

Court File No.: CV-22-00685200-00CL

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

*IN THE MATTER OF Section 101 of the Courts of Justice Act, R.S.O. 1990 c.C.43, as amended,
and in the matter of Section 243(1) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3,
as amended*

B E T W E E N:

PRICEWATERHOUSECOOPERS INC.

(solely in its capacity as court-appointed receiver and manager of
Bridging Finance Inc. and certain related entities and investment funds)

Applicant

- and -

**NORTHERN CITADEL CAPITAL INC., ONE8ONE DAVENPORT INC.,
and 181 DAVENPORT RETAIL INC.**

Respondents

**RESPONDING FACTUM OF THE APPLICANT
(Motion returnable October 31, 2022)**

October 29, 2022

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PART I - OVERVIEW

1. This factum is filed in response to a motion brought by Khashayar Khavari (“**Khash**”) to intervene as an added party to the receivership application brought by the Applicant in respect of three insolvent companies.¹
2. Khash asserts a claim to 50% of the equity in each of One8One and 181 Retail and 100% of the equity in Northern Citadel. Khash’s contingent equity claim is contested by the Respondents and is the subject of ongoing litigation arising from a longstanding dispute between former business partners. None of this is relevant to the receivership application.
3. The receivership application is brought by the Applicant on behalf of Bridging, the senior secured creditor of the Respondents. Bridging is owed approximately \$55 million from the Respondents under the Loan and is facing a significant shortfall. Bridging’s debt and security are not contested by Khash.
4. Khash is a stranger to the debtor-creditor relationship between Bridging and the Respondents. Khash is not an obligor under the Loan nor is he a party or a signatory to any of the applicable agreements. No relief is sought in respect of Khash. Khash appears to have no economic interest in these proceedings and will not be materially prejudiced by the appointment of a receiver.
5. Khash’s motion to intervene as an added party to the receivership application should be dismissed with costs.

¹ All capitalized terms not expressly defined herein are defined in the Affidavit of Tyler Ray sworn August 8, 2022 or the Factum of Khashayar Khavari dated October 28, 2022.

PART II - THE FACTS

6. The facts relevant to the relief sought by Khash are set out in his affidavit affirmed October 20, 2022 (the “**Khash Affidavit**”) and in the Affidavit of Tyler Ray sworn August 8, 2022 (the “**Ray Affidavit**”).

PART III - THE ISSUE

7. The issue on this motion is whether Khash’s motion to intervene as an added party to the receivership application should be granted.

PART IV - LAW & ANALYSIS

8. Khash correctly sets out the applicable legal test at paragraph 20 of his factum. Rule 13.01 of the *Rules of Civil Procedure* provides as follows:

Leave to Intervene as Added Party

13.01 (1) A person who is not a party to a proceeding may move for leave to intervene as an added party if the person claims,

- (a) an interest in the subject matter of the proceeding;
- (b) that the person may be adversely affected by a judgment in the proceeding; or
- (c) that there exists between the person and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding.

(2) On the motion, the court shall consider whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding and the court may add the person as a party to the proceeding and may make such order as is just. R.R.O. 1990, Reg. 194, r. 13.01 (2).

9. The burden on the moving party to obtain leave to intervene is higher in private disputes. The Court must carefully consider granting leave as intervention by a third-party adds to the costs and complexity of litigation, regardless of any agreement to restrict submissions.²
10. Relief under Rule 13.01 is discretionary. The Court must consider whether the intervention will unduly delay or prejudice determination of the rights of the parties to the proceeding and may add a party as is just.³
11. Khash has not discharged his burden of satisfying the foregoing test.

A. Khash is a Stranger to the Debtor-Creditor Relationship

12. Notably absent from Khash's factum is any case law to support the proposition that a contingent equity claimant who is a stranger to the debtor-creditor relationship may be added as a party to a receivership application brought by a secured creditor in respect of an insolvent debtor. To the contrary, in *Central 1 Credit Union*, the only reported decision in which this issue was considered, Brown J. (as he then was) recognized that there is no precedent for a stranger to the debtor-creditor relationship being granted status as a party to a receivership application. The moving party requesting such status in *Central 1 Credit Union* was denied on the basis that, among other things, it was a stranger to the adjudication of private contractual rights as between the applicant secured creditor and the debtor respondent (as in the present case).⁴

² *Authorson (Litigation Guardian of) v. Canada (Attorney General)*, 2001 CanLII 4382 (ONCA) at paras [8](#) & [9](#).

³ [Rules of Civil Procedure, R.R.O., Reg. 194](#) at R. 13.01(2).

⁴ *Central 1 Credit Union v. UM Financial*, 2011 ONSC 5612 at [paras 22 & 23](#).

13. This is a private application brought on behalf of a senior secured creditor in respect of three insolvent debtors. The nature of the relationship between Bridging and the Respondents is derived from the applicable loan and security documents. Khash is a stranger to that debtor-creditor relationship. Khash is not a party to any of these agreements. Khash is not a signatory to any of these agreements. No relief is being sought by the Applicant in respect of Khash.
14. Given that the Respondents do not appear to have any assets of meaningful value⁵ and Bridging is facing a multi-million dollar shortfall on the debt and security granted by the Respondents to Bridging, it appears that Khash's claimed equity interest in the Respondents is worthless.
15. Allowing the relief sought would introduce unnecessary complexity and costs to this proceeding in order to protect an interest in the receivership proceeding that has no value, to the detriment of the Respondents' stakeholders generally. There is no legal or equitable basis for Khash to be added as a party to this application
16. To the extent that Khash wishes to participate in this proceeding as an interested party (whether on account of his contingent equity interest or otherwise), similar to all other stakeholders of the Respondents, he is entitled to do so. Khash is on the service list and may file materials or seek the assistance of the Court in respect of any relief sought by the proposed Receiver moving forward.

⁵ Affidavit of Tyler Ray sworn August 8, 2022 at para 94(f), CaseLines Master: A66.

B. No Adverse Impact

17. Khash claims that the receivership application will adversely affect his interests because:
- (i) the proposed Receiver would be authorized to exercise powers previously exercisable by the board of directors or the officers of the Respondents; (ii) the proposed Receiver could take steps in respect of the Property in a manner contrary to Khash's interests; and (iii) the stay of proceedings could adversely impact the Khash Litigation. Each of these arguments is addressed below.
18. First, the proposed Receivership Order provides the Receiver with the standard powers contained in the Model Order that are typically only exercisable by a debtor's board of directors or officers prior to a receivership (such as the right to exercise any shareholder rights held by the Respondents). The granting of these powers to the Receiver ensures that only the Receiver can act in the name of the debtor in receivership, which benefits all stakeholders of the Respondents; the need for such powers arises regardless of who had the right to appoint the board members or officers of the Respondents.
19. Second, Khash claims that he may be adversely impacted by the receivership because the Receiver may dispose of assets or exercise shareholder or similar rights over which Khash has an interest. This argument should be dismissed. The proposed Receiver will take steps to realize upon the assets of the Respondents under the supervision of this Court for the benefit of all stakeholders. No distribution will be made to any stakeholders (including the Applicant) absent an order of the Court obtained on notice to the service list. To the extent Khash wishes to assert a trust or other type of proprietary claim against any of the Respondents' property, that claim can be addressed in the receivership proceeding without

the need for intervenor status. Further, there is no evidence to suggest that any shareholder rights held by the Respondents (such as the right to vote or receive dividends in respect of shares held in other companies) should be treated differently than any of the Respondents' other assets.

20. Third, Khash claims that the stay of proceedings contemplated under the Receivership Order could adversely impact his interests in the ongoing Khash Litigation. It is notable that there are approximately 30 named defendants in that litigation (of which the Respondents are only two). Although the Khash Litigation would be stayed as it relates to the two Respondents if the Receivership Order is granted, such litigation may continue in the ordinary course against the other defendants. The Applicant does not seek a non-party stay in respect of the other named defendants. Further, as described above, the claims of Khash against the Respondents that would otherwise be asserted in the Khash Litigation may be addressed in the receivership. Khash has failed to articulate any specific relief or remedies sought in the Khash Litigation that cannot otherwise be addressed by the Court or the proposed Receiver in the context of the receivership proceeding.

C. No Questions of Law or Fact in Common

21. Finally, there are no questions of law or fact in common between the parties to the receivership application and Khash that would justify Khash's intervention.
22. The issue on this application is whether a receiver should be appointed over the Respondents. As recognized by Justice Brown in *Central 1 Credit Union*, the issues on a receivership application typically include: (i) the existence of a debt and default; (ii) the

quality of the security; and (iii) the need for a receiver in view of any alternative remedies available to the applicant.

23. Khash does not dispute the existence of the debt owing to Bridging and the various defaults under the Loan. Khash does not dispute the quality of the security held by Bridging or the insolvency of the Respondents. There is no suggestion that any remedies short of the appointment of a receiver are more appropriate in the circumstances. None of the legal issues to be determined in the Khash Litigation are connected to the issues on this application.
24. Khash does not dispute any of the questions of fact or law arising on this application – he simply takes issue with the scope of the proposed Receivership Order. There is no legal or equitable basis to grant him status to intervene as an added party.
25. Khash's motion should be dismissed with costs.

PART V - RELIEF REQUESTED

26. For all of the foregoing reasons, the Bridging Receiver requests that this Court grant an Order substantially in the form of the draft Receivership Order located at Tab 3 of its Application Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 29th day of October, 2022.



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**SCHEDULE “A”
LIST OF AUTHORITIES**

No.	Case Law
1.	<i>Authorson (Litigation Guardian of) v. Canada (Attorney General)</i>, 2001 CanLII 4382
2.	<i>Central 1 Credit Union v. UM Financial</i>, 2011 ONSC 5612

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