

COUNSEL SLIP

COURT FILE

NO.: CV-19-00614593-00CL

DATE: January 28, 2020

NO. ON LIST 2

TITLE OF
PROCEEDING

**CORNER FLAG LLC v. ERWIN HYMER GROUP NORTH
AMERICA et al.**

COUNSEL FOR:

- ☐ PLAINTIFF(S)
☐ APPLICANT(S)
☐ PETITIONER(S)

Jeremy Dacks and Justine Erickson
for Alvarez & Marsal ~~LLP~~ Canada Inc.
as Receiver

PHONE 416-862-4423
FAX 416-862-6666
EMAIL j.dacks@osler.com
j.erickson@osler.com

COUNSEL FOR:

- ☐ DEFENDANT(S)
☐ RESPONDENT(S)

Paula Masic
for KS2 Corp. and Anthony Scarpotice
as Inspector

PHONE 416-518-0893
FAX 416-214-1374
EMAIL p.masic@dsavocats.ca

JUDICIAL NOTES:

Virginie Gauthier
Norton Rose for secured creditor EHG SE

416-216-4853
416-216-3930

virginie.gauthier@nortonrose
fyllbright.com

Court File Number: CV-19-614593-00CL

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Carver Flag LLC
AND Plaintiff(s)

Erwin Hymer Group N.A. Inc.
Defendant(s)

Case Management ☒ Yes ☐ No by Judge: McBROWN

Counsel	Telephone No:	Facsimile No:
(as per counsel slip)	(slip)	

- ☐ Order ☐ Direction for Registrar (No formal order need be taken out)
☐ Above action transferred to the Commercial List at Toronto (No formal order need be taken out)

- ☐ Adjourned to: _____
☐ Time Table approved (as follows): _____

A+M brings this motion seeking essentially for heads of relief. Three are proposed - ① approval of fees of A+M / counsel, ② insulating Confidential Appendix C and ③ approving the Third Report of A+M. I have reviewed the materials and heard the submissions of counsel concerning the above three issues. I am

28 Jan 20

Date

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McBROWN

Judge's Signature

☐ Additional Pages _____

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satisfied that the Third Report ought to be approved. The fees sought by the Receiver and Counsel are also fair and reasonable. The fees are substantial, but proportional, as this has been a complicated matter, both legally and factually.

It is also appropriate to now unseal Confidential Appendix C since the Transactions noted herein have closed.

The fourth, contentious issue involves the proposed interim distribution to EHG SE. One stakeholder - KS2 Corp with Anthony Scappaticci as Inspector - seeks an adjournment of this portion of the motion so that it can continue investigation into whether, in essence, EHG SE in its dealings with the Respondent acted wrongly so that this stakeholder

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might have a claim of equitable subordination and thus elevate its unsecured claim ahead of the secured claim of FHG SE.

At the hearing I declined to adjourn this portion of the motion and granted the interim distribution.

In my view an adjournment was not necessary or reasonable. No affidavit was proffered to support the request and there is no evidence to support any suspicion of wrongful conduct. Further, the Receiver/Manager A & M has conducted extensive investigations and advises, as does its counsel, that nothing untoward has surfaced to support the suspicions of Mr Scappaticci. Counsel for Mr Scappaticci fairly conceded that A & M has been

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entirely responsive to its requests for information and documentation. Counsel also fairly concedes that its claim for priority as against the assigned TD Loan Agreement would be problematic. This amount is significant and far exceeds the proposed interim distribution.

Furthermore it bears noting that EHG SE is also going to experience a significant shortfall which in part at least, undercuts a suspicion of wrapdoing in the circumstances of this matter. Much of the shortfall is uninsured.

Last, I see no reason to await the production of the Cohen Hamilton report. It deals with potential losses suffered by EHGNA as a result of

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dealing with Roadtrek.

In all of the circumstances it is fair and reasonable to deal with the issue of the interim distribution. No one else opposes.¹

Given distribution to other secured creditors made to date FHG SE is entitled to a payout. The amount to be distributed - \$4.5 million is reasonable as there is \$6.3 million held by ATM.

The order shall go as per the draft filed & signed.

me

1. Receiver ATM supports the distribution.