267-00CL

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

PROCEEDING COMMENCED AT TORONTO

PRIORITY CLAIMS PROCEDURE ORDER

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Receiver