

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

B E T W E E N :

**951584 ONTARIO INC. DBA MAXIUM FINANCIAL SERVICES**

Applicant

– and –

**PULSE RX INC. AND FAMILY PHARMACY CLINIC INC.**

Respondents

**AND IN THE MATTER OF THE ADMINISTRATION OF THE  
PULSE SHARE TRUST**

**FACTUM OF THE RECEIVER  
(RE: DISTRIBUTION AND DISCHARGE)**

February 3, 2023

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capacity as the court appointed receiver  
of Pulse Rx Inc. and Family Pharmacy  
Clinic Inc. and as Trustee of the Pulse  
Share Trust**

**TO: THE SERVICE LIST**

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## PART I – OVERVIEW

1. MNP Ltd. in its capacity as receiver and receiver and manager (in such capacities, the “**Receiver**”) of all of the property, assets and undertakings of Family Pharmacy Inc. and Pulse RX Inc. and as the trustee of the Pulse Share Trust (collectively, the “**Debtors**”) seeks an Order, *inter alia*, substantially in the form attached at Tab 3 of the Motion Record (the “**Order**”) that, among other things:

- (a) abridges the time for service of this motion, validates the manner of service, and declares that this motion is properly returnable before the Court;
- (b) authorizes the Receiver to make distributions to the Canada Revenue Agency (the “**CRA**”), McKesson Canada Corporation (“**McKesson**”), 2047944 Ontario Inc. (“**National Pharmacy**”) and to 1951584 Ontario Inc. (“**Maxium**” and with National Pharmacy, the “**Secured Creditors**”) as described in the Third Report of the Receiver dated January 31, 2023 (the “**Third Report**”);
- (c) approves the fees and disbursements of the Receiver and of its independent counsel, Reconstruct LLP (“**Reconstruct**”) until the conclusion of these proceedings;
- (d) approves the discharge of the Receiver upon the filing of the Discharge Certificate in the form substantially as set out as in the Order (the “**Discharge Certificate**”), certifying that the remaining receivership tasks described in the Third Report have been completed by the Receiver (the “**Remaining Activities**”); and
- (e) approves the Third Report and the activities and conduct of the Receiver and its counsel, Reconstruct, as disclosed therein.

## PART II – FACTS

2. The facts on this motion are set out in the Third Report filed in support of this motion. Capitalized terms used herein but otherwise undefined have the respective meanings given to them in the Third Report. The following is a high-level summary of the facts relevant to this motion.

### A. The Pulse and Family Pharmacy Assets

3. Pulse, a wholly-owned subsidiary of Family Pharmacy, was incorporated on January 27, 1936.<sup>1</sup> As such, Pulse is considered a “Pre-1954 Charter Company”, under which the owner of a pharmacy is not required to be a pharmacist.<sup>2</sup>

4. Pulse’s assets consisted primarily of inventory, accounts receivable, certain service contracts (collectively, the “**Business Assets**”) and its charter and articles of incorporation (the “**Pulse Charter**”).<sup>3</sup>

5. On December 20, 2021, the Receiver closed a transaction for the purchase and sale of the Business Assets, and that transaction was approved by the Court on December 14, 2021 (the “**Business Asset Transaction**”).<sup>4</sup> On May 31, 2022, the Receiver closed a transaction for the purchase and sale of the Pulse Charter, and that transaction was approved by the Court on May 24, 2022 (the “**Pulse Share Transaction**”).

6. Resulting from the Business Asset Transaction and the Pulse Share Transaction, there is approximately approximately \$1,208,336 in the estate to distribute (the “**Excess Funds**”).<sup>5</sup>

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<sup>1</sup> The Third Report of the Receiver dated January 31, 2023, at para 2 at [Caselines Master E470](#) Receiver’s **Motion Record**, at Tab 2 [*Third Report*].

<sup>2</sup> Third Report, *ibid* at para 4 at [Caselines Master E470](#); *Drug and Pharmacies Regulations Act*, RSO 1990, c H.4 at s 142(4).

<sup>3</sup> Third Report, *ibid* at para 4 at [Caselines Master E470](#).

<sup>4</sup> Third Report, *ibid* at para 4 at [Caselines Master E470](#).

<sup>5</sup> Third Report, *ibid* at para 19 at [Caselines Master E464](#).

Additionally, the Receiver anticipates additional recoveries from the collection of HST refunds and additional interest earned on the Excess Funds.<sup>6</sup>

## **B. The Secured Claims**

7. During the pendency of the receivership, the CRA filed a series of claims for unpaid source deductions, including an amended claim letter, dated July 11, 2022 (the “**Amended CRA Claim**”), in the amount of \$988,860, of which \$444,493 represents a deemed trust claim (the “**CRA Priority Payable**”).<sup>7</sup>

8. McKesson registered a security interest in Pulse’s inventory and delivered a statement of account to the Receiver indicating its pre-filing claim against Pulse is in the amount of \$5,685.39.<sup>8</sup>

### ***The Secured Creditors***

9. A significant portion of the value of the Debtors was derived from the Pulse Charter.<sup>9</sup>

10. Despite an earlier-in-time registration by a predecessor to Maxium, National Pharmacy appears to have a first priority claim over the property of Pulse as a result of the absence of an assignment of security agreement from CIT Financial Ltd. to Maxium as well as the underlying security documentation provided to the Receiver.<sup>10</sup> Despite this, Maxium is the only Secured Creditor that registered a security interest as against Family Pharmacy.<sup>11</sup>

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<sup>6</sup> Third Report, *ibid* at para 19 at [Caselines Master E464](#).

<sup>7</sup> Third Report, *ibid* at para 22 at [Caselines Master E476](#).

<sup>8</sup> Third Report, *ibid* at para 39 at [Caselines Master E481](#).

<sup>9</sup> Third Report, *ibid* at para 35 at [Caselines Master E480](#).

<sup>10</sup> Third Report, *ibid* at para 33 at [Caselines Master E479](#).

<sup>11</sup> Third Report, *ibid* at para 31 at [Caselines Master E479](#).

11. As set out in more detail in the Third Report, given the nature of the Pulse Charter, there is some uncertainty as to the priority of the security interests registered by Maxium and National Pharmacy.<sup>12</sup> The Pulse Charter was sold pursuant to a share purchase agreement, which shares were, at the time of sale, an asset of Family Pharmacy.<sup>13</sup> However, in the usual course, prior to a distribution to equity holders of Pulse, all secured and unsecured creditor claims must be satisfied in full.<sup>14</sup> Accordingly, Maxium would only obtain value from the sale of the Pulse Charter if all claims, including the claims of National Pharmacy, were otherwise satisfied in full.<sup>15</sup>

12. On August 30, 2022, the Receiver's counsel directed correspondence to counsel for each of National Pharmacy and Maxium noting that, absent a consensual resolution, the Receiver will be required to seek direction from the Court.<sup>16</sup>

13. Thereafter, the Secured Creditors came to a consensual agreement on the distribution of the funds available to them, vitiating the need to seek advice and direction on the priority issue identified above.<sup>17</sup>

### **C. The Debtors' Tax Status**

14. As noted in these proceedings, Pulse had a history of non-compliance with its obligations under the *Income Tax Act* and *Excise Tax Act*.<sup>18</sup> Pulse's last corporate tax return was filed for the

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<sup>12</sup> Third Report, *ibid* at para 36 at [Caselines Master E480](#).

<sup>13</sup> Third Report, *ibid* at para 36 at [Caselines Master E480](#).

<sup>14</sup> Third Report, *ibid* at para 36 at [Caselines Master E480](#).

<sup>15</sup> Third Report, *ibid* at para 36 at [Caselines Master E480](#).

<sup>16</sup> Third Report, *ibid* at para 37 at [Caselines Master E480](#).

<sup>17</sup> Third Report, *ibid* at para 38 at [Caselines Master E480](#).

<sup>18</sup> Third Report, *ibid* at para 20 at [Caselines Master E476](#).

fiscal year ended December 31, 2014. Similarly, Family Pharmacy had not filed a corporate tax return since 2010.<sup>19</sup>

15. The Receiver is responsible for filing tax returns to account for its activities after the date it was appointed.<sup>20</sup> On January 31, 2023, the Receiver electronically filed the corporate tax returns of the Debtors.<sup>21</sup>

16. Pursuant to the Tax Statutes, certain distributions are subject to the receipt of a Tax Clearance Certificate (each as defined in the Order).<sup>22</sup> Any liability arising from the assessment of Pulse's post-receivership corporate tax returns would be transferred to, assumed by and vest absolutely and exclusively in Family Pharmacy.<sup>23</sup> Any claim for unpaid corporate tax would rank as an unsecured claim subordinate to the CRA Priority Payable and the claims of the Secured Creditors and McKesson.<sup>24</sup>

### **PART III – ISSUES**

17. The issues at his motion are whether this Court should order that:

- (a) the distributions to the CRA, McKesson and the Secured Creditors should be granted;
- (b) the fees and activities of the Receiver and its counsel should be approved; and
- (c) the Receiver should be discharged upon the filing of the Discharge Certificate in the form substantially as set out as in the Order, certifying that the remaining receivership tasks described in the Third Report have been completed by the Receiver.

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<sup>19</sup> Third Report, *ibid* at para 20 at [Caselines Master E476](#).

<sup>20</sup> Third Report, *ibid* at para 24 at [Caselines Master E477](#).

<sup>21</sup> Third Report, *ibid* at para 26 at [Caselines Master E477](#).

<sup>22</sup> Third Report, *ibid* at para 27 at [Caselines Master E477](#).

<sup>23</sup> Third Report, *ibid* at para 28 at [Caselines Master E477](#).

<sup>24</sup> Third Report, *ibid* at para 28 at [Caselines Master E477](#).



## PART IV – LAW & ARGUMENT

### A. The Distributions of the Excess Funds to the CRA, McKesson and the Secured Creditors Should be Authorized

18. The Receiver submits that, subject to standard assumptions and qualifications, the Secured Creditors hold valid and enforceable security interests in respect of the property covered by their respective security. The Receiver and its counsel have reached this conclusion after reviewing the applicable loan and security documents for each of the Secured Creditors and the Receiver has been provided with security opinions which confirm, subject to standard assumptions and qualifications, the validity of the Secured Creditors claims.

19. As noted above, due to the diminutive value of the McKesson claim, the Receiver has not sought an opinion from its counsel as to the validity of the security, nor did it undertake to trace the realizations from Pulse's inventory to McKesson's claim which could foreseeably deplete greater funds from the receivership estate rather than distributing McKesson's secured claim.<sup>25</sup>

20. The Receiver asks that the Court issue an order that the Distributions shall not constitute a "distribution" under the Tax Statutes (as defined in the Third Report) and that the Receiver be empowered, after the passage of sixty days following the date of the contemplated Order, to make the Distributions without a Tax Clearance Certificate.<sup>26</sup> Notwithstanding the foregoing, the Receiver intends on applying to CRA for the Tax Clearance Certificate and provide CRA with the 60-day period to permit it to revise their assessments or claims, as necessary.<sup>27</sup>

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<sup>25</sup> Third Report, *ibid* at paras 39-40 at [Caselines Master E481](#).

<sup>26</sup> Third Report, *ibid* at para 29 at [Caselines Master E478](#).

<sup>27</sup> Third Report, *ibid* at para 29 at [Caselines Master E478](#).

21. This Court has the jurisdiction to authorize the Receiver to make the Distributions without a Tax Clearance Certificate pursuant to section 243(1)(c) of the BIA which provides this Court with the jurisdiction to allow a receiver to “take any other action that the court considers advisable” if just or convenient to do so”.<sup>28</sup> Section 243(1)(c) has been interpreted broadly and found to grant Canadian courts jurisdiction to do what “justice dictates” and “practicality demands”.<sup>29</sup>

22. Similar orders authorizing distributions prior to the issuance of a Tax Clearance Certificate have been granted by the Court, including recently by Justice Osborne in the CCAA Proceedings of Eve & Co Incorporated and Eve & Co International Holdings Ltd.<sup>30</sup>

23. In addition, no party will be prejudiced if the requested relief is granted, including the CRA. Any claim for unpaid corporate tax would not, in any event, be paid as it would rank as an unsecured claim subordinate to the CRA Priority Payable, the claims of the Secured Creditors and McKesson.<sup>31</sup> Any liability that a Tax Clearance Certificate would address would not be payable under any circumstance based on the fulcrum nature of the Secured Creditors’ claims.<sup>32</sup>

#### **B. The Fees and Activities of the Receiver and its Counsel Should be Approved**

24. The activities of the Receiver described in the Third Report were all necessary and undertaken in good faith pursuant to the Receiver's duties and powers set out in the Receivership Order, and were in each case in the best interests of the Debtors’ stakeholders generally.<sup>33</sup>

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<sup>28</sup> [BIA](#) at s 243(1)(c).

<sup>29</sup> [Third Eye Capital Corporation v Ressources Dianor Inc./Dianor Resources Inc.](#), 2019 ONCA 508 at paras 52 and 57.

<sup>30</sup> [Distribution and Termination Order of Justice Osborne dated November 30, 2022](#), Court File No: CV-22-00678884-00CL.

<sup>31</sup> Third Report, *ibid* at para 28 at [Caselines Master E477](#).

<sup>32</sup> Third Report, *ibid* at para 28 at [Caselines Master E477](#).

<sup>33</sup> Third Report, *ibid* at paras 44-47 at [Caselines Master E482](#).

25. The Receiver is seeking approval of the professional fees incurred by it and its legal counsel as described in the fee affidavits attached to the Third Report, including the estimated fees of the Receiver and its legal counsel in connection with the completion of these proceedings. The standard to be applied is whether the compensation sought is “fair and reasonable”, with an emphasis on the value provided and what was accomplished.<sup>34</sup>

**C. The Receiver should be Discharged Upon the Filing of the Discharge Certificate**

26. Once the Receiver has completed the Remaining Activities, as provided in the Third Report, it will have completed its mandate. The Receiver therefore respectfully submits that this receivership proceeding should be terminated and the Receiver should be discharged and released following the filing of the Discharge Certificate with the Court, certifying that it has completed the Remaining Activities.

**PART V – RELIEF REQUESTED**

27. For the reasons set out above, the Receiver requests that this Honourable Court grant the Order included at Tab 3 of the Motion Record.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 3<sup>rd</sup> DAY OF FEBRUARY, 2023.**



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**RECONSTRUCT LLP**

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<sup>34</sup> [Bank of Nova Scotia v Diemer, 2014 ONCA 851](#) at paras 44-45.

**SCHEDULE "A"****List of Authorities**

1. <a href="#"><i>Third Eye Capital Corporation v Ressources Dianor Inc./Dianor Resources Inc, 2019 ONCA 508</i></a>
2. <a href="#"><i>Distribution and Termination Order of Justice Osborne dated November 30, 2022,</i></a> Court File No: CV-22-00678884-00CL.
3. <a href="#"><i>Bank of Nova Scotia v Diemer, 2014 ONCA 851</i></a>

**SCHEDULE "B"**

**Statutory Authorities**

*Drug and Pharmacies Regulations Act*, RSO 1990, c H.4

**Operation of pharmacies by corporation**

**142** (1) No corporation shall own or operate a pharmacy unless the majority of the directors of the corporation are pharmacists.

**Same**

(2) No corporation shall own or operate a pharmacy unless a majority of each class of shares of the corporation is owned by and registered in the name of pharmacists or in the name of health profession corporations each of which holds a valid certificate of authorization issued by the College.

**Idem**

(4) Subsection (2) does not apply to any corporation operating a pharmacy on the 14th day of May, 1954.

*Bankruptcy and Insolvency Act*, RSC 1985, c B-3

**Court may appoint receiver**

243 (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

- (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
- (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
- (c) take any other action that the court considers advisable.

*Income Tax Act*, RSC 1985, c 1 (5th Supp)

**Certificate before distribution**

159(2) Every legal representative (other than a trustee in bankruptcy) of a taxpayer shall, before distributing to one or more persons any property in the possession or control of the legal representative acting in that capacity, obtain a certificate from the Minister, by applying for one in prescribed form, certifying that all amounts

(a) for which the taxpayer is or can reasonably be expected to become liable under this Act at or before the time the distribution is made, and

(b) for the payment of which the legal representative is or can reasonably be expected to become liable in that capacity

have been paid or that security for the payment thereof has been accepted by the Minister.

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FINANCIAL SERVICES  
Applicant

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Proceedings commenced at Toronto

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