

CV-19-614593-00CL

Court File No:

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

BETWEEN:

CORNER FLAG LLC

Applicant

- and -

ERWIN HYMER GROUP NORTH AMERICA, INC.

Respondent



**APPLICATION UNDER SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O.
1990, C. C.43, AS AMENDED, AND SECTION 243 OF THE *BANKRUPTCY AND
INSOLVENCY ACT*, R.S.C. 1985, C. B-3 AS AMENDED**

NOTICE OF APPLICATION

TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicant. The claim made by the applicant appears on the following pages.

THIS APPLICATION will come on for a hearing before a judge of the Commercial List on Friday, February 15, 2019 at 12:00 p.m., at 330 University Avenue, Toronto, Ontario.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the Rules of Civil Procedure, serve it on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but not later than 2 days before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date: February 15, 2019

Issued by



C. Irwin
Local Registrar
Registrar

Address of the Court Office:
Commercial List Office
330 University Avenue
Toronto, Ontario
M5G 1R7

TO:

<p>ERWIN HYMER GROUP NORTH AMERICA, INC. 25 Reuter Drive Cambridge, Ontario N3E 1A9</p> <p>Jeffrey Merk, Director jmerk@airdberlis.com</p>	<p>AIRD & BERLIS LLP 181 Bay Street, Suite 1800 Toronto, Canada M5J 2T9</p> <p>Steve Graff sgraff@airdberlis.com</p> <p>Kathryn Esaw kesaw@airdberlis.com</p> <p><i>Lawyers for the Director, Jeff Merk</i></p>
<p>ERWIN HYMER GROUP SE C/O THOR INDUSTRIES, INC. 601 East Beardsley Ave Elkhart, Indiana</p>	

<p>46514</p> <p>Trevor Gasper tgasper@thorindustries.com</p> <p>Todd Woelfer twoelfer@thorindustries.com</p>	
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Application

1. The Applicant, Corner Flag LLC (“**Corner Flag**”) makes an application for an order, substantially in the form to be filed (the “**Appointment Order**”), *inter alia*:
 - (a) abridging the time for service of the Notice of Application and the Application Record, and dispensing with further service thereof;
 - (b) appointing Alvarez & Marsal Canada Inc. (“**A&M**” or the “**Proposed Receiver**”) as receiver and manager (in such capacity, the “**Receiver**”), without security, of all assets, undertakings and properties (the “**Property**”) of Erwin Hymer Group North America, Inc. (“**ENA**”) pursuant to section 243 of the *Bankruptcy and Insolvency Act* (Canada), R.S.C. 1985, C. B-3 as amended (the “**BIA**”) and pursuant to section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C-43, as amended (the “**CJA**”);
 - (c) waiving the requisite notice period referenced in section 243(1.1) of the BIA pursuant to section 243(1.1)(b) of the BIA;
 - (d) granting a stay of proceedings in respect of ENA or the Property or any assets located on premises belonging to or leased by ENA;
 - (e) granting a charges over the Property on the terms set out in the proposed Appointment Order (i) in favour of the Receiver and counsel to the Receiver to secure their fees and disbursements in respect of these proceedings (the “**Receiver’s Charge**”) and (ii) for the purpose of funding the exercise of the powers and duties conferred upon the Receiver by the Appointment Order, including interim expenditures (the “**Receiver’s Borrowing Charge**”); and

- (f) such further and other relief as counsel may request and this Honourable Court may permit.

THE GROUNDS FOR THE APPLICATION ARE:

Background

- (f) ENA was, until recently, a wholly-owned Canadian subsidiary of the international Erwin Hymer group of companies (the “**Erwin Hymer Global Group**”). ENA was the key entity in the Erwin Hymer Global Group’s North American operations.
- (g) Pursuant to a share purchase agreement (the “**SPA**”) entered into on September 18, 2018, Thor Industries Inc. (“**Thor**”) was to acquire the Erwin Hymer Global Group through an acquisition of all outstanding shares of the Erwin Hymer Global Group’s parent company, EHG SE (the “**Thor Transaction**”).
- (h) Subsequent to the execution of the SPA, EHG SE and Thor became aware of certain financial irregularities within the books and records of the EHG NA Entities which appear to be long standing and which were not known to either EHG SE or Thor at the time the SPA was executed.
- (i) Ultimately, the parties to the Thor Transaction agreed to amend the SPA to exclude the EHG NA Entities from the scope of the Thor Transaction. To facilitate this, EHG SE divested its ownership interests in the EHG NA Entities pursuant to a transaction with Corner Flag, whereby Corner Flag acquired all outstanding shares in ENA and certain other EHG NA Entities (the “**Carve-Out Transaction**”).

- (j) EHG is now a wholly owned subsidiary of Corner Flag.
- (k) ENA has been suffering from an operational, liquidity and governance crisis and it is imperative that the Proposed Receiver be appointed as soon as possible so as to bring much needed stability and governance to the ENA business, preserve optionality and facilitate an orderly process to evaluate, conduct and implement realization strategies and options in respect of ENA's business and assets, for the benefit of all stakeholders.

Overview of ENA's Business

- (l) Prior to the closing of the Carve-Out Transaction and the Thor Transaction, ENA's core activity covered the development, assembly and marketing of recreational vehicles. ENA purchased the components required for the development and assembly of motorhomes from suppliers and assembled the motorhomes. Once ENA has manufactured recreational vehicles, it sells them to a network of dealers who, in turn, sells the recreational vehicles to end customers.
- (m) ENA employs approximately 850 employees, the majority of which are full time. The weekly payroll obligations of ENA are in excess of CAD \$1 million. ENA did not have sufficient liquidity to fund payroll obligations and will not have sufficient funds to continue funding payroll obligations. As such, the proposed Appointment Order provides that all employees of ENA will be deemed to be terminated by ENA immediately prior to the issuance of the requested Appointment Order.

- (n) In the absence of the appointment of a receiver to conduct a sale process on an expedited basis, ENA will face a permanent and abrupt cessation of operations and a liquidation of assets on a piecemeal basis with no ability to preserve the optionality of identifying a turn-key purchaser.
- (o) The Proposed Receiver intends to cause ENA to retain sufficient former employees to assist with the receivership proceedings while it evaluates realization strategies and options in respect of ENA's business and assets.

Current State of ENA's Business

- (p) Since January 2019 and the discovery of the financial irregularities in ENA's reporting, ENA has been experiencing significant operational, liquidity and governance challenges which have rendered it unable to continue to operate in the normal course. The financial irregularities appear to be long standing and pervasive and have eroded confidence in the senior management of the ENA.
- (q) A number of key management and employees of ENA have been suspended pending the outcome of an investigation into the financial irregularities and all but one of the directors of ENA have resigned or been removed. ENA has very limited funds available at this time and is not expected to be able to continue to meet its payroll or other short-term obligations without additional funding.
- (r) ENA has in excess of CAD \$300 million in liabilities, has not been able to meet its obligations as they become due, and does not have sufficient funding to support its workforce.

- (s) As a result of market perception and/or non-payment of obligations, ENA has also received a number of notices from supply creditors demanding payment of amounts owing to them and/or indicating that they will not be providing any further trade credit to ENA;
- (t) ENA is in urgent need of court supervision with the assistance of a court officer. Given the current status of ENA's business, it is critical that A&M be appointed as Receiver as expeditiously as possible so that it can take steps to preserve and maintain the property of ENA and assess realization strategies and options. This urgency is heightened given the lack of senior management at ENA and the existence of a corporate governance void.

Secured Indebtedness and Indebtedness to Corner Flag

- (u) Following closing of the Thor Transaction, ENA continued to have a liquidity shortfall which rendered it unable to meet certain critical immediate and short-term obligations including employee payroll obligations. To satisfy these immediate obligations, ENA borrowed approximately CAD \$5.09 million from Corner Flag on February 14, 2019, which loan was evidenced by a promissory note issued by ENA to Corner Flag (the "**ENA Promissory Note**").
- (v) To secure its obligations under the ENA Promissory Note, ENA granted a security interest to Corner Flag over all of its present and after acquired property pursuant to a general security agreement dated February 14, 2019.

- (w) On February 14, 2019, Corner Flag delivered to ENA a demand for repayment of the amounts owing to it pursuant to the ENA Promissory Note and a notice under section 244 (the “**Section 244 Notice**”) of the BIA to ENA.
- (x) The amounts owing to Corner Flag have not been repaid. Corner Flag has requested that the sole remaining director of ENA waive the 10-day notice period provided for under the Section 244 Notice. Such waiver has not yet been provided.

Funding of Receivership

- (y) Corner Flag has funded all wages owing to employees up to and including the date of termination, which funding was provided to ENA on a secured basis and evidenced by a demand promissory note (as set out in greater detail below). Corner Flag has also agreed to fund vacation pay accrued to the date of termination (once such quantum is determined by the Receiver), and all the other costs of the receivership process, all in accordance with the agreed upon Receiver Term Sheet (as defined below), an agreed upon budget and the terms of the proposed Appointment Order.
- (z) Therefore, if appointed, the Receiver will be empowered pursuant to the terms of the proposed Appointment Order to borrow funds from Corner Flag in accordance with a budget set out in a term sheet (the “**Receiver Term Sheet**”) for the purposes of, among other things, funding accrued but unpaid vacation pay for terminated employees, financing the professional costs and disbursements of the

receivership and the costs associated with an expedited sale process, including paying its fees and disbursements and those of its independent counsel.

The Proposed Receiver

- (aa) A&M is a licensed trustee, as defined in the BIA, with experience in Canadian and cross-border insolvency engagements, including receiverships; and
- (bb) The appointment of A&M as Receiver is just and convenient in the circumstances.

Additional Grounds

- (cc) The grounds as more particularly set out in the Affidavit of Mark Gottlieb sworn February 15, 2019 (the “**Gottlieb Affidavit**”);
- (dd) Section 243 of the BIA;
- (ee) Section 243(1.1)(b) of the BIA;
- (ff) Section 101 of the CJA;
- (gg) Rules 1.04, 2.03, 3.02, 16, 38 and 39 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg 194, as amended; and
- (hh) Such further and other grounds as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

- (a) the Gottlieb Affidavit, and the exhibits thereto; and
- (b) such further and other materials as counsel may advise and this Honourable Court may permit.

February 15, 2019

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Respondent

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
Proceeding Commenced at Toronto

NOTICE OF APPLICATION
(Re: Appointment Order)
(Returnable February 15, 2019)

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