

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

**ENLIGHTENED FUNDING CORPORATION**

Applicant

- and -

**VELOCITY ASSET AND CREDIT CORPORATION AND 926749  
ONTARIO LTD. O/A CLONSILLA AUTO SALES AND LEASING**

Respondents

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

**FACTUM OF THE RECEIVER**

June 21, 2024

**THORNTON GROUT FINNIGAN LLP**  
TD West Tower, Toronto-Dominion Centre  
100 Wellington Street West, Suite 3200  
Toronto, ON M5K 1K7  
Fax: (416) 304-1313

**Rebecca L. Kennedy (LSO# 61146S)**  
Email: rkennedy@tgf.ca

**Derek Harland (LSO# 79504N)**  
Email: dharland@tgf.ca

Tel: 416-304-1616

Lawyers for the Receiver

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## PART I - NATURE OF THE MOTION

1. Deloitte Restructuring Inc. (“**Deloitte**”) was appointed as receiver (the “**Receiver**”) on October 26, 2023, over the property of Velocity Asset and Credit Corporation (“**Velocity**”) and certain property of 926749 Ontario Ltd. o/a Clonsilla Auto Sales and Leasing (the “**Dealer**” and, together with Velocity, the “**Debtors**”). The Receiver was appointed over the remainder of the Dealer’s property on December 8, 2023, pursuant to an Amended and Restated Receivership Order (the “**A&R Receivership Order**”).
2. Immediately prior to the A&R Receivership Order being granted, the Dealer and Jaqstan Consulting Inc. o/a AutoLoans 4 You (“**AutoLoans**”) discussed and entered into a transaction regarding four vehicles owned by the Dealer (the “**Four Vehicles**”).
3. The core issue on this motion is whether the transaction between the Dealer and AutoLoans was structured as a loan arrangement or as a purchase by AutoLoans of the Four Vehicles.
4. The evidence is conclusive that the transaction between the Dealer and AutoLoans regarding the Four Vehicles was an unsecured loan arrangement. On November 30, 2023, the Dealer and AutoLoans executed debt instruments with respect to the Four Vehicles. On December 1, 2023, AutoLoans advanced loan funding to the Dealer pursuant to these debt instruments. The debt instruments were binding contracts and the parties treated them as such.
5. AutoLoans argues that on December 4, 2023, the parties entered into purchase agreements in respect of the Four Vehicles (which they admittedly backdated to November 30, 2023) (the “**Alleged Purchase Agreements**”). In reviewing the books and records of the Dealer, there are no emails or documents evidencing the negotiation or execution of the Alleged

Purchase Agreements or the termination or repudiation of the debt instruments. No such emails or documents are included in AutoLoans' Motion Records. There is no evidence that consideration was ever provided for the Alleged Purchase Agreements and the conduct of the parties does not indicate they treated the Alleged Purchase Agreements as binding.

6. In the alternative, if the Alleged Purchase Agreements are found to be binding contracts, which the Receiver denies, such a transfer of the Four Vehicles to AutoLoans would constitute a preference pursuant to section 95 of the *Bankruptcy and Insolvency Act* (Canada) (the "**BIA**") and should be set aside. The Dealer has been assigned into bankruptcy and the transfer would have the effect of giving AutoLoans a preference over other creditors of the Dealer.
7. For the reasons described above and as further set out below, the Receiver respectfully submits the motion brought by AutoLoans should be dismissed, with costs.

## **PART II - THE FACTS**

8. The facts relevant to the relief sought by the Receiver are set out in greater detail in the Fourth Report of the Receiver dated May 14, 2024 (the "**Fourth Report**") and are summarized below. All capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Fourth Report.

### ***Background***

9. On October 26, 2023, pursuant to an application brought by Enlightened Funding Corporation ("**Enlightened**") Deloitte was appointed as the Receiver over all property of

Velocity and certain property of the Dealer (the “Receivership Order”).<sup>1</sup> The Receivership Order did not apply to the Four Vehicles.

10. On December 8, 2023, Justice Conway granted the A&R Receivership Order that expanded the receivership to all property of the Debtors (the “**Property**”), including the Four Vehicles, and to “preserve, protect, and ultimately realize on the Property subject to the security of secured creditors”.<sup>2</sup>
11. The A&R Receivership Order authorizes and empowers the Receiver to exercise control over all of the Property, including proceeds.<sup>3</sup>
12. On May 3, 2024, Justice Conway granted Deloitte the power to assign the Debtors into bankruptcy (the “**Bankruptcy Order**”).<sup>4</sup>

***Undisputed Facts Establish Binding Loan Agreement***

13. The Dealer and AutoLoans had an existing lending arrangement whereby AutoLoans provided financing for the Dealer’s leasing business. AutoLoans is a creditor of the Dealer.<sup>5</sup>
14. Based on the evidentiary record before the Court on this motion, the following are undisputed facts from the Fourth Report, as well as the Motion Record of AutoLoans dated April 16, 2024 (the “**AutoLoans Motion Record**”) and the Reply Affidavit of Jacquie

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<sup>1</sup> Fourth Report at para 2, Tab 1 of the Responding Motion Record of the Receiver dated May 14, 2024 (the “**Responding Motion Record**”).

<sup>2</sup> Fourth Report at para 3, Tab 1 of the Responding Motion Record.

<sup>3</sup> Fourth Report at para 4, Tab 1 of the Responding Motion Record.

<sup>4</sup> Fourth Report at para 5, Tab 1 of the Responding Motion Record.

<sup>5</sup> Fourth Report at para 21, Tab 1 of the Responding Motion Record; Affidavit of Paul Shapiro sworn April 15, 2024 (the “**Shapiro Affidavit**”) at paras 5 and 8, Tab 7 of the AutoLoans Motion Record; Transcript from the Cross-Examination of Paul Shapiro held June 3, 2024 (the “**Shapiro Transcript**”) at Qs 30-32.

Rabinowitz sworn May 24, 2024 (the “**Reply Affidavit**”), that support the Receiver’s position that the Dealer and AutoLoans entered into a loan agreement with respect to the Four Vehicles:

- (a) in late November 2023, the Dealer approached AutoLoans for a loan;<sup>6</sup>
- (b) the initial discussions between AutoLoans and the Dealer were regarding a possible loan transaction;<sup>7</sup>
- (c) on November 27, 2023, Hugh Waddell (“**Waddell**”), the former principal of the Dealer, sent Jacquie Rabinowitz (“**Jacquie**”), one of the principals of AutoLoans, a list of leases for which the Dealer was seeking financing;<sup>8</sup>
- (d) between November 27 and 28, 2023, Jacquie and Waddell engaged in a discussion regarding the amount of financing being requested by the Dealer and the due diligence that Jacquie must perform, including registrations of financing statements under the *Personal Property Security Act* (Ontario) (“**PPSA**”), ensuring there were no prior liens, and determining which of her corporate entities she would use for the loan. Jacquie confirmed via email, that “we are going to be funding leases for [the Dealer] and then getting paid back monthly blended principle [sic] and interest;”<sup>9</sup>

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<sup>6</sup> Affidavit of Jacquie Rabinowitz sworn April 15, 2024 (the “**Jacquie Affidavit**”) at para 2, Tab 2 of the AutoLoans Motion Record; Reply Affidavit at para. 6.

<sup>7</sup> Reply Affidavit at para 6; Fourth Report at para 21, Tab 1 of the Responding Motion Record.

<sup>8</sup> Fourth Report at para 22, Tab 1 of the Responding Motion Record; Jacquie Affidavit at para 7, Tab 2 of the AutoLoans Motion Record.

<sup>9</sup> Fourth Report at para 22 and Appendix “G”, Tab 1 of the Responding Motion Record.

- (e) on November 29, 2023, AutoLoans registered PPSA financing statements against the Dealer as debtor in respect of the Four Vehicles;<sup>10</sup>
- (f) on November 29, 2023, at 4:49 P.M., Jacquie sent an email to Waddell and Maryanne Jacobs (“**Jacobs**”), an employee of the Dealer, attaching the loan payment amortization schedule, which set out the principal and interest payments. The principal and interest payments match the payment amount due under debt instruments described as Fixed Rate Installment Notes (the “**FRINs**”);<sup>11</sup>
- (g) on November 30, 2023, at 10:50 A.M., Jacobs directed lessees to send payments directly to AutoLoans on the instruction of Jacquie;<sup>12</sup>
- (h) on November 30, 2023, at 12:36 P.M., Jacquie sent Waddell a draft FRIN for review that would remain a draft until she completed and sent them to Waddell for signature.<sup>13</sup>
- (i) On November 30, 2023, at 12:44 P.M., Jacquie sent her draft FRIN to her accountant, Mr. Warren Goldberg (“**Goldberg**”) for review. Her email notes that she created a workbook to track the payments [principal & interest] coming in and that HST would need to be returned to the Dealer to be submitted monthly. She asked for advice on the HST issue.<sup>14</sup>

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<sup>10</sup> Jacquie Affidavit at para 10, Tab 2 of the AutoLoans Motion Record; Fourth Report at para 27 and Appendix “J”, Tab 1 of the Responding Motion Record.

<sup>11</sup> Fourth Report at para. 26 and Appendix “I”, Tab 1 of the Responding Motion Record.

<sup>12</sup> Fourth Report at Appendix “F”, Tab 1 of the Responding Motion Record; Affidavit of Maryanne Jacobs sworn April 12, 2024 (the “**Jacobs Affidavit**”) at Exhibit “B”, Tab 5 of the AutoLoans Motion Record.

<sup>13</sup> Jacquie Affidavit at para 14, Tab 2 of the AutoLoans Motion Record; Fourth Report at para 29 and Appendix “K”, Tab 1 of the Responding Motion Record.

<sup>14</sup> Goldberg Affidavit at paragraph 2, Tab 3 of the Autoloans Motion Record; Reply Affidavit at Exhibit “A”.

- (j) On November 30, 2023, at 12:48 P.M., Goldberg told Jacquie he didn't have time to respond to her request and would look at it in the next day or two.<sup>15</sup>
- (k) on November 30, 2023, at 1:14 P.M., Waddell responded to Jacquie and advised that the draft FRIN sent by Jacquie was agreeable to the Dealer;<sup>16</sup>
- (l) on November 30, 2023, at 2:55 P.M., Jacquie sent completed execution versions of the FRINs for the Four Vehicles to Waddell in four separate emails and asked Waddell to sign and return the FRINs;<sup>17</sup>
- (m) on November 30, 2023, at 4:16 P.M., Waddell signed a FRIN for each of the Four Vehicles (the "**Executed FRINs**") and returned them via email to Jacquie;<sup>18</sup>
- (n) on December 1, 2023, at 1:19 P.M., the funds were advanced by AutoLoans to the Dealer;<sup>19</sup>
- (o) On December 6, 2023, Jacquie sent Waddell an invoice for the PPSA registrations made against the Dealer in connection with the registration of the FRIN transaction and indicated the Dealer registrations could be renewed next year;<sup>20</sup> and
- (p) title and registration to the Four Vehicles were never transferred to AutoLoans,<sup>21</sup>

(collectively, the "**Undisputed Facts**").

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<sup>15</sup> Reply Affidavit, Exhibit "A".

<sup>16</sup> Fourth Report at para 30 and Appendix "L", Tab 1 of the Responding Motion Record.

<sup>17</sup> Fourth Report at para 31 and Appendix "M", Tab 1 of the Responding Motion Record.

<sup>18</sup> Fourth Report at para 31 and Appendix "N", Tab 1 of the Responding Motion Record.

<sup>19</sup> Fourth Report at para 32 and Appendix "O", Tab 1 of the Responding Motion Record; Affidavit of Hugh Waddell sworn April 12, 2024 (the "**Waddell Affidavit**") at Exhibit "F", Tab 4 of the AutoLoans Motion Record.

<sup>20</sup> Fourth Report at para 33 and Appendix "P", Tab 1 of the Responding Motion Record.

<sup>21</sup> Waddell Affidavit at para 26, Tab 4 of the AutoLoans Motion Record.



15. The Undisputed Facts are determinative of the motion. The transaction in respect of the Four Vehicles was a loan transaction and the motion brought by AutoLoans ought to be dismissed.

***Purported Purchase Agreement***

16. The following is a summary of the evidence of AutoLoans that the transaction was intended to be a purchase transaction:
- (a) on November 30, 2023, Jacobs took the files for the Four Vehicles and placed them in green folders to be transferred to AutoLoans;<sup>22</sup>
  - (b) on the morning of December 1, 2023, Jacquie spoke to Goldberg about the best way to structure the transaction. Goldberg advised Jacquie that the best approach would be for AutoLoans to purchase the vehicles;<sup>23</sup>
  - (c) over the weekend of December 2<sup>nd</sup> and 3<sup>rd</sup>, 2023, Paul Shapiro (“**Shapiro**”) drafted purchase documents in respect of the Four Vehicles;<sup>24</sup>
  - (d) on December 4, 2023, AutoLoans and the Dealer executed the purchase agreements, witnessed by Shapiro (the “**Alleged Purchase Agreements**”). The Alleged Purchase Agreements were backdated to November 30, 2023;<sup>25</sup> and
  - (e) the A&R Receivership Order was issued before title to the Four Vehicles could be transferred to AutoLoans.<sup>26</sup>

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<sup>22</sup> Jacobs Affidavit at para 9, Tab 5 of the AutoLoans Motion Record.

<sup>23</sup> Jacquie Affidavit at paras 16-17, Tab 2 of the AutoLoans Motion Record.

<sup>24</sup> Jacquie Affidavit at para 19, Tab 2 of the AutoLoans Motion Record.

<sup>25</sup> Jacquie Affidavit at paras 19-20, Tab 2 of the AutoLoans Motion Record; Shapiro Affidavit at para 14, Tab 7 of the AutoLoans Motion Record.

<sup>26</sup> Waddell Affidavit at para 26, Tab 2 of the AutoLoans Motion Record.

17. AutoLoans offers a narrative in their materials that the transaction completed by the Dealer and AutoLoans was a purchase transaction. This narrative is not supported by, and is inconsistent with, the books and records of the Debtors which the Receiver has access to, including the Debtors' emails (the "**Records**") and all the documentary evidence (save the Alleged Purchase Agreements). Further, the narrative offered by all of the affiants is mostly irrelevant, unreliable and includes hearsay evidence. The Court should not rely on this evidence and should instead rely on the Undisputed Facts set out above.
18. Based on a review of the Records, there are no emails or documents evidencing the negotiation or execution of the Alleged Purchase Agreements, or the termination or repudiation of the FRINs.<sup>27</sup> AutoLoans has not produced any contemporaneous documentary evidence illustrating same.
19. AutoLoans produced one (1) email chain between AutoLoans and Goldberg purporting to reflect AutoLoans' need for Goldberg to comment on the structure of the transaction shortly before the final populated FRINs were sent to Waddell for execution. However, at no time in the email chain did Jacquie request advice on the structure."<sup>28</sup> Her question related to the remittance of HST.

#### ***AutoLoans Discovers Possible Receivership***

20. AutoLoans became aware of a possible receivership involving Enlightened shortly after the execution of the Executed FRINs and the advancement of funds. On December 1, 2023, at 5:08 P.M., after the FRIN loan funds had been advanced to the Dealer, Jacquie

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<sup>27</sup> Fourth Report at paras 34-35, Tab 1 of the Responding Motion Record.

<sup>28</sup> Jacquie Affidavit at Exhibit "C", Tab 2 of the AutoLoans Motion Record.

sent among others, Waddell and her father, Shapiro, an email indicating that she discovered Clonsilla had bought certain vehicles at an auction with a trustee as seller and that there was a potential receivership proceeding involving Enlightened. Jacquie said to Waddell: “These 3 vehicles were funded by [Enlightened] through Velocity and now you have bought them back from an Auction with a Trustee as the seller. Surely you should know if they are in receivership as they can not sell a vehicle without a registration and they would have to get that registration from your office. Hugh, are you sure there is nothing else you want to disclose to us?”<sup>29</sup>

21. At this time, Jacquie knew that Clonsilla had bought these vehicles at an auction from a trustee as a seller because Waddell had sent Jacquie the paperwork regarding these purchases.<sup>30</sup>
22. On December 1, 2023, at 10:36 P.M., Shapiro sent among others, Jacquie and Waddell, an email advising that Waddell would not explain to him what was going on with Enlightened. Shapiro asked: “What I don’t understand is how the accountants were able to sell cars that were in Clonsilla’s fleet. Did [Enlightened] take them back or did Hugh take them back and give to Longo... What is the story with this Hugh?”<sup>31</sup>

### ***Receiver’s Discovery of the AutoLoans Transaction***

23. On December 13, 2023, the Receiver identified correspondence in the corporate email account of Waddell determining that Jacquie had been corresponding directly with the

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<sup>29</sup> Rabinowitz Transcript, Exhibit “A”.

<sup>30</sup> Rabinowitz Transcript at Q 43.

<sup>31</sup> Shapiro Transcript, Exhibit “A”.

Dealer's lessees and directing them to make their monthly lease payments to AutoLoans and not to the Receiver.<sup>32</sup>

24. On December 19, 2023, the Receiver spoke with Jacquie by telephone and informed her that she was interfering with the Receiver's mandate by trying to improperly redirect lease payments owed to the Dealer.<sup>33</sup>
25. Following this discussion, the Receiver reviewed the Records of the Dealer with respect to any transactions involving AutoLoans. The Receiver identified the Executed FRINs in the Records.<sup>34</sup> No other documents (purchase or otherwise) were in the Records with respect to the Four Vehicles.
26. On January 4, 2024, the Receiver received a letter dated January 3, 2024, from Spizzirri Law Professional Corporation ("**Spizzirri**"), counsel to AutoLoans. Spizzirri advised that AutoLoans had purchased the Four Vehicles. As evidence for the transaction between AutoLoans and the Dealer, Spizzirri provided the Receiver with documents including:
  - (i) an agreement dated November 30, 2023, purportedly documenting the purchase of the Four Vehicles by AutoLoans;
  - (ii) for each vehicle, the Executed FRIN with respect to each vehicle;
  - (iii) for each vehicle, a separate purchase agreement dated November 30, 2023, purporting to transfer the vehicle to AutoLoans;

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<sup>32</sup> Fourth Report at para 9, Tab 1 of the Responding Motion Record.

<sup>33</sup> Fourth Report at para 11 and Appendix "D", Tab 1 of the Responding Motion Record.

<sup>34</sup> Fourth Report at para 12 and Appendix "E", Tab 1 of the Responding Motion Record.

- (iv) for each vehicle, a confirmation of PPSA registration made by AutoLoans against the Dealer and the individual lessee; and
- (v) wire instructions and a copy of a bank draft in the amount of \$67,749, representing a portion of the purchase price. The balance of the purchase price, in the amount of \$22,793, was purportedly paid via a reduction of amounts allegedly owing by the Dealer to AutoLoans.<sup>35</sup>

27. The Executed FRINs were provided by AutoLoans in the letter as evidence of the agreement between the Dealer and AutoLoans. There was no suggestion in Spizzirri's letter that the Executed FRINs were not valid and binding documents between the Dealer and AutoLoans, as is now currently submitted by AutoLoans.<sup>36</sup>
28. After reviewing the email correspondence, the Records, and the various documentation provided by Jacquie and Spizzirri, the Receiver concluded that the valid transactions completed by the Dealer and AutoLoans were financing arrangements set out in the Executed FRINs that created unsecured debt obligations of the Dealer to AutoLoans. The Receiver concluded the Alleged Purchase Agreements were not valid or enforceable and did not constitute a purchase of the Four Vehicles by AutoLoans.<sup>37</sup>

### **PART III - ISSUES**

29. There are two issues to be determined:

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<sup>35</sup> Fourth Report at paras 15-16 and Appendix "F", Tab 1 of the Responding Motion Record.

<sup>36</sup> Fourth Report at para 16, Tab 1 of the Responding Motion Record.

<sup>37</sup> Fourth Report at paras 17-20, Tab 1 of the Responding Motion Record.

- (a) whether the Executed FRINs or the Alleged Purchase Agreements govern the Four Vehicles; and
- (b) if the Alleged Purchase Agreements are valid and binding agreements evidencing a transfer of the Four Vehicles to AutoLoans, whether such transfer should be set aside as a preference pursuant to section 95 of the BIA.

#### **PART IV - LAW & ARGUMENT**

**(a) THE EXECUTED FRINs ARE VALID AND BINDING AGREEMENTS**

30. The common law holds to an objective theory of contract formation. In determining whether the parties' conduct met the conditions for contract formation, the court is to examine "how each party's conduct would appear to a reasonable person in the position of the other party". The question is not what the parties subjectively had in mind but whether their conduct was such that a reasonable person would conclude that they intended to be bound. In answering this question, courts are not limited to the four corners of the purported agreement, but may consider the surrounding circumstances.<sup>38</sup>
31. In this case, the elements of contract formation – offer, acceptance and consideration, are present in the case of the FRINs.<sup>39</sup>
32. Jacquie sent an offer for acceptance to Waddell on November 30, 2023, at 2:55 P.M. when she sent the execution copies of the FRINs for the Four Vehicles to Waddell and asked Waddell to sign and return the FRINs. Waddell accepted the offer when he signed and

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<sup>38</sup> *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, 2021 SCC 22 [*Ethiopian Orthodox*] at [paras 35 and 37](#).

<sup>39</sup> *Ethiopian Orthodox*, *ibid* at [para 35](#).

returned the Executed FRINs to Jacquie on November 30, 2023, at 4:16 P.M. As consideration for the Dealer providing the Executed FRINs, AutoLoans advanced the funds to the Dealer on December 1, 2023.

33. The conduct of the parties and the surrounding circumstances also support an objective finding that they intended to be bound by the FRINs:
- (a) Jacquie sent Waddell an amortization schedule on November 29, 2023, which demonstrated that the Dealer's monthly principal and interest payments to AutoLoans were equal to the lease proceeds;<sup>40</sup>
  - (b) PPSA registrations against the Dealer as business debtor and the Four Vehicles and lease proceeds were registered in favour of AutoLoans on November 29, 2023;
  - (c) on December 6, 2023, Jacquie emailed Waddell regarding future renewal of the PPSA registrations. If AutoLoans owned the Four Vehicles, there would be no reason for Jacquie to discuss renewal of the PPSA registrations;<sup>41</sup>
  - (d) there is no evidence of any change in the PPSA registrations since they were made by AutoLoans;
  - (e) AutoLoans' counsel delivered a letter to the Receiver's counsel on January 4, 2024, which included the Executed FRINs as documentary evidence of the agreement between the parties.<sup>42</sup> The letter did not dispute the validity of the FRINs but instead relied on them to support AutoLoans' interest in the Four Vehicles. The first time

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<sup>40</sup> Fourth Report at para 26 and Appendix "I", Tab 1 of the Responding Motion Record.

<sup>41</sup> Fourth Report at para 33 and Appendix "P", Tab 1 of the Responding Motion Record.

<sup>42</sup> Fourth Report at paras 15-16 and Appendix "F", Tab 1 of the Responding Motion Record.

that anyone alleged to the Receiver that the Executed FRINs were not intended to be valid and binding and were only “draft” was when AutoLoans delivered its Motion Record; and

- (f) all of the contemporaneous email correspondence between the parties evidences a loan transaction, not a purchase. Even the emails produced by AutoLoans with its accountant refer to the fact that AutoLoans is advancing a loan in respect of the Four Vehicles and will receive principal and interest with respect to the loans.

34. The Executed FRINs are valid and binding agreements. There is no evidence supporting an intention of the parties to terminate or repudiate the Executed FRINs.

**(b) THE ALLEGED PURCHASE AGREEMENTS ARE NOT VALID AND BINDING**

35. In contrast to the Executed FRINs, a reasonable person reviewing the evidence would not conclude that the parties intended to be bound by the Alleged Purchase Agreements.

36. As an initial matter, there is no evidence of consideration for the Alleged Purchase Agreements. The wire transfer made by AutoLoans on December 1, 2023, was made following the Dealer’s acceptance of the FRINs at 4:16 P.M. the previous day. The Alleged Purchase Agreements were not drafted at the time of the advance of the funds and were not purportedly signed until December 4, 2023. There is no subsequent payment made by AutoLoans. Accordingly, the basic elements of contractual formation are not met with respect to the Alleged Purchase Agreements.



37. The conduct of the parties and the surrounding circumstances also do not support an objective finding that the parties intended to be bound by the Alleged Purchase Agreements:
- (a) the registration of the vehicles was never transferred to AutoLoans;
  - (b) AutoLoans was not given the “green folders” prepared by Jacobs on November 30, 2023, containing the Dealer’s files on the Four Vehicles, despite Shapiro attending the Dealer’s office on December 4, 2023, to complete the Alleged Purchase Agreement; and
  - (c) following the purported execution of the Alleged Purchase Agreements, on December 6, 2023, Jacquie emailed Waddell regarding maintaining the PPSA registrations against the Dealer in respect of the Four Vehicles moving forward.
38. The only evidence filed by AutoLoans in support of the Alleged Purchase Agreements are the statements made in the sworn affidavits included in AutoLoans’ motion record and reply record. Notably, there are zero documents included in these affidavits evidencing the Alleged Purchase Agreements, other than purported copies of the agreements themselves.
39. There are numerous emails documenting the extensive negotiation, drafting and execution of the FRINs. Yet there are none for the Alleged Purchase Agreements. AutoLoans is asking the Court to accept that the entirely undocumented purchase transaction should be accepted over the extensively documented loan transaction. In the Receiver’s respectful submission, this argument should be rejected.

(c) **AUTOLOANS' AFFIDAVIT EVIDENCE IS NOT CREDIBLE AND SHOULD BE GIVEN NO WEIGHT**

40. The following raises credibility issues with the evidence of AutoLoans' affiants.

*Jacque Affidavit*

41. The Jacque Affidavit asserts that the FRINs were never meant to be signed by the Dealer and that Jacque specifically advised Waddell to not sign the FRINs.<sup>43</sup> The documentary evidence is clear that Jacque did in fact ask Waddell to sign and return the Executed FRINs, which Waddell did.<sup>44</sup> The parties were *ad idem*.<sup>45</sup>
42. The Jacque Affidavit indicates that the four PPSA registrations made by AutoLoans on November 29, 2023, were merely "precautionary liens".<sup>46</sup> However, on December 6, 2023, Jacque told Waddell the liens have been registered for one year and the parties would revisit the registration when the lien was up for renewal.<sup>47</sup>
43. Jacque's Reply Affidavit states: "I never personally directed a single lessee to make payments to AutoLoans and not the Receiver. The only emails with respect to directions to pay AutoLoans came from [the Dealer] on November 30, 2023."<sup>48</sup> In fact, Jacque specifically directed lessees to make payments to AutoLoans on at least December 4, 2023, December 5, 2023, December 7, 2023, December 8, 2023, December 9, 2023, and December 13, 2023.<sup>49</sup>

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<sup>43</sup> Jacque Affidavit at paras 14-15, Tab 2 of the AutoLoans Motion Record.

<sup>44</sup> Fourth Report at para 31 and Appendix "M", Tab 1 of the Responding Motion Record.

<sup>45</sup> Reply Affidavit at paras 6-7.

<sup>46</sup> Jacque Affidavit at para 10, Tab 2 of the AutoLoans Motion Record.

<sup>47</sup> Fourth Report at para 33 and Appendix "P", Tab 1 of the Responding Motion Record.

<sup>48</sup> Reply Affidavit at para 11.

<sup>49</sup> Rabinowitz Transcript, Exhibit "B".

*Waddell Affidavit*

44. As is outlined in the previous Reports filed in this proceeding, there is *prima facie* evidence of fraud relating to the Debtors involving Waddell.<sup>50</sup> Further, as found by this Court, Waddell knowingly unlabeled cars he sold to innocent purchasers where he had not made the required payments to his floor plan financiers, and he admitted to knowingly transferring cars to third parties and discharging security interests without payments to the required secured creditors.<sup>51</sup>

**(d) IN THE ALTERNATIVE, THE TRANSFERS OF THE FOUR VEHICLES WOULD BE PREFERENCES**

45. If this Court finds that the Alleged Purchase Agreements are valid and enforceable obligations with respect to the Four Vehicles, which the Receiver expressly denies, the transfers would be preferences under section 95(1) of the BIA.
46. Under section 95(1) of the BIA, preferences are void as against the trustee in bankruptcy. For the purposes of this motion, the Receiver will assume the parties were at arm's length when negotiating the Alleged Purchase Agreements, although that is not conceded.
47. The test for a preference under section 95(1)(a) of the BIA is:
- (a) The transferor was insolvent at the time of the transfers;
  - (b) The transfers occurred between three months prior to the date of the initial bankruptcy event and the date of bankruptcy; and

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<sup>50</sup> Supplement to the Third Report at paragraph 18 and Appendix "F".

<sup>51</sup> [Endorsement of Justice Conway dated May 3, 2024 at para 5.](#)

- (c) The transfers had the effect of giving a creditor a preference over other creditors at the time.<sup>52</sup>

48. All of these factors are present with respect to the Alleged Purchase Agreements.
49. Justice Conway has previously held that the factual record at the time of the Receivership Order “...clearly established [the Debtors’] insolvency.”<sup>53</sup> Accordingly, the Dealer was insolvent as of the date of the Alleged Purchase Agreements.
50. Pursuant to the Bankruptcy Order, the “date of the initial bankruptcy event” of the Dealer has been deemed to be October 6, 2023.<sup>54</sup> The Bankruptcy Order was made on May 3, 2024. Accordingly, the Alleged Purchase Agreements and the purported transfers of the Four Vehicles were made during the period contemplated by section 95(1)(a) of the BIA.
51. AutoLoans was a creditor at the time, not only under the Executed FRINs, but also in respect of other indebtedness owed by the Dealer. As recorded in the Alleged Purchase Agreements, the Dealer allegedly owed AutoLoans over \$20,000 and the Dealer and AutoLoans had a historical debtor-creditor relationship.<sup>55</sup>
52. The effect of the transfers would be that other creditors of the Dealer with an interest in the Four Vehicles would be deprived of those assets to satisfy their claims against the Dealer. As set out in *Truestar*, where assets are removed from the estate of a debtor and transferred

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<sup>52</sup> *Truestar Investments Ltd. v Baer*, [2018 ONSC 3158](#) [*Truestar*] at paras. [14](#), [58-59](#).

<sup>53</sup> [Endorsement of Justice Conway dated May 3, 2024 at footnote 1.](#)

<sup>54</sup> [Bankruptcy Order at para 3.](#)

<sup>55</sup> Jacquie Affidavit at Exhibit “D”, Tab 2 of the AutoLoans Motion Record.

to an unsecured creditor of the debtor during the period set out in section 95(1)(a), that is a preference.<sup>56</sup>

53. When a transfer has the effect of giving one creditor a preference over other creditors, the presumption is that the transfer was made with a view to giving the creditor a preference over other creditors in the absence of evidence to the contrary.<sup>57</sup>
54. The presumption is that this transaction was made with a view to giving a preference. \In this case, there is also evidence to support that presumption. Email communication between AutoLoans and the Dealer suggest AutoLoans discovered receivership proceedings involving Enlightened and attempted to re-paper the transaction in a way that would reflect a purchase of the Four Vehicles, rather than a loan transaction, to give AutoLoans a preference with respect to the Four Vehicles.
55. On the evening of December 1, 2023, AutoLoans became aware of a receivership proceeding involving Enlightened and vehicles that were purchased by the Dealer at auction with a trustee as seller. AutoLoans requested more information from Waddell.<sup>58</sup> Waddell wasn't able to or wouldn't provide further information when the matter was discussed with Shapiro.<sup>59</sup> This is when all email correspondence between Jacquie, Shapiro and Waddell ceases, and all undocumented "negotiations" occurred.
56. Shapiro, who has fifty years' experience in automotive sales and leasing business, admitted that he knew that if the transaction was not a purchase that the obligation owing to

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<sup>56</sup> *Truostar*, *supra* at [para 64](#).

<sup>57</sup> BIA, s. 95(2).

<sup>58</sup> Rabinowitz Transcript, Exhibit "A".

<sup>59</sup> Shapiro Transcript, Exhibit "A".

AutoLoans would be a simple debt in these proceedings.<sup>60</sup> He also admitted that he understood that if the Alleged Purchase Agreements were binding, they would take the assets out of the receivership.<sup>61</sup> It was Shapiro who testified that he drafted the Alleged Purchase Agreements for AutoLoans and organized their signing and backdating,<sup>62</sup> all of which occurred after he became aware of a potential receivership proceeding.<sup>63</sup>

57. Accordingly, in the event that the Alleged Purchase Agreements, and not the FRINs, are found to be binding agreements, the transfer of the Four Vehicles should be set aside pursuant to section 95 of the BIA.

#### **PART V - CONCLUSION**

58. For all of the foregoing reasons, the Receiver requests that this Court dismiss the motion of AutoLoans, with costs.

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<sup>60</sup> Shapiro Transcript at question 22.

<sup>61</sup> Shapiro Transcript at question 17-21.

<sup>62</sup> Shapiro Affidavit at paragraph 14.

<sup>63</sup> Shapiro Transcript at question 51 – 60.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 21st day of June, 2024.



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**THORNTON GROUT FINNIGAN LLP**

TD West Tower, Toronto-Dominion Centre  
100 Wellington Street West, Suite 3200  
Toronto, ON M5K 1K7  
Fax: (416) 304-1313

**Rebecca L. Kennedy (LSO# 61146S)**

Email: rkennedy@tgf.ca

**Derek Harland (LSO# 79504N)**

Email: dharland@tgf.ca

Tel: 416-304-1616

Lawyers for the Receiver

**SCHEDULE “A”  
LIST OF AUTHORITIES**

1. [\*Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga\*, 2021 SCC 22](#)
2. [\*Truestar Investments Ltd. v Baer\*, 2018 ONSC 3158](#)
3. [Endorsement of Justice Conway dated May 3, 2024](#)
4. [Bankruptcy Order dated May 3, 2024](#)



## SCHEDULE “B” RELEVANT STATUTES

### *Bankruptcy and Insolvency Act, R.S.C., 1985, C. B-3*

#### **Preferences**

- **95 (1)** A transfer of property made, a provision of services made, a charge on property made, a payment made, an obligation incurred or a judicial proceeding taken or suffered by an insolvent person
  - **(a)** in favour of a creditor who is dealing at arm’s length with the insolvent person, or a person in trust for that creditor, with a view to giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy; and
  - **(b)** in favour of a creditor who is not dealing at arm’s length with the insolvent person, or a person in trust for that creditor, that has the effect of giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is 12 months before the date of the initial bankruptcy event and ending on the date of the bankruptcy.
- **Preference presumed**
  - **(2)** If the transfer, charge, payment, obligation or judicial proceeding referred to in paragraph (1)(a) has the effect of giving the creditor a preference, it is, in the absence of evidence to the contrary, presumed to have been made, incurred, taken or suffered with a view to giving the creditor the preference — even if it was made, incurred, taken or suffered, as the case may be, under pressure — and evidence of pressure is not admissible to support the transaction.
- **Exception**
  - **(2.1)** Subsection (2) does not apply, and the parties are deemed to be dealing with each other at arm’s length, in respect of the following:
    - **(a)** a margin deposit made by a clearing member with a clearing house; or
    - **(b)** a transfer, charge or payment made in connection with financial collateral and in accordance with the provisions of an eligible financial contract.

**ENLIGHTENED FUNDING CORPORATION** and **VELOCITY ASSET AND CREDIT CORPORATION AND 926749 ONTARIO LTD.**

Court File No.: CV-23-00707330-00CL

Proceeding commenced at Toronto

## Lawyers for the Receiver