AUGLAIZE COUNTY
COMMON PLEAS COURT
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I. JEAN MECKSTROTH
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
AUGLAIZE COUNTY, OHIO
CIVIL DIVISION

PAUL MASTRONARDI,	:	Case No. 2017-CV-0144
Plaintiff,	:	Judge Frederick D. Pepple
v.	:	
LUIS CHIBANTE, ***et al.***	:	
Defendants.	:	

BANK OF MONTREAL'S MEMORANDUM IN OPPOSITION TO RECEIVER'S MOTION TO APPROVE NOTE AND SECURITY

Bank of Montreal hereby files this *Memorandum in Opposition* (the "Memorandum") [1] to the *Receiver's Motion to Approve Note and Security* (the "Motion") filed by James L. Thieman, Receiver (the "Receiver") for Golden Fresh Farms Holdings, Inc. ("Holdings") and Golden Fresh Farms Enterprises, L.P. ("Enterprises").[2] By his Motion, the Receiver seeks *nunc pro tunc* approval of a $2,000,000 (Canadian) Unauthorized Receivership Loan (defined herein) obtained on behalf of Enterprises and Holdings, with the loan proceeds used exclusively to satisfy a pre-receivership, unsecured loan made by Plaintiff Paul Mastronardi's grandparents to

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[1] BMO hereby incorporates by reference the entirety of its prior filings in this case as if fully restated herein, which detail its first priority security position over all of the assets of Enterprises (as defined herein) and Holdings (as defined herein), and includes *Bank of Montreal's Statement of Position Regarding Hearings on Dissolution of Both Golden Fresh Farms Holdings, Inc. and Golden Fresh Farms Enterprises, L.P.* (filed in the case docket on October 27, 2017), *Amended Expedited Motion to Intervene* (filed in the case docket on October 11, 2017), and the *Answer of Bank of Montreal to Verified Complaint for Dissolution, Appointment of a Receiver, and Monetary Relief* (filed in the case docket on October 23, 2017).

[2] On January 23, 2018, the Court entered *Orders Dissolving Limited Partnership (Contingent) and Dissolving Corporation, Appointing Receiver Over Limited Partnership, and Authorizing Receivers to Act* (the "Dissolution Orders"), which appointed Mr. Thieman as Receiver over Enterprises (Mr. Thieman was appointed Receiver for Holdings on September 29, 2017) and authorizes him to operate the ongoing businesses and, ultimately, wind up the affairs of Enterprises and Holdings.

Golden Fresh Farms, LLP.[3] Meanwhile, Bank of Montreal, the first priority senior secured lender of Enterprises and Holdings, is owed in excess of $22 million from Enterprises, Holdings and certain guarantors, and it is unknown whether or not the process to sell the assets of Enterprises and Holdings in this case as directed by the Dissolution Orders will result in payment in full to Bank of Montreal.

Bank of Montreal has remained consistent in its position throughout this entire receivership case: it seeks to protect and to preserve its rights under its Loan and Security Documents and applicable law. Bank of Montreal's first priority security rights and interests in all of the assets of Enterprises and Holdings are not altered by this case, the receivership, or the Dissolution Orders, such that no pre-receivership, unsecured loan obligation of Enterprises and/or Holdings should be paid in any amount unless and until the debt obligations of Enterprises and Holdings to Bank of Montreal are fully satisfied. The Unauthorized Receivership Loan violates the priority scheme of claims under Ohio law and the Loan and Security Documents between Bank of Montreal and its borrowers,[4] violates the terms and conditions of the Receivership Loan Agreement (defined herein) and related Court orders, was not necessary for the ongoing operations of Enterprises or Holdings in this receivership, and the Motion should be denied.

[3] The Receiver represents that the $2,000,000 unsecured loan from Plaintiff Paul Mastronardi's grandparents can be traced to Enterprises, even though the Promissory Note attached as Exhibit A to the Motion references Golden Fresh Farms LLP, not Enterprises or Holdings, as the borrower. No tracing was provided in support of the Motion. Nevertheless, for purposes of this Memorandum, Bank of Montreal will assume that the beneficiary of the Mastronardi Grandparent Note (defined herein) was Enterprises and/or Holdings.

[4] The various "Loan and Security Documents" are proprietary and contain confidentiality provisions, but can be made available under seal or pursuant to a confidentiality agreement acceptable to Bank of Montreal.

Background Facts Relevant to the Unauthorized Receivership Loan

After the commencement of this case and the appointment of the Receiver over Holdings on September 29, 2017, which included the imposition of a stay of any action by any party against the property of Enterprises or Holdings (the "Receivership Stay"), the Receiver represented that additional funds were needed to continue to operate Enterprises and Holdings, specifically for payroll, utilities, and other expenses required to keep Enterprises operating. 617885 Ontario Limited, and entity affiliated with Plaintiff Paul Mastronardi and/or his family, agreed to loan funds necessary for the ongoing business operations of Enterprises and Holdings during the receivership. On October 25, 2017, the Receiver filed a *Motion to Approve Loan Agreement*, which included the consent of Bank of Montreal, to approve the loans from 617885 Ontario Limited, which consent was predicated upon loan documents (the "Receivership Loan Agreement") satisfactory to Bank of Montreal that required any and all loans from 617885 Ontario Limited to Enterprises and/or Holdings being used to "fund the operation of the Entities," be "fully subordinate to" any and all interests of Bank of Montreal, and prohibited payments from any loans to partners, shareholders, officers, and directors of Enterprises and Holdings or any affiliates. The structure of the Receivership Loan Agreement created a security interest subordinate to Bank of Montreal in all monies received by the Receiver from the sale of agricultural products. The Court entered an *Order Sustaining Motion to Approve Loan Agreement* on November 1, 2017 (the "Order Approving Receivership Loans"). Following the entry of the Dissolution Orders, the Order Approving Receivership Loans was amended with "no substantive changes" pursuant to a subsequent Court Order entered on January 29, 2018 (the "Amended Order Approving Receivership Loans").

Without any notice to Bank of Montreal, and in direct contravention of the Amended Order Approving Receivership Loans and Receivership Loan Agreement, as well as the claim priority scheme set forth in the Loan and Security Documents and Ohio law, on January 30, 2018, the Receiver borrowed $2,000,000 (Canadian) from 617885 Ontario Limited "to pay a Promissory Note from Olindo and Dorothy Mastronardi," Plaintiff Paul Mastronardi's grandparents, dated May 2016 (the "Mastronardi Grandparent Note"), which was arguably in default and matured on January 9, 2018 (the "Unauthorized Receivership Loan"). The Unauthorized Receivership Loan was used to pay off the entirety of the pre-receivership, unsecured Mastronardi Grandparent Note, while Bank of Montreal continues to be owed secured debt in excess of $22 million. The Motion seeks to approve the Unauthorized Receivership Loan *nunc pro tunc*, elevating a pre-receivership, unsecured loan in the form of the Mastronardi Grandparent Note ahead of Bank of Montreal's outstanding first priority senior secured debt.

Argument

The Unauthorized Receivership Loan Was Not Necessary and Violates the Priority Scheme of Claims Under Ohio Law, to the Detriment of Bank of Montreal.

The Motion states, in sum, that the Receiver entered into the Unauthorized Receivership Loan (i) to avoid litigation threatened by counsel for Olindo and Dorothy Mastronardi due to the alleged default and maturity of the Mastronardi Grandparent Note and (ii) was favorable to Enterprises and Holdings because it avoided an increase in the amount of the unsecured claim arising from the Mastronardi Grandparent Note. However, the Receivership Stay prevents Olindo and Dorothy Mastronardi from commencing any litigation against Enterprises and Holdings, such that even the threat of litigation arguably violates the

Receivership Stay imposed by this Court, negating any purported risk of litigation. Additionally, the posture of this case makes it uncertain whether or not secured claimants, such as Bank of Montreal, will be paid in full from the sale of assets of Enterprises and Holdings, and whether unsecured claimants, such as Olindo and Dorothy Mastronardi as well as numerous unsecured trade creditors, will receive any distributions from the receivership, negating any arguable benefit of a reduced unsecured claim amount.

Nonetheless, through the Unauthorized Receivership Loan—for no apparent reason — Olindo and Dorothy Mastronardi have been paid in full on the Mastronardi Grandparent Note and preferred to all other similarly situated unsecured creditors who may be "out of the money" in this receivership and, most surprisingly, preferred over senior secured creditors, such as Bank of Montreal. *See, e.g., Huntington National Bank v. 5777 Grant, LLC*, 216 WL 6392581 (Eighth Dist. Ct. of Appeals, Oct. 27, 2016 (proceeds from receivership sale directed to pay secured claims first). It is unrefuted in this case that Bank of Montreal is the first priority secured creditor over all assets of Enterprises and Holdings with senior priority over all junior creditors. There is no legal precedent in Ohio for this preferential treatment of the unsecured Mastronardi Grandparent Note over the senior secured liens of Bank of Montreal, none is cited in the Motion, and the Motion should be denied.

The Unauthorized Receivership Loan Violates the Amended Order Approving Receivership Loans and the Receivership Loan Agreement.

The Motion suggests that the Receiver has an unfettered right to obtain loans on behalf of Enterprises and Holdings by virtue of a receiver's powers under Ohio Revised Code § 2735. This is simply not the law in Ohio. At best, O.R.C 2735.04 authorizes a receiver to "enter into contracts, including, but not limited to contracts of sale, lease, or, *so long*

as existing lien rights will not be impacted...". Unquestionably, the Unauthorized Receivership Loan has impacted the senior lien rights of Bank of Montreal in the amount of approximately $22 million that remains outstanding, by paying a junior, unsecured loan in full.

Because there are limitations on the powers of receivers under Ohio law, Court approval was sought and obtained for loans made by 617885 Ontario Limited to Enterprises and Holdings, requiring them to be consistent with the terms and conditions of the Receivership Loan Agreement. To the best of Bank of Montreal's knowledge, all loans made by 617885 Ontario Limited during the receivership comply with the terms and conditions of the Court-approved Receivership Loan Agreement, except the Unauthorized Receivership Loan. The proceeds of the Unauthorized Receivership Loan were used to payoff of the unsecured Mastronardi Grandparents Note without providing <u>any</u> benefit to this receivership (as described above), satisfied a pre-receivership debt owed to an "affiliate" of Plaintiff Paul Mastronardi, and was certainly not "necessary and appropriate for the ongoing operations of the Receivership." The Unauthorized Receivership Loan violates this Court's prior orders and the Receivership Loan Agreement to which Bank of Montreal consented, and the Motion should be denied.

<u>The Mastronardi Grandparents Note Violated the Borrowers' Loan and Security Documents with Bank of Montreal</u>

Pursuant to the Loan and Security Documents between Enterprises and the Bank of Montreal, Enterprises represented to the Bank of Montreal that it was not obligated under or subject to, directly or indirectly, any indebtedness other than the indebtedness described in Section 11(p) and disclosed on Schedule 11(p) to the Credit Agreement. This representation was materially false as it did not disclose the existence of the Mastronardi Grandparents Note.

Specifically, the Mastronardi Grandparents Note was not listed on the Schedules to the Credit Agreement. The Mastronardi Grandparents Note was similarly not disclosed or scheduled in the original Credit and Security Agreement, dated June 3, 2016, between Enterprises and the Bank of Montreal.

Furthermore, had Enterprises disclosed the existence of the Mastronardi Grandparents Note, Bank of Montreal would have insisted on the delivery of a subordination agreement with the holders of the same pursuant to which all payments to such holders would be prohibited in circumstances of default. It must be assumed that, in the absence of such disclosure, that the Mastronardi Grandparents Note is to be treated as Subordinated Debt (as such term is defined in the Loan and Security Documents). Paragraph 12(z) of the Credit Agreement provides that Subordinated Debt cannot be repaid other than as detailed in the applicable Subordination Agreement, which would have required the Bank of Montreal's approval.

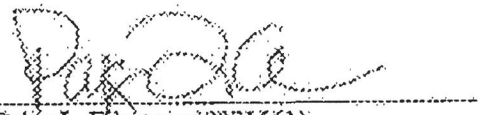
By misrepresenting to the Bank of Montreal its outstanding debt obligations, Enterprises put the Bank of Montreal in a position where the repayment if its senior secured debt is effectively subordinated to the repayment of unsecured debt owing to a related (affiliated) party. This circumstance is unacceptable and a direct violation of the terms of the Credit Agreement. The receivership process should not permit Enterprises to default under the terms of the Credit Agreement or promote its misrepresentations to the Bank of Montreal with respect to Enterprises' existing debt. To allow the Unauthorized Receivership Loan to stand could chill secured lending to Ohio companies.

Conclusion

The Motion, seeking the *nunc pro tunc* approval of the Unauthorized Receivership Loan used to pay off the pre-receivership, unsecured Mastronardi Grandparent Note ahead of senior claimants, including Bank of Montreal, is unprecedented. The relief requested in the Motion violates well-established Ohio law, the Court's prior Amended Order Approving Receivership Loans, the Receivership Loan Agreement, and the terms and conditions of the Loan and Security Documents. The Motion should be denied and either direct (i) the Receiver, 617885 Ontario Limited and Olindo and Dorothy Mastronardi to unwind the Unauthorized Receivership Loan transaction immediately, or (ii) classifying the Unauthorized Receivership Loan made by 617885 Ontario Limited as a pre-receivership, general unsecured loan, placing it at the same level of claim priority as the Mastronardi Grandparent Note prior to the unauthorized transaction at issue.

Dated: March 9, 2018

Respectfully Submitted,



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CERTIFICATE OF SERVICE

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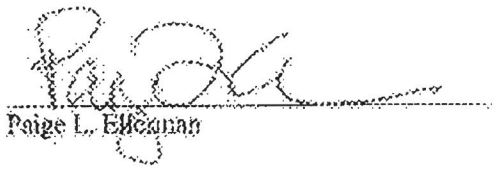

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