

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

BETWEEN:

FIREPOWER DEBT GP INC., AS AGENT

Applicant

-and-

THEREDPIN, INC. AND THEREDPIN.COM REALTY INC.

Respondent

**IN THE MATTER OF 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, R.S.O. 1990, c.C-43, AS AMENDED**

**MOTION RECORD OF THE MOVING PARTY
(for Motion returnable September 10, 2019)**

KLEIN & SCHONBLUM ASSOCIATES
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FirePower Asset Management Inc.*

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Lawyers for Dennise Paccione, Amut Muthreja, Kayla Donato and Michael Sotoadeh

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AND TO: HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO AS REPRESENTED BY THE MINISTER OF FINANCE
Legal Services Branch
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Toronto, ON M5G 2C8

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**ONTARIO
SUPERIOR COURT OF JUSTICE
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<i>Tab</i>	<i>Description</i>
1	Notice of Motion dated August 22, 2019
2	Affidavit of Lois Bardos sworn on August 22, 2019

Tab 1

**ONTARIO
SUPERIOR COURT OF JUSTICE
Commercial List**

BETWEEN:

FIREPOWER DEBT GP INC., AS AGENT

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-and-

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COURTS OF JUSTICE ACT, R.S.O. 1990, c.C-43, AS AMENDED**

NOTICE OF MOTION

ClaimsPro LP (“ClaimsPro”) on behalf of Certain Underwriters at Lloyd’s, the insurer of the Commission Protection Policy of former real estate agents and cooperating brokerages of TheRedPin.com Realty Inc. (“TRP Realty”), will make a motion before a Judge presiding over the Commercial List on Tuesday, the 10th day of September, 2019, at 10:00 a.m. or as soon after that time as the Motion can be heard, at the Courthouse located at 330 University Avenue, Toronto, Ontario.

PROPOSED METHOD OF HEARING: Orally

THE MOTION IS FOR:

1. An Order that the Receiver, MNP Inc., of the assets, property and undertaking of TRP Realty
-

and TheRedPin Inc., pay to those cooperating brokers listed in Exhibit “E” in the Affidavit of Lori Bardos, sworn on the 22nd day of August, 2019, from funds the Receiver is holding in the amount as indicated in the “Total Claimed” column of Exhibit “E” in satisfaction of the amounts owed to the cooperating brokers on those transactions indicated therein.

2. Costs of this motion, if opposed;
3. Such further and other relief as to this Honourable Court may seem just.

THE GROUNDS FOR THE MOTION ARE:

1. Pursuant to the Order of The Honourable Justice Hainey made on June 14, 2018 (the “Receivership Order”), MNP Inc., was appointed as Receiver of the undertaking, property and assets of TRP Realty and TheRedPin, Inc.
 2. TRP Realty was a real estate brokerage registered under the *Real Estate Business and Brokers Act, 2002*, (“REBBA”) to trade in real estate as a brokerage in the Province of Ontario. As such, TRP Realty earned real estate commission on the purchase and sale of properties.
 3. All real estate salespersons and brokerages are required to register with the Real Estate Council of Ontario (“RECO”) which is legislated to administer REBBA.
 4. RECO requires all real estate persons and brokerages to purchase the policies from RECO’s insurance program which includes a Commission Protection Policy. This policy protects Registrants (salespersons and brokerages) from the loss of commissions caused by real estate broker fraud, misappropriation of funds or insolvency.
 5. ClaimsPro is the program adjuster responsible for receipt of claims, investigation and adjustment of those claims with respect to the Commission Protection Policy.
 6. There is an issue as to whether or not the commissions owed to TRP Realty and collected and received by MNP Inc. is subject to trust in favour of the former salespersons of TRP Realty or whether they are to be paid to secured debtors of TRP Realty and TheRedPin Inc.
-

That issue was placed before the Court as a result of a Motion for Direction by MNP Inc. and determined by The Honourable Justice Penny by way of Endorsement made on November 30, 2018, wherein it was determined that commissions were not held in trust on behalf of the former salespersons of TRP Realty.

7. The Endorsement of The Honourable Justice Penny however, did reference the entitlement of former cooperating brokers of TRP Realty.
8. The Receiver has indicated that it has the appropriate documentation and is in receipt of funds with respect to commissions owed to cooperating brokerage and is prepared to pay those cooperating brokerages as set out in Exhibit E of the Affidavit of Lori Bardos.
9. Rules 1.04 and 37 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended.
10. 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:

1. Notice of Motion dated August 22, 2019;
2. Affidavit of Lori Bardos sworn August 22, 2019; and
3. Such further and other material as counsel may advise and this Honourable Court may permit.

Dated: August 22, 2019

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AND TO: HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO AS REPRESENTED BY THE MINISTER OF FINANCE
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**FIREPOWER DEBT GP INC., AS AGENT vs. THEREDPIN,
INC. AND THEREDPIN.COM REALTY INC.**

Court File No.: CV-18-599644-00CL

*ONTARIO
SUPERIOR COURT OF JUSTICE*

*IN THE MATTER OF 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, R.S.O. 1990, C.C.43, AS AMENDED*

PROCEEDING COMMENCED AT TORONTO

NOTICE OF MOTION

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Lawyers for Certain Underwriters of Lloyds

Tab 2

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AFFIDAVIT OF LORI BARDOS

I, Lori Bardos, of the Town of Bradford West Gwillimbury, County of Simcoe, in the Province of Ontario, make oath and say as follows:

1. I am a Claims Manager with ClaimsPro LP and as such have knowledge of the matters hereinafter deposed to.
 2. TheRedpin.Com Realty Inc. (“TRP Realty”) was a real estate brokerage registered under the *Real Estate Business and Brokers Act, 2002* (“REBBA”) to trade in real estate as a brokerage in the Province of Ontario. I understand from previous material filed that TRP Realty was a wholly owned subsidiary of TheRedPin Inc.
 3. TRP Realty was a real estate brokerage and earned real estate commission on the purchase, sale and leasing of properties.
-

4. REBBA regulates the sale of real estate in Ontario. Among other things, REBBA regulates the conduct of real estate brokers, brokerages and salespersons and requires persons to register under REBBA in order to trade in real estate, including as a brokerage, broker or salesperson. The Real Estate Council of Ontario (“RECO”) is legislated to administer REBBA. All real estate salespersons and brokerages are required to register with RECO.
 5. All registered salespersons and brokers are required to participate in RECO’s insurance program. RECO’s insurance program includes Consumer Deposit Insurance, Commission Protection Insurance and Errors and Omissions Insurance (“RECO Insurance Program”).
 6. Commission Protection Insurance protects Registrants from the loss of commission caused by real estate broker fraud, misappropriation of funds or insolvency.
 7. Policies are underwritten by certain Lloyds Underwriters (“the Insurer”) through its cover holder (“the cover holder”) 3303128 Canada Inc. T/A Alternative Risk Services. Attached and marked as **Exhibit “A”** is a true copy of the commission Protection Policy with respect to the RECO program.
 8. ClaimsPro LP is the RECO Insurance Program adjuster and is responsible for receipt of claims, investigation and adjustment of those claims with respect to the RECO Insurance Program.
 9. As a result of loan agreements made between TheRedPin Inc, TRP Realty and Firepower Debt GP Inc., as agent for Firepower Asset Management Income and Firepower GPA Debt LOP (“Firepower”), an Application was brought to appoint a receiver by Firepower, as agent pursuant to the terms of the loan agreement and the general security agreement that was given by TRP Realty and TheRedPin Inc.
 10. In that application it was indicated that there was another loan agreement between Trilogy Growth Fund LP (“Trilogy”) and TRP Realty and TheRedPin Inc. and the material in that application indicated that TRP Realty and the Red Pin Inc. defaulted on the loan agreement and as such, Firepower sought to have a Receiver appointed to collect all outstanding commissions owed to TRP Realty.
-

11. In the ordinary course, the commissions that were owed and paid to TRP Realty would then in turn be paid to the agents of TRP Realty and cooperating brokerages.
 12. In a real estate transaction with respect to the sale or lease of a property, where a real estate brokerage is involved, the real estate brokerage is either involved in the transaction as the listing brokerage or cooperating brokerage and in some cases may act as a dual brokerage (both listing brokerage and cooperating brokerage). The listing broker acts in the transaction on behalf of the vendor and the cooperating brokerage acts on behalf of the purchaser.
 13. In most real estate transactions, there is a deposit paid on entering into an Agreement of Purchase and Sale or an Agreement to Lease. The deposit is generally paid to the listing brokerage. On completion of the transaction if there is any commission to be paid over and above the amount of the deposit, it is also paid to the listing brokerage. The listing brokerage then pays out the commission owed to a cooperating brokerage and to its own agents.
 14. As a result of the Application to appoint a Receiver, an Order was made by the Honourable Justice Hainey on June 14, 2018, appointing MNP Inc., as Receiver, over all the assets, and property of TRP Realty and TheRedPin Inc. Attached hereto and marked as **Exhibit "B"** to this my Affidavit is the Order of the Honourable Justice Hainey made on June 14, 2018.
 15. Subsequent to the appointment of MNP Inc. as Receiver, Firepower and Trilogy took the position that all the commissions owed to TRP Realty were not trust funds and should be paid to Firepower and Trilogy in repayment of the debt owed by TRP Realty and TheRedPin Inc. As a result of the fact that Firepower and Trilogy were seeking to have the Receiver collect all commissions owed to TRP Realty and apply those commissions to the debt owed by TRP Realty and TheRedPin Inc., the result would be that TRP Realty's agents and cooperating brokerages would not receive payment of their commissions that were owed to them. If the existing commissions to be collected and paid were utilized to pay the debts to Firepower and Trilogy there would not be sufficient funds left to pay the commissions owed to the TRP Realty's agents and cooperating brokers.
-

16. As a result of the position taken by Firepower and Trilogy to have the commissions applied to its and Trilogy's debt, claims were made pursuant to the Commission Protection Policy by former agents of TRP Realty and cooperating brokerages and as a result, ClaimsPro as representative of the underwriter of that policy became involved in this matter.
 17. The former agents of TRP Realty, the cooperating brokerages and insurer of the Commission Protection Policy became involved in the determination of whether a Firepower was entitled to collect commissions and apply it to its and Trilogy's debt or whether those commissions as received by TRP Realty were trust funds for the former agents of TRP Realty and the cooperating brokers.
 18. The Receiver, MNP Inc. as court appointed receiver of the undertaking, property and assets of the Red Pin Inc. and TRP Realty brought a motion for advice and direction which was heard on October 22, 2018 by the Honourable Justice Penny with respect to these issues.
 19. The Order of the Honourable Justice Penny is attached and marked as **Exhibit "C"** to my affidavit and the Endorsement of the Honourable Justice Penny made on November 30, 2018 is attached and marked as **Exhibit "D"** to my affidavit.
 20. The Honourable Justice Penny determined that the former agents of TRP Realty did not have a trust claim in priority to the secured creditors, Firepower and Trilogy. That determination has been appealed by the former agents of TRP Realty and the insurer of the Commission Protection Policy.
 21. I am advised by Jeffrey Klein and do verily believe that as a result of a review of the Reasons of the Honourable Justice Penny which suggested that the funds received by the Receiver and owed to cooperating brokers were trust funds, he wrote to the lawyers for the Receiver, Harry Fogul, and Sam Babe, on March 1, 2019 inquiring as to whether cooperating brokers would be paid from those funds held by the Receiver.
-

- 22. I am advised by Jeffrey Klein and do verily believe as a result the Receiver has indicated that it is prepared to pay the cooperating brokers those commissions which could be verified by documentation and confirmation that the Receiver had received funds with respect to those transactions sufficient to pay the commissions to the cooperating brokers.

- 23. ClaimsPro has made a claim on behalf of the cooperating brokers for the commissions owed to them. Attached and marked as **Exhibit "E"** to my affidavit is a true copy of a printout of those commissions owed to cooperating brokers which the Receiver has reviewed and is satisfied to pay. It is to be noted that with respect to the claim of Royal LePage Signature Realty regarding 439 Champlain Avenue, the Receiver has received only the sum of \$10,000 and while Royal LePage is actually owed \$13,616.50, the Receiver can and will only pay the sum of \$10,000 towards Royal LePage.

- 24. I make this affidavit in support of a motion for an order that the Receiver, MNP Inc. be permitted to pay those cooperating brokers from funds it is holding as indicated in the "total claimed" column of Exhibit "E" as satisfaction of the amounts owed to the cooperating brokers on those transactions indicated in Exhibit "E".

AFFIRMED at the Town of Newmarket)
 in the Province of Ontario, this 22 day of)
 August, 2019.)

Laurie Jess
 A COMMISSIONER, ETC.

Lori Bardos
LORI BARDOS

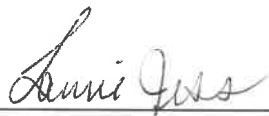
Laurie Elizabeth Jess, a Commissioner, etc.,
 Province of Ontario, for Silver Vale,
 Barristers and Solicitors.
 Expires May 24, 2022.

Tab A

This is **Exhibit "A"** referred to in the

Affidavit of **Lori Bardos**

sworn before me, this 22 day of August, 2019



A COMMISSIONER, ETC.

**Laurie Elizabeth Jess, a Commissioner, etc.,
Province of Ontario, for Stiver Vale,
Barristers and Solicitors.
Expires May 24, 2022.**



PROFESSIONAL LIABILITY INSURANCE

Effected with certain Lloyd's Underwriters ("the Insurer") through Lloyd's Approved Coverholder ("the Coverholder"):
3303128 Canada Inc. T/A Alternative Risk Services
36 Toronto Street, Suite 510, Toronto, Ontario M5C 2C5

DECLARATIONS

THIS IS A CLAIMS-MADE INSURANCE POLICY. PLEASE READ CAREFULLY.

Name of Canadian Intermediary: Alternative Risk Services

Policy No.: RECO092017-01
Replaces Policy No.: RECO092016-01

Endorsements Issued at Inception: USA Jurisdiction, Terrorism Exclusion, Nuclear Incident Exclusion

1. **Named Insured:** Real Estate Council of Ontario
2. **Named Insured Address:** 3300 Bloor Street West, West Tower, Suite 1200
Toronto, ON M8X 2X2
3. **Policy Period:** From: September 1, 2017 To: August 31, 2018
Both days inclusive, Standard Time at the address of the **Named Insured**
4. **Limits of Liability:**
 - Coverage A: Errors & Omissions Insurance
Limits: \$1,000,000 each **Claim**/\$3,000,000 Annual Aggregate
 - Coverage B: Commission Protection Insurance Extension
Limits: \$100,000 each **Claim**/\$3,000,000 Aggregate each **Occurrence**
 - Coverage C: Consumer Deposit Insurance Extension
Limits: \$100,000 each **Claim**/\$3,000,000 Aggregate each **Occurrence**
 - Sub-Limit: **Claims** arising out of **Social Engineering Fraud** under Coverages (B) and (C) are covered up to \$10,000 each **Claim**
5. **Deductibles:**
 - Coverage A: Errors & Omissions Insurance
 - (a) \$2,500 for each **Claim** that resulted in a payment for settlement or judgment plus, if applicable:
 - (b) a further \$2,500 for each additional **Claim** against the same **Insured Member** reported within the current and prior three Policy Periods which results in a payment for settlement or judgment under this or a prior Policy.
 - Coverage B: Commission Protection Insurance Extension \$250 each **Claim**
 - Coverage C: Consumer Deposit Insurance Extension \$Nil
6. **Annual Premium:** \$373.00 per **Registrant**
7. **Minimum Retained Premium:** \$373.00 per **Registrant**
8. **Professional Services:** As defined herein
9. **Notice of Claim:**

Errors & Omissions and Commission Protection	Consumer Deposit
To: ClaimsPro LP 16700 Bayview Ave. Suite 211 Newmarket, ON L3X 1W1 Toll Free: 1-877-740-1913 Fax: 1-866-735-1033 Email: claims@reco-claims.ca	To: Insurance Department Real Estate Council of Ontario 3300 Bloor Street West West Tower, Suite 1200 Toronto, ON M8X 2X2 Phone: 416-207-4800 Toll Free: 1-800-245-6910 Fax: 416-207-4820 Email: insurance@reco.on.ca

The insurance contract consists of this DECLARATIONS page as well as all coverage wordings, riders, or endorsements that are attached hereto.

IDENTIFICATION OF INSURER/ACTION AGAINST INSURER

This insurance has been effected in accordance with the authorization granted to the Coverholder by the Underwriting Members of the Syndicates whose definitive numbers and proportions are shown in the Table attached to Agreement No. B0621PFDO11817 (hereinafter referred to as "the Underwriters"). The Underwriters shall be liable hereunder each for his own part and not one for another in proportion to the several sums that each of them has subscribed to the said Agreement.

In any action to enforce the obligations of the Underwriters, they can be designated or named as "Lloyd's Underwriters" and such designation shall be binding on the Underwriters as if they had each been individually named as defendant. Service of such proceedings may validly be made upon the Attorney In Fact in Canada for Lloyd's Underwriters whose address for such service is 1155 rue Metcalfe, Suite 2220, Montreal, Québec H3B 2V6.

NOTICE

Any notice to the Underwriters may be validly given to the Coverholder.

In witness whereof this POLICY has been signed, as authorized by the Underwriters, by 3303128 Canada Inc. T/A Alternative Risk Services.

The Named Insured is requested to read this POLICY and, if incorrect, return it immediately for alteration.

In the event of an occurrence likely to result in a Claim under this insurance, immediate notice should be given to the Coverholder whose name and address appears above. All inquiries and disputes are also to be addressed to the Coverholder.

For purposes of the Insurance Companies Act (Canada), this Canadian Policy was issued in the course of Lloyd's Underwriters' insurance business in Canada.

The business insured/reinsured herein meets the necessary conditions to qualify as, and is being transacted as, "insuring in Canada a risk" in accordance with Part XIII of the Insurance Companies Act (Canada).

THIS POLICY CONTAINS A CLAUSE WHICH MAY LIMIT THE AMOUNT PAYABLE.

COVERAGE B

COMMISSION PROTECTION INSURANCE EXTENSION

Section I — Insuring Agreements

In consideration of the payment of the premium, and subject to the **Limits of Liability** and the terms and conditions contained herein, the **Insurer** hereby agrees:

1. **Loss of Commission**

To pay on behalf of the **Insured** the amount of any **Claim** for **Loss** sustained by a **Claimant** in a trade in the Province of Ontario in real estate arising out of an **Occurrence** discovered during the **Policy Period**. Payment of any **Claim** shall only apply for the benefit of a **Claimant**.

2. **Defence and Payments of Costs**

In respect of the insurance coverage under this POLICY, the **Insurer** will:

- (a) defend any action against the **Named Insured** or an **Administrative Employee** relating to any **Claim** that relates directly or indirectly to **Loss**;
- (b) subject to the COVERAGE LIMITS set out below, pay all **Defence Costs**, it being understood that the payment of **Defence Costs** will not erode the **Limits of Liability** provided by this POLICY.

3. **Coverage Limits**

- (a) The **Limit of Liability** – each **Claim** stated in the DECLARATIONS shall be the maximum liability of the **Insurer** for **Loss** in any **Claim**.
- (b) The **Limit of Liability** – Aggregate each **Occurrence** stated in the DECLARATIONS shall be the maximum liability of the **Insurer** for any **Occurrence**. If the total amount of all **Claims** in relation to any **Occurrence** exceeds the aggregate **Limit of Liability**, then **Claims** will be settled on a pro-rata basis in the same proportion that the aggregate **Limit of Liability** bears to the total amount of all **Claims**.
- (c) If payment is made for a **Claim** under this POLICY, the **Claimant** (never the **Named Insured**) shall pay the **Deductible** stated in Item 5.B of the DECLARATIONS. The **Deductible** shall apply to each **Claim** for **Loss** but shall not apply to **Defence Costs**.

Section II — Definitions

The definitions under Coverage A apply to Coverage B except for the following:

“Administrative Employee” means a present or former employee, director, officer, manager, volunteer or committee member of the **Named Insured** acting within the scope of his or her duties in that capacity.

“Claim” under Coverages B and C means a demand for money.

“Claimant” means a **Brokerage, Broker** or **Salesperson** or their estates who has sustained a **Loss**, but shall not include any third party who may assert a **Claim** under a contract of assignment or factoring, provided such **Brokerage, Broker** or **Salesperson** was not the subject of, or responsible for, the **Occurrence**.

“Commission” is the remuneration owing to, to be paid to, or earned by, a **Registrant(s)** for a trade in the Province of Ontario in real estate within twenty-four (24) months prior to the date of first notification of the **Occurrence** to the **Insurer**.

“Commission Trust” means a constituted trust where all deposits and other monies received by or due to a **Brokerage** directed to satisfy **Commission** payable or damages or other compensation in lieu of **Commission**, plus applicable taxes, on any trade in real estate are received and held by the **Brokerage** in trust. Where the deposit is received by a listing **Brokerage**, the beneficiaries of the **Commission Trust** shall be the cooperating **Brokerage** and any

listing **Salesperson** or listing **Broker** to the extent of any agreed **Commission** amount, and the listing **Brokerage** as to the balance after payment of such agreed **Commission**. Where the funds are received and held by the cooperating **Brokerage**, the beneficiaries of the **Commission Trust** shall be the cooperating **Salesperson** or cooperating **Broker** to the extent of any agreed **Commission** amount and the cooperating **Brokerage** as to the balance after payment of such agreed **Commission**.

In the event that the cooperating **Brokerage** receives the deposit, the beneficiaries to the **Commission Trust** shall be the listing **Brokerage** and any cooperating **Salesperson** or cooperating **Broker** to the extent of any agreed **Commission** amount and the cooperating **Brokerage** as to the balance after payment of such agreed **Commission**. Where the funds are received and held by the listing **Brokerage**, the beneficiaries of the **Commission Trust** shall be the listing **Salesperson** or listing **Broker** to the extent of any agreed **Commission** amount, and the listing **Brokerage** as to the balance after payment of such agreed **Commission**.

"**Commission Trust Account**" means a trust account maintained at a Canadian chartered bank or a trust company and designated as a "**Commission Trust Account**". The **Commission Trust Account** shall be used only for the receipt and disbursement of **Commission Trust** funds, and kept separate and apart from the statutory trust account that a **Brokerage** is required to maintain for customer and/or client funds.

"**Deductible**" is that indicated in the DECLARATIONS, Item 5, Coverage B.

"**Insured**" under Coverages B and C means:

- (a) the **Named Insured**;
- (b) an **Administrative Employee**; or
- (c) a **Registrant**.

"**Limits of Liability**" is that indicated in the DECLARATIONS, Item 4, Coverage B.

"**Loss**" means loss of **Commission** which has been or, in the normal course in a trade in real estate, including the sale of a business by share transfer, but does not include any trade or trading which is regulated by the Securities Act, R.S.O. 1990, Chapter S.5, would have been or ought to have been entrusted to or received by one **Registrant** in its/his/her **Professional Capacity** but is owed to another **Registrant** in its/his/her **Professional Capacity**.

"**Occurrence**" means

- (a) insolvency of a **Registrant**; or
- (b) all acts of theft, fraud, misappropriation or wrongful conversion combined, committed directly or indirectly by a **Registrant** or present or former employee, director, officer or manager of a **Registrant** of moneys or other property entrusted to, or received by, the **Registrant** in the **Registrant's Professional Capacity**; or
- (c) **Social Engineering Fraud**.

Regardless the number of such incidents of insolvency or the number of such acts of theft, fraud, misappropriation or wrongful conversion, they will be grouped as an amount to only one **Occurrence**, regardless of the number of **Claimants** who suffer a **Loss**.

"**Professional Capacity**" means the capacity as a **Salesperson**, **Broker** or **Brokerage**.

"**Social Engineering Fraud**" means a misrepresentation of fact or an intentional, malicious, willful or fraudulent act undertaken by a third party that misleads a **Claimant** and directly results in a **Loss**.

Section III — Exclusions

This POLICY does not apply to any Claim:

1. on account of acts by any **Registrant** while acting as executor, administrator, trustee, guardian, conservator or in any fiduciary capacity other than as a **Brokerage, Salesperson or Broker** for a person other than itself/himself/herself;
2. on account of any **Occurrence** arising out of or attributable to any fact, circumstance or situation which has been the subject of any notice given under any policy of which this POLICY is a direct or indirect renewal or replacement.

Section IV — Conditions

1. Severability of Interest

It is a condition precedent of this POLICY that the **Occurrence** which is alleged to give rise to a **Claim** is related to a **Registrant** while it, he or she was registered under the Real Estate and Business Brokers Act, 2002 or successor legislation as from time to time amended to trade in real estate in the Province of Ontario. No **Insured** shall be entitled to the benefit of this POLICY unless this condition is fulfilled except that coverage will apply to any **Insured** who inadvertently or unknowingly employs or becomes associated with a **Salesperson, Broker or Brokerage** who is not registered under the Real Estate and Business Brokers Act, 2002 or successor legislation as from time to time amended to trade in real estate in the Province of Ontario and against whom a **Claim** is made and such **Insured** is alleged or found to be vicariously liable. Notwithstanding the foregoing, it is agreed by the **Insurer** that an **Insured** shall be entitled to the benefit of this POLICY with respect to a **Claim** which arises out of an **Occurrence** during a period when the registration of the **Registrant** with the **Named Insured** has lapsed or been suspended due to administrative error on the part of the **Named Insured**.

2. Notice and Cooperation

The **Insured** will give notice, by submitting a detailed Notice of Claim in the prescribed form, of a **Claim** or an **Occurrence** that could result in a **Claim** to the **Insurer** as soon as practicable. For the purposes of this Section, the **Insurer** will also accept as notice of claim under this POLICY a Notice of Occurrence with sufficient particulars from an **Insured** where such **Occurrence** later gives rise to a **Claim** from a **Claimant**.

All **Claims** arising out of an **Occurrence** must be reported to the **Insurer** within twenty-four (24) months of the date of first notification of the **Occurrence** to the **Insurer**.

The **Insured** making the **Claim** and/or the **Claimant** shall cooperate with the **Insurer** and, upon the **Insurer's** request, assist in making settlements and in the conduct of suits or proceedings. The **Insured** and/or the **Claimant** shall attend hearings, mediations, arbitrations, trials and examinations and shall assist in securing and giving evidence and obtaining the attendance of witnesses.

Upon the **Insurer's** request, the **Insured** and/or the **Claimant** shall produce for the **Insurer's** examination all pertinent records in his/her/their possession, care or control at such reasonable times and places as the **Insurer** shall designate, and shall cooperate with the **Insurer** in all matters with respect thereto. Notwithstanding the foregoing, the obligation of the **Named Insured** to produce records to the **Insurer** is subject to the **Named Insured's** duties and responsibilities under legislation related to real estate or the **Named Insured** in the Province of Ontario, including the Real Estate and Business Brokers Act, 2002 and the regulations thereunder as from time to time amended, and every statute and regulation that may be substituted therefor or any successor legislation and/or the Administrative Agreement between the **Named Insured** and the Province of Ontario and/or the by-laws of the **Named Insured** and/or any applicable privacy laws.

The **Insurer** will have a maximum period of one (1) year from the receipt of Notice of Claim in which the **Insurer** must complete, finalize and close its investigation and present its findings on any potential **Claim** to the **Insured** and/or the **Claimant**. This period is granted regardless of cancellation, termination or expiration of this POLICY.

3. **Claims Summary Reports**

The **Insurer** will remit claims summary reports to the **Named Insured** when necessary or upon request.

4. **Proof of Loss**

A detailed and signed Notice of Claim shall constitute proof of **Loss** for each **Claim** submitted to the **Insurer** by an **Insured** and/or the **Claimant** making the **Claim**. Upon completing its investigation and being satisfied that coverage exists, subject to the terms and conditions of this **POLICY**, the **Insurer** shall settle each **Claim** within a reasonable period of time not to exceed ninety (90) days.

5. **Other Insurance, Trust and Other Accounts**

If there is available to the **Insured** or **Claimant** other insurance, indemnity, trust or other accounts, the **Insurer** shall be liable hereunder only for the part of any payment which is in excess of the amount actually recovered by the **Insured** or **Claimant** from such other insurance, indemnity, trust or other accounts.

6. **Subrogation and Recovery**

In the event of any payment under this **POLICY**, the **Insurer** shall be further subrogated to all rights of recovery of the **Insured** against any person and the **Insured** and/or the **Named Insured** shall execute and deliver instruments and papers and render assistance to the **Insurer** to secure such rights subject to the **Insured's** and/or **Named Insured's** duties and responsibilities under legislation related to real estate or the **Named Insured** in the Province of Ontario, including the Real Estate and Business Brokers Act, 2002 and the regulations thereunder as from time to time amended, and every statute and regulation that may be substituted therefor or any successor legislation and/or the Administrative Agreement between the **Named Insured** and the Province of Ontario and/or the by-laws of the **Named Insured** and/or any applicable privacy laws.

Any recoveries effected by the **Insurer** shall be applied net of the expense of such recovery, firstly to the **Insurer** as reimbursement of amounts paid in settlement of any **Claim**, and secondly to the **Insured** in satisfaction of any retention within the **Deductible**.

The **Insurer** expressly waives all rights of subrogation or recovery against any **Registrant** of a corporation or partnership who is neither an author, accomplice nor acting in collusion with the dishonest **Registrant** in respect of any **Occurrence** resulting in any **Claim** paid under this **POLICY**.

7. **Cancellation**

This **POLICY** may be cancelled:

- (a) by mutual consent of the **Named Insured** and the **Insurer**;
- (b) by the **Insurer** for non-payment of premium. Such cancellation may be effected by written notice by registered mail stating when, not less than fifteen (15) days thereafter, the cancellation shall be effective. The mailing of such notice as aforesaid shall be sufficient proof of notice and this **POLICY** shall terminate at the date and hour specified in such notice;
- (c) by the **Named Insured** if a change in legislation, a change in the regulations or a change in the by-laws of the **Named Insured** precludes the necessity of this insurance. Such cancellation may be effected by written notice to the **Insurer** stating when thereafter the cancellation shall be effective.

8. **Notice of Renewal Terms and Notice of Non-Renewal**

The **Insurer**, no less than one hundred and sixty-five (165) days prior to the **Anniversary**, shall offer irrevocable rates, terms and conditions to renew this **POLICY** for twelve (12) months. The **Named Insured** may accept said offer forty-five (45) days prior to the subsequent **Anniversary**.

9. **Assignment**

No coverage shall apply in respect of any **Claim** where an **Insured** has assigned or transferred rights to making a **Claim** under this Coverage B without the express written consent of the **Insurer**.

10. **Action Against the Insurer**

No suit, action or proceeding of any kind to recover under this POLICY shall be brought after the expiration of five (5) years from the termination or cancellation of this POLICY in its entirety, provided, however, that if such limitation for bringing suit, action or proceeding is prohibited or made void by any law controlling the construction of this POLICY, such limitation shall be deemed to be amended so as to be equal to the minimum period of limitation permitted by such law.

11. **Arbitration Clause**

In the event of a dispute between the **Insured** and/or the **Named Insured** and/or the **Insurer** as to the interpretation of this POLICY, or the settlement of **Claims**, or the apportionment of liability, or amount of the **Deductible**, a single arbitrator appointed pursuant to the provisions of The Arbitration Act, 1991 shall decide such dispute.

12. **Canadian Currency Clause**

All **Limits of Liability**, premiums and other amounts as expressed in this POLICY are in Canadian currency.

13. **Economic or Financial Sanctions**

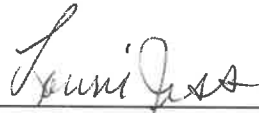
The **Insurer** shall not knowingly provide cover or be liable to pay any **Claim** or provide benefit hereunder to the extent that the provision of such cover, payment of such **Claim** or provision of such benefit would expose the **Insurer** to any sanction, prohibition or restriction under any applicable international economic or financial sanctions legislation.

Tab B

This is **Exhibit "B"** referred to in the

Affidavit of **Lori Bardos**

sworn before me, this 22 day of August, 2019



A COMMISSIONER, ETC.

Laurie Elizabeth Jess, a Commissioner, etc.,
Province of Ontario, for Silver Vale,
Barristers and Solicitors.
Expires May 24, 2022.

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE)
JUSTICE *HAINES*)

THURSDAY, THE 14TH
DAY OF JUNE, 2018

FIREPOWER DEBT GP INC., AS AGENT

Applicant

- and -

THEREDPIN, INC. and THEREDPIN.COM REALTY INC.

Respondents



ORDER
(appointing Receiver)

THIS APPLICATION made by the Applicant for an Order pursuant to section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "BIA") and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended (the "CJA") appointing MNP Ltd. ("MNP") as receiver (the "Receiver") without security, of all of the assets, undertakings and properties of the Respondents, TheRedPin, Inc. and TheRedPin.com Realty Inc. (the "Debtors"), acquired for, or used in relation to a business carried on by the Debtors, was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of Jared Kalish sworn June 13, 2018, including the exhibits thereto, and on hearing the submissions of counsel for the Applicant and such other counsel listed on the Counsel Slip, no one appearing for the other parties listed on the service list although duly served as appears from the affidavit of service of Aryan Ziaie sworn June 13, 2018, and on reading the consent of MNP to act as the Receiver,

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Application and the Application Record is hereby abridged and validated so that this application is properly returnable today and hereby dispenses with further service thereof.

APPOINTMENT

2. **THIS COURT ORDERS** that pursuant to section 243(1) of the BIA and section 101 of the CJA, MNP is hereby appointed Receiver, without security, of all of the assets, undertakings and properties of the Debtors acquired for, or used in relation to a business carried on by the Debtors, including all proceeds thereof (the "Property").

RECEIVER'S POWERS

3. **THIS COURT ORDERS** that the Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Property and, without in any way limiting the generality of the foregoing, the Receiver is hereby expressly empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:

- (a) to take possession of and exercise control over the Property and any and all proceeds, receipts and disbursements arising out of or from the Property;
- (b) to receive, preserve, and protect the Property, or any part or parts thereof, including, but not limited to, the changing of locks and security codes, the relocating of Property to safeguard it, the engaging of independent security personnel, the taking of physical inventories and the placement of such insurance coverage as may be necessary or desirable;
- (c) to manage, operate, and carry on the business of the Debtors, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part of the business, or cease to perform any contracts of the Debtors;
- (d) to engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Receiver's powers and duties, including without limitation those conferred by this Order;
- (e) to purchase such equipment, inventories, supplies, premises or other assets to continue the business of the Debtors or any part or parts thereof;
- (f) to receive and collect all monies and accounts now owed or hereafter owing to the Debtors and to exercise all remedies of the Debtors in collecting such monies, including, without limitation, to enforce any security held by the Debtors;
- (g) to settle, extend or compromise any indebtedness owing to the Debtors;
- (h) to execute, assign, issue and endorse documents of whatever nature in respect of any of the Property, whether in the Receiver's name or in the name and on behalf of the Debtors, for any purpose pursuant to this Order;

- (i) to initiate, prosecute and continue the prosecution of any and all proceedings and to defend all proceedings now pending or hereafter instituted with respect to the Debtors, the Property or the Receiver, and to settle or compromise any such proceedings. The authority hereby conveyed shall extend to such appeals or applications for judicial review in respect of any order or judgment pronounced in any such proceeding;
- (j) to market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate and, without limiting the generality of the foregoing, the Receiver is hereby authorized to carry out a sales process for the Property in accordance with the steps and timelines set out in Schedule "A" attached hereto;
- (k) to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business, with approval of this Court, and in such case notice under subsection 63(4) of the *Ontario Personal Property Security Act* shall not be required;
- (l) to apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property;
- (m) to report to, meet with and discuss with such affected Persons (as defined below) as the Receiver deems appropriate on all matters relating to the Property and the receivership, and to share information, subject to such terms as to confidentiality as the Receiver deems advisable;
- (n) to apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and, if thought desirable by the Receiver, in the name of the Debtors;

- (o) to enter into agreements with any trustee in bankruptcy appointed in respect of the Debtors, including, without limiting the generality of the foregoing, the ability to enter into occupation agreements for any property owned or leased by the Debtors;
- (p) to exercise any shareholder, partnership, joint venture or other rights which the Debtors may have; and
- (q) to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations;

and in each case where the Receiver takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other Persons (as defined below), including the Debtors, and without interference from any other Person.

DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE RECEIVER

4. **THIS COURT ORDERS** that (i) the Debtors, (ii) all of its current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on its instructions or behalf, and (iii) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order (all of the foregoing, collectively, being "Persons" and each being a "Person") shall forthwith advise the Receiver of the existence of any Property in such Person's possession or control, shall grant immediate and continued access to the Property to the Receiver, and shall deliver all such Property to the Receiver upon the Receiver's request.

5. **THIS COURT ORDERS** that all Persons shall forthwith advise the Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or

affairs of the Debtors, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the "Records") in that Person's possession or control, and shall provide to the Receiver or permit the Receiver to make, retain and take away copies thereof and grant to the Receiver unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this paragraph 5 or in paragraph 6 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Receiver due to the privilege attaching to solicitor-client communication or due to statutory provisions prohibiting such disclosure.

6. **THIS COURT ORDERS** that if any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service provider or otherwise, all Persons in possession or control of such Records shall forthwith give unfettered access to the Receiver for the purpose of allowing the Receiver to recover and fully copy all of the information contained therein whether by way of printing the information onto paper or making copies of computer disks or such other manner of retrieving and copying the information as the Receiver in its discretion deems expedient, and shall not alter, erase or destroy any Records without the prior written consent of the Receiver. Further, for the purposes of this paragraph, all Persons shall provide the Receiver with all such assistance in gaining immediate access to the information in the Records as the Receiver may in its discretion require including providing the Receiver with instructions on the use of any computer or other system and providing the Receiver with any and all access codes, account names and account numbers that may be required to gain access to the information.

7. **THIS COURT ORDERS** that the Receiver shall provide each of the relevant landlords with notice of the Receiver's intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the Receiver's entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Receiver, or by further Order of this Court upon application by the Receiver on at least two (2) days notice to such landlord and any such secured creditors.

NO PROCEEDINGS AGAINST THE RECEIVER

8. **THIS COURT ORDERS** that no proceeding or enforcement process in any court or tribunal (each, a "Proceeding"), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.

NO PROCEEDINGS AGAINST THE DEBTORS OR THE PROPERTY

9. **THIS COURT ORDERS** that no Proceeding against or in respect of the Debtors or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtors or the Property are hereby stayed and suspended pending further Order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

10. **THIS COURT ORDERS** that all rights and remedies against the Debtors, the Receiver, or affecting the Property, are hereby stayed and suspended except with the written consent of the

Receiver or leave of this Court, provided however that this stay and suspension does not apply in respect of any "eligible financial contract" as defined in the BIA, and further provided that nothing in this paragraph shall (i) empower the Receiver or the Debtors to carry on any business which the Debtors are not lawfully entitled to carry on, (ii) exempt the Receiver or the Debtors from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

NO INTERFERENCE WITH THE RECEIVER

11. **THIS COURT ORDERS** that no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Debtors, without written consent of the Receiver or leave of this Court.

CONTINUATION OF SERVICES

12. **THIS COURT ORDERS** that all Persons having oral or written agreements with the Debtors or statutory or regulatory mandates for the supply of goods and/or services, including without limitation, all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Debtors are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Receiver, and that the Receiver shall be entitled to the continued use of the Debtors' current telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this

Order are paid by the Receiver in accordance with normal payment practices of the Debtors or such other practices as may be agreed upon by the supplier or service provider and the Receiver, or as may be ordered by this Court.

RECEIVER TO HOLD FUNDS

13. **THIS COURT ORDERS** that all funds, monies, cheques, instruments, and other forms of payments received or collected by the Receiver from and after the making of this Order from any source whatsoever, including without limitation the sale of all or any of the Property and the collection of any accounts receivable in whole or in part, whether in existence on the date of this Order or hereafter coming into existence, shall be deposited into one or more new accounts to be opened by the Receiver (the "Post Receivership Accounts") and the monies standing to the credit of such Post Receivership Accounts from time to time, net of any disbursements provided for herein, shall be held by the Receiver to be paid in accordance with the terms of this Order or any further Order of this Court.

EMPLOYEES

14. **THIS COURT ORDERS** that all employees or independent contractors of the Debtors shall remain the employees or independent contractors of the Debtors until such time as the Receiver, on the Debtors' behalf, may terminate the employment of such employees or independent contractors. The Receiver shall not be liable for any employee-related liabilities, including any successor employer liabilities as provided for in section 14.06(1.2) of the BIA, other than such amounts as the Receiver may specifically agree in writing to pay, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*.

PIPEDA

15. **THIS COURT ORDERS** that, pursuant to clause 7(3)(c) of the *Canada Personal Information Protection and Electronic Documents Act*, the Receiver shall disclose personal information of identifiable individuals to prospective purchasers or bidders for the Property and to their advisors, but only to the extent desirable or required to negotiate and attempt to complete one or more sales of the Property (each, a "Sale"). Each prospective purchaser or bidder to whom such personal information is disclosed shall maintain and protect the privacy of such information and limit the use of such information to its evaluation of the Sale, and if it does not complete a Sale, shall return all such information to the Receiver, or in the alternative destroy all such information. The purchaser of any Property shall be entitled to continue to use the personal information provided to it, and related to the Property purchased, in a manner which is in all material respects identical to the prior use of such information by the Debtors, and shall return all other personal information to the Receiver, or ensure that all other personal information is destroyed.

LIMITATION ON ENVIRONMENTAL LIABILITIES

16. **THIS COURT ORDERS** that nothing herein contained shall require the Receiver to occupy or to take control, care, charge, possession or management (separately and/or collectively, "Possession") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the

Canadian Environmental Protection Act, the *Ontario Environmental Protection Act*, the *Ontario Water Resources Act*, or the *Ontario Occupational Health and Safety Act* and regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Receiver from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Receiver shall not, as a result of this Order or anything done in pursuance of the Receiver's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

LIMITATION ON THE RECEIVER'S LIABILITY

17. **THIS COURT ORDERS** that the Receiver shall incur no liability or obligation as a result of its appointment or the carrying out the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*. Nothing in this Order shall derogate from the protections afforded the Receiver by section 14.06 of the BIA or by any other applicable legislation.

RECEIVER'S ACCOUNTS

18. **THIS COURT ORDERS** that the Receiver and counsel to the Receiver shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges unless otherwise ordered by the Court on the passing of accounts, and that the Receiver and counsel to the Receiver shall be entitled to and are hereby granted a charge (the "**Receiver's Charge**") on the Property, as security for such fees and disbursements, both before and after the making of this Order in respect of these proceedings, and that the Receiver's Charge shall form a first

charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subject to sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

19. **THIS COURT ORDERS** that the Receiver and its legal counsel shall pass its accounts from time to time, and for this purpose the accounts of the Receiver and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

20. **THIS COURT ORDERS** that prior to the passing of its accounts, the Receiver shall be at liberty from time to time to apply reasonable amounts, out of the monies in its hands, against its fees and disbursements, including legal fees and disbursements, incurred at the standard rates and charges of the Receiver or its counsel, and such amounts shall constitute advances against its remuneration and disbursements when and as approved by this Court.

FUNDING OF THE RECEIVERSHIP

21. **THIS COURT ORDERS** that the Receiver be at liberty and it is hereby empowered to borrow by way of a revolving credit or otherwise, such monies from time to time as it may consider necessary or desirable, provided that the outstanding principal amount does not exceed \$200,000 (or such greater amount as this Court may by further Order authorize) at any time, at such rate or rates of interest as it deems advisable for such period or periods of time as it may arrange, for the purpose of funding the exercise of the powers and duties conferred upon the Receiver by this Order, including interim expenditures. The whole of the Property shall be and is hereby charged by way of a fixed and specific charge (the "Receiver's Borrowings Charge") as security for the payment of the monies borrowed, together with interest and charges thereon, in priority to all security interests, trusts, liens, charges and encumbrances, statutory or

otherwise, in favour of any Person, but subordinate in priority to the Receiver's Charge and the charges as set out in sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

22. **THIS COURT ORDERS** that neither the Receiver's Borrowings Charge nor any other security granted by the Receiver in connection with its borrowings under this Order shall be enforced without leave of this Court.

23. **THIS COURT ORDERS** that the Receiver is at liberty and authorized to issue certificates substantially in the form annexed as Schedule "B" hereto (the "Receiver's Certificates") for any amount borrowed by it pursuant to this Order.

24. **THIS COURT ORDERS** that the monies from time to time borrowed by the Receiver pursuant to this Order or any further order of this Court and any and all Receiver's Certificates evidencing the same or any part thereof shall rank on a *pari passu* basis, unless otherwise agreed to by the holders of any prior issued Receiver's Certificates.

SERVICE AND NOTICE

25. **THIS COURT ORDERS** that the E-Service Protocol of the Commercial List (the "Protocol") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List website at <http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/e-service-protocol/>) shall be valid and effective service. Subject to Rule 17.05 this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules of Civil Procedure. Subject to Rule 3.01(d) of the Rules of Civil Procedure and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission. This Court further

orders that a Case Website shall be established in accordance with the Protocol with the following URL: mnpdebt.ca/theredpin

26. **THIS COURT ORDERS** that if the service or distribution of documents in accordance with the Protocol is not practicable, the Receiver is at liberty to serve or distribute this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or facsimile transmission to the Debtors' creditors or other interested parties at their respective addresses as last shown on the records of the Debtors and that any such service or distribution by courier, personal delivery or facsimile transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

27. **THIS COURT ORDERS** that the Applicant, the Receiver and their respective counsel are at liberty to serve or distribute this Order, any other materials and orders as may be reasonably required in these proceedings, including any notices, or other correspondence, by forwarding true copies thereof by electronic message to the Applicant's creditors or other interested parties and their advisors. For greater certainty, any such distribution or service shall be deemed to be in satisfaction of a legal or juridical obligation, and notice requirements within the meaning of clause 3(c) of the Electronic Commerce Protection Regulations, Reg. 81000-2-175 (SOR/DORS).

GENERAL

28. **THIS COURT ORDERS** that the Receiver may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

29. **THIS COURT ORDERS** that nothing in this Order shall prevent the Receiver from acting as a trustee in bankruptcy of the Debtors.

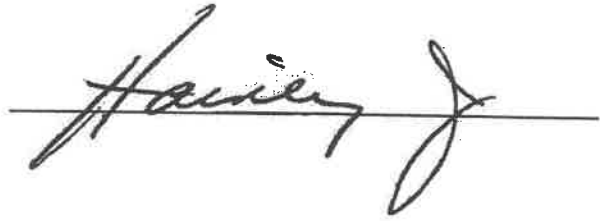
30. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

31. **THIS COURT ORDERS** that the Receiver be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Receiver is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

32. **THIS COURT ORDERS** that the Applicant shall have its costs of this application, up to and including entry and service of this Order, provided for by the terms of the Applicant's security or, if not so provided by the Applicant's security, then on a substantial indemnity basis to be paid by the Receiver from the Debtors' estate with such priority and at such time as this Court may determine.

33. **THIS COURT ORDERS** that any interested party may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to the Receiver and to any other party

likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

A handwritten signature in cursive script, appearing to read "Hainey J.", written over a horizontal line.

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SCHEDULE "A"

SALE PROCESS AND TIME LINE

1. **Definitions.** All capitalized terms used but not defined herein shall have the meaning ascribed to them in the order of the Ontario Superior Court of Justice [Commercial List] (the "Court") dated June 14, 2018 (the "Receivership Order") authorizing, *inter alia*, the Receiver to conduct the marketing and sale of all or part of the Property of TheRedPin, Inc. and TheRedPin.com Realty Inc. (collectively the "Company") in accordance with the terms hereof.
2. **Contacting Interested Parties.** Commencing on the week of June 18, 2018 the Receiver shall contact potential purchasers of the Property or business of the Company and advise such parties of the opportunity to acquire the Property or business (the "Opportunity").
3. **Advertisement.** During the week of June 18, 2018, or as soon thereafter as practical, the Receiver shall advertise the Opportunity one time in The Globe and Mail (National Edition).
4. **Due Diligence.** During the week June 18, the Receiver shall make available to prospective purchasers (collectively, the "Prospective Purchasers"), upon receipt of an executed confidentiality agreement from a Prospective Purchaser, (a) a confidential information memorandum describing the Property and Opportunity in sufficient detail as is reasonably required by Prospective Purchasers to consider submitting an offer for the Property and facilitate the conduct of due diligence by Prospective Purchasers; and, (b) access to an electronic data room, prepared and maintained by the Receiver, containing documents and information pertaining to the Opportunity.
5. **Offer Deadline.** Any offers to purchase the Property must be submitted in writing to and received by the Proposal Trustee at 111 Richmond Street West, Suite 300, Toronto, ON, M5H 2G4, attention: Alan Shiner, by no later than 5:00pm (E.S.T.) on July 23, 2018 (the "Offer Deadline").
6. **Qualifying Offers.** The Receiver in consultation with FIREPOWER DEBT GP INC, AS AGENT and Trilogy Growth Fund LP the (the "Secured Creditors"), shall determine whether any offers are "Qualifying Offers". Qualifying Offers must, among other things, meet the following minimum criteria:
 - (a) the offer must be for a purchase price that the Receiver, in consultation with the Secured Creditors, would accept (subject to such further negotiation as may take place in accordance with this sales process);
 - (b) the offer must be accompanied by a deposit in the form of certified cheque payable to the Receiver in Trust which is equal to at least 10% of the aggregate purchase price payable under the offer;
 - (c) the offer must be open for acceptance until July 25, 2018
 - (d) the offer must not contain any contingency relating to due diligence or financing or any other material conditions precedent to the offeror's obligation to complete the

transaction other than court approval;

- (e) the offeror must provide written evidence satisfactory to the Receiver of its ability to consummate the transaction;
 - (f) the offer must be accompanied by a copy of the offer blacklined to the form of purchase and sale agreement to be provided to Prospective Purchasers by the Receiver; and
 - (g) the offer must be on such terms and conditions as are typical in the context of sales in the context of court appointed receiver (and as will be set out in the form of sale agreement to be provided by the Receiver), which terms shall include without limitation: (i) the sale of the Property on an "as is, where is" basis, without any representations, warranties or conditions made or granted in connection therewith; (ii) that the completion of the transaction is conditional on the granting of an approval and vesting Order by the Court; and, (iii) a closing by no later than August 16, 2018.
7. Negotiation of Qualifying Offers. The receiver may, in consultation with the Secured Creditors, enter into negotiations with the offerors in respect of one or more of the Qualifying Offers in an effort to ascertain the highest and best offer. Additionally, it is open to the Receiver, in consultation with the Secured Creditors, to elect not to accept any of the Qualifying Offers, whether before or after negotiation of the same. The Receiver reserves the right to accept a qualifying offer prior to the offer deadline
8. Winning Offer. By no later than July 27, 2018, the Receiver shall, in consultation with the Secured Creditors, determine the highest and best offer with respect to the Property (the "Winning Offer"), at which point the Receiver shall enter into a definitive agreement in connection therewith (the "Sale Agreement"), subject to Court approval.
9. Court Approval of the Winning Offer. On or before August 10, 2018, the Receiver shall make a motion to the Court for approval of the Sale Agreement and vesting order in respect of the same.
10. Return of Deposits. All deposits received (except such deposit forming part of the Winning Offer) shall be held by the Receiver in Trust until the execution of the Sale Agreement and, thereafter, returned to the respective Prospective Purchasers thereafter. The deposit forming part of the winning Offer shall be dealt with in accordance with the Sale Agreement.

Modifications. The Receiver reserves the right to amend the sales process steps and time line.

SCHEDULE "B"

RECEIVER CERTIFICATE

CERTIFICATE NO. _____

AMOUNT \$ _____

1. **THIS IS TO CERTIFY** that MNP Ltd., the receiver (the "Receiver") of the assets, undertakings and properties of TheRedPin, Inc. and TheRedPin.com Realty Inc. (the "Debtors") acquired for, or used in relation to a business carried on by the Debtors, including all proceeds thereof (collectively, the "Property") appointed by Order of the Ontario Superior Court of Justice (Commercial List) (the "Court") dated the 14th day of June, 2018 (the "Order") made in an action having Court file number -CL- , has received as such Receiver from the holder of this certificate (the "Lender") the principal sum of \$ _____, being part of the total principal sum of \$ _____ which the Receiver is authorized to borrow under and pursuant to the Order.

2. The principal sum evidenced by this certificate is payable on demand by the Lender with interest thereon calculated and compounded [daily][monthly not in advance on the _____ day of each month] after the date hereof at a notional rate per annum equal to the rate of _____ per cent above the prime commercial lending rate of Bank of _____ from time to time.

3. Such principal sum with interest thereon is, by the terms of the Order, together with the principal sums and interest thereon of all other certificates issued by the Receiver pursuant to the Order or to any further order of the Court, a charge upon the whole of the Property, in priority to the security interests of any other person, but subject to the priority of the charges set out in the Order and in the *Bankruptcy and Insolvency Act*, and the right of the Receiver to indemnify itself out of such Property in respect of its remuneration and expenses.

4. All sums payable in respect of principal and interest under this certificate are payable at the main office of the Lender at Toronto, Ontario.

5. Until all liability in respect of this certificate has been terminated, no certificates creating charges ranking or purporting to rank in priority to this certificate shall be issued by the Receiver to any person other than the holder of this certificate without the prior written consent of the holder of this certificate.

6. The charge securing this certificate shall operate so as to permit the Receiver to deal with the Property as authorized by the Order and as authorized by any further or other order of the Court.

7. The Receiver does not undertake, and it is not under any personal liability, to pay any sum in respect of which it may issue certificates under the terms of the Order.

DATED the ____ day of _____, 20__.

MNP Ltd., solely in its capacity
as Receiver of the Property, and not in its
personal capacity

Per: _____

Name:

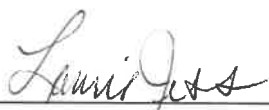
Title:

Tab C

This is **Exhibit "C"** referred to in the

Affidavit of **Lori Bardos**

sworn before me, this 22 day of August, 2019



A COMMISSIONER, ETC.

**Laurie Elizabeth Jess, a Commissioner, etc.,
Province of Ontario, for Silver Vale,
Barristers and Solicitors.
Expires May 24, 2022.**

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE)
JUSTICE PENNY)
FRIDAY, THE 30TH
DAY OF NOVEMBER, 2018

BETWEEN:

FIREPOWER DEBT GP INC., AS AGENT

Applicant

and

THEREDPIN, INC. and THEREDPIN.COM REALTY INC.

Respondents



ORDER

THIS MOTION, brought by MNP Ltd. in its capacity as Court-appointed receiver (the "Receiver") of the undertaking, property and assets of TheRedPin, Inc. and The RedPin.Com Realty Inc. ("TRP Realty"), for advice and direction, was heard October 22, 2018 at the Court House, 330 University Ave., Toronto, Ontario, with a decision rendered on November 30, 2018, and a supplementary decision on costs rendered on January 2, 2019,

ON READING the Second Report of the Receiver dated September 10, 2018, the Supplement to the Second Report of the Receiver dated September 28, 2018, the Second Supplement to the Second Report of the Receiver dated October 11, 2018, the Third Supplement to the Second Report of the Receiver dated October 19, 2018, the Affidavit of Tarik Gidamy sworn

September 19, 2018; the Transcript of the Cross-Examination of Tarik Gidamy taken October 11, 2018, the Affidavit of Dennise Paccione sworn September 19, 2018, the Transcript of the Cross-Examination of Dennise Paccione taken October 4, 2018, the Affidavit of William Durrell sworn October 3, 2018, the Affidavit of Jared Kalish sworn October 9, 2018, and the Transcript of the Cross-Examination of Jared Kalish taken October 11, 2018, and on hearing submissions from counsel for the Receiver, counsel for the Applicants, counsel for Trilogy Growth Fund LP, counsel for the Court-appointed representatives of all real estate agents who contracted with TRP Realty for the provision of realtor services prior to June 14, 2018 (the "TRP Agents"), and counsel for certain underwriters of Lloyd's of London ("Lloyd's"),

1. **THIS COURT ORDERS AND DECLARES** that none of the commissions receivable due to TRP Realty and payable to the TRP Agents that have been collected by the Receiver or are to be collected by the Receiver are held in trust or are to be held in trust for the benefit of the TRP Agents.
 2. **THIS COURT ORDERS** that no determination is made as to whether any commissions receivable due to TRP Realty and payable to outside brokers, assignees or "cashback buyers" that have been collected by the Receiver or are to be collected by the Receiver are held in trust or are to be held in trust for the benefit of such parties.
 3. **THIS COURT ORDERS** that the TRP Agents shall be paid \$45,000.00 in costs from the assets of TRP Realty.
 4. **THIS COURT ORDERS** that Lloyd's shall pay \$16,000 in costs to FirePowerDebt GP Inc.
-

5. **THIS COURT ORDERS** that Lloyd's shall pay \$6,000 in costs to Trilogy Growth Fund LP.
6. **THIS COURT ORDERS** that the Receiver may seek its costs by way of further application.



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FIREPOWER DEBT GP INC., AS AGENT
Applicant

-and-

THEREDPIN, INC. and THEREDPIN.COM REALTY INC.
Respondents

Court File No. CV-18-59964400CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT
TORONTO

ORDER

ADAIR GOLDBLATT BIEBER LLP
95 Wellington Street West
Suite 1830, P.O. Box 14
Toronto, ON M5J 2N7

Jordan Goldblatt (50755H)
jgoldblatt@agblp.com

Tel: 416.499.9940

Fax: 647.689.2059

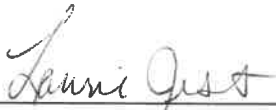
Lawyers for the TRP Agents

Tab D

This is **Exhibit "D"** referred to in the

Affidavit of **Lori Bardos**

sworn before me, this 22 day of August, 2019



A COMMISSIONER, ETC.

Laurie Elizabeth Jess, a Commissioner, etc.,
Province of Ontario, for Silver Vale,
Barristers and Solicitors.
Expires May 24, 2022.

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Firepower Debt GP Inc., as Agent, Applicant
AND:
TheRedPin, Inc. and TheRedPin.com Realty Inc., Respondents
BEFORE: Penny J.
COUNSEL: *Harry Fogul* for the Receiver, MNP Ltd.
Harvey Chaiton for Firepower Debt GP Inc.
A. Kauffman for Trilogy Growth Fund LP
J. Goldblatt and I. Graham for the Agents
J.S. Klein for Certain Underwriters at Lloyds
HEARD: October 22, 2018

ENDORSEMENT

Overview

[1] TheRedPin Inc. and TheRedPin.com Realty Inc. operated a technology assisted real estate brokerage that provided an online platform to consumers which included listings for new and pre-construction projects. These companies will be referred to as TRP and TRP Realty.

[2] In June 2018, MNP Ltd. was appointed Receiver of TRP and TRP Realty. In this motion, the Receiver seeks the advice and direction of the Court about whether certain third party commissions to be collected by the Receiver are held in trust for the benefit of TRP Realty's agents (the "Agents"), outside brokers and certain assignees and "cashback" buyers.

[3] The parties agree that commissions of approximately \$3.7 million are owing to the Agents. TRP and TRP Realty, however, are insolvent. TRP Realty is indebted to Firepower Debt GP Inc. and Trilogy Growth Fund LP in an amount exceeding \$6.4 million; this is a secured obligation. If the Agents' commissions are not subject to a trust, these funds will form part of the debtors' assets subject to Firepower and Trilogy's security, leaving the Agents with unsecured claims against TRP Realty's estate, *Ontario Ministry of Consumer and Commercial Relations v. Safeguard Real Estate Ltd.*, (1994) 114 D.L.R. (4th) 546 (Gen. Div.) [Commercial List], at paras. 13-14.

[4] The parties also agree that there is no statutory or regulatory requirement to hold the Agents' commissions in trust. The Real Estate Council of Ontario confirmed to the Receiver that all registrants are, however, required to maintain a group insurance program that includes commission protection coverage. Coverage against this type of loss is not dependent upon the existence of a commission trust account, although the insurer says that it encourages the use of commission trust accounts as a prudent claims management tool.

[5] The parties further agree there is no definitive document which unambiguously establishes a trust in favour of the Agents. Rather, the existence of a trust, the Agents submit, must be implied from surrounding circumstances, transaction documents and TRP Realty's conduct. The parties agree that the determination of whether there is a trust depends on the application of the "three certainties:" certain of subject matter, certainty of object and certainty of intention.

[6] Finally, the parties agree that, of the three certainties, it is the certainty of intention that is in issue in this case. In other words, the parties agree there is certainty of subject matter (the commissions themselves) and certainty of object (TRP Realty and the Agents). The parties disagree about whether TRP Realty intended to establish a trust over the commissions on behalf of the Agents.

[7] Thus, the issue for determination on this motion for directions is whether TRP Realty intended to establish a trust in favour of the Agents over commissions payable to TRP Realty from purchasers of condominiums, most of which are scheduled to close in the future over a period that will run from 2018 until 2023.

Background

[8] The *Real Estate and Business Brokers Act, 2002*, S.O. 2002, c. 30 Sch. C, establishes the rules which all real estate salespersons, brokers and brokerages must follow. The Real Estate Council of Ontario is the body responsible for the administration of *REBBA* and regulates the activity of trading real estate in Ontario. All brokerages, brokers and real estate salespersons must be registered and meet all the requirements for registration. In particular:

- (a) the brokerage is the entity authorized to trade in real estate, not the salesperson or the broker of record;
- (b) every brokerage must designate a broker as its broker of record to ensure that the brokerage complies with the *REBBA*; and
- (c) it is the brokers and salespersons who perform the listing and selling activities that generate the trades.

[9] TRP Realty's revenues are primarily derived from real estate commissions generated from the activities of its licensed salespersons, or "agents." As of the date of the Receiver's appointment, there were 63 active Agents and 43 former Agents who still had pending commissions owing. Because TRP Realty dealt heavily with the new and future condominium market, these pending commissions are in respect of real estate deals that are scheduled to close anywhere between 2018 and 2023.

[10] TRP Realty acted either for a buyer, in which case it was the co-operating brokerage, or for a seller, in which case it was the listing brokerage. Of the 730 pending transactions to be settled by the Receiver, only 28 trades relate to transactions where TRP Realty was the listing brokerage. In all the rest, it was a co-operating brokerage.

[11] Where TRP Realty is the listing brokerage, it received deposits from the buyers under the agreements of purchase and sale. These deposits were required by regulatory rules to be deposited into the brokerage's real estate trust account. This meant the commission on these sales were also paid into the trust account because, as a practical matter, the deposit was used to satisfy the seller's obligation to the brokers to pay the commission. For this reason, most of the commissions due from TRP Realty to third parties (co-operating brokers who were not TRP Realty Agents) were lodged in the real estate trust account. This is because TRP Realty only dealt with third party brokerages on the relatively small number of occasions when it was the listing (or selling) agent.

[12] Some of the documents used by TRP Realty were standard forms developed by the Ontario Real Estate Council. These were commonly used in connection with re-sales. However, in connection with pre-construction deals, the transaction documents were usually specific to the builder or particular project. For example, of the over \$6.6 million in pending commissions as of the date of the receivership, 21% or \$1.4 million, were for resales, whereas 79%, or about \$5.2 million, were future commissions owing to TRP Realty relating to pre-construction or new development transactions where the OREC forms were typically not used.

Certainty of Intention

Legal Framework

[13] A trust is a relationship which arises whenever a person (called the trustee) is compelled in equity to hold property for the benefit of some other person (called the beneficiary) in such a way that the real benefit of the property accrues not to the trustee but to the beneficiary.

[14] As noted above, a valid trust exists where there the three certainties are satisfied: certainty of intent, certainty of subject matter and certainty of object. The issue in this case is certainty of intent.

[15] Certainty of intent requires that it be clear that the donor or settlor intended to create a trust; i.e., that the settlor intended for the property in question to be held for the benefit of another. No formal document evidencing the creation of a trust is required. Nor is it necessary that the settlor use any specific language - even the use of the word "trust" is not necessarily dispositive one way or the other. The question is one of substance - did the settlor evidence an intention that the property be held by one person for another person's benefit? This intention may be express or implied and may be determined from words or acts.

[16] Where a trust is to be implied, however, effect must be given to inferences as to the intention of the parties which a reasonable person would draw from the words or conduct of the parties and not to any subjective or other intention which was not made manifest at the time. Certainty of intention cannot solely derive from a "moral obligation as to what is to be done with the property," *Bank of Nova Scotia v. Alcon Group Inc.* 2012 NBCA 57, at para. 18 and *Waters' Law of Trusts in Canada* (4th ed.) at para. 5.1.

The Bank Accounts

[17] TRP Realty maintained three bank accounts:

- (1) a real estate trust account which is where TRP Realty deposited buyer deposits, as required under s. 27(1) of *REBBA*;
- (2) a commission account which is where all commissions earned by TRP Realty on transactions were ultimately deposited and from which commissions belonging to TRP Realty and third parties such as cooperating brokers and the Agents were paid; and
- (3) an operating account into which TRP Realty transferred the commissions it earned on transactions from the commission account and from which it paid its operating expenses such as payroll and overhead.

[18] Neither the real estate trust account nor the commission account bore interest. Service fees for these accounts were always paid from TRP Realty's operating account.

[19] Prior to August 2014, the commission account was held at TD Bank. Statements from this account contained the reference "TRUST ACCT" on the mailing line of the statement.

[20] From March 2014 to March 2018, TRP Realty banked with Comerica Bank (through the facilities of the Royal Bank of Canada). Bank statements from Comerica stated "COMMISSION TRUST" on the mailing line. Similarly, cheques drawn on the commission account contained the notation "COMMISSION TRUST" on them. When TRP Realty paid commissions to Agents through electronic transfers, it did so through an account described as "RBC - Commission Trust." This notation on the account was changed by RBC in 2018 to read only "RBC - Commission."

[21] According to information obtained by the Receiver from the Royal Bank, TRP Realty's commission account was provided with a description, on opening, of "Realty Commission." Most likely, this nomenclature was requested by the client, TRP Realty, since the bank does not normally assign nomenclature of this kind to any account. In any event, from the bank's perspective, the account is a standard operating account, not a trust account. According to the Royal Bank, among other things a Trust "know your client" form and a Trust Agreement are typically required to open and operate a trust account. No such documents were provided to or held by the Royal Bank in relation to TRP Realty's commission account.

[22] The Agents rely on an affidavit filed by Tarik Gidamy, who is a founder of TRP Realty and served as its broker of record until May 2017. Mr. Gidamy has sworn that he set up the commission account on the basis that the commissions TRP Realty was obliged to pay out to others did not belong to TRP Realty and that TRP Realty could only use money that was to TRP Realty's credit in the commission account when transferring funds to its operating account. He claims that TRP Realty had no expectation that it could use funds in its commission account owing to others, such as Agents, in the ordinary course of its business.

The Transaction and Other Documents

[23] Each TRP salesperson (Agent) entered into an 11 page contract with TRP Realty under which the Agent agreed to provide real estate services to TRP Realty (the "Contract"). Each Agent specifically agreed that his or her relationship with the company is that of independent contractor. In this Contract, TRP Realty agreed to pay commission on all transactions executed through the company provided the company received a minimum of \$500 per executed transaction to cover administrative costs. The Agent agreed that the company will receive the greater of \$500 or the company portion of the listed commission split. The company agreed to issue commission cheques each Wednesday for transactions closed where final payment was received the previous week. Commissions for pre-construction transactions were to be paid in accordance with the builder's payment schedule. The Contract contained an entire agreement clause which, among other things, provided that the Contract superseded all prior agreements. There is no provision in the Contract that commissions are to be held in trust by TRP Realty for the benefit of the Agents, nor is there any language that could reasonably be construed as having this meaning or intent.

[24] The Agents point to a number of transaction documents which, they argue, show that the commission account was intended to be a trust account. First, when an agreement of purchase and sale had "gone firm," TRP Realty provided the Agent with a trade record sheet setting out information about the transaction and the specific commission split between TRP Realty and the TRP agent.

[25] The trade record sheet is a standard form document provided through a "back office" software provider called "brokerWolf." The trade record sheet is required by regulation to contain certain specified information. The particular form of trade record sheet provided by brokerWolf included the following language (which is not prescribed by regulation): "It is understood between all parties that this agreement shall constitute a commission trust agreement *as set out in the contract*" [emphasis added]. BrokerWolf confirmed to the Receiver that this wording is in one of the "default lines that are part of the original set up/install of brokerWolf."

[26] The Agents argue that "the contract" in this report means the Contract between the Agents and TRP Realty. As noted above, however, the Contract makes no mention of, and no provision for, holding Agents' commissions in trust, nor does it contain any language from which an intention or obligation to do so could reasonably be inferred.

[27] It is common ground that certain "cooperating" broker agreements expressly contemplate TRP Realty holding commissions for cooperating brokerages in trust. The Agents reason that, if TRP Realty's commission account contained cooperating broker commissions that were held in trust, then all commissions, including TRP Realty's and the Agents', must also be held in trust.

[28] There are two difficulties with this argument. First, the documents employed in the limited number of transactions involving cooperating brokers specifically contemplated that cooperating broker commissions will be held in trust pending payment out to the cooperating brokerage. There is no similar explicit language regarding the Agents. The second problem with this argument is that it is only when TRP Realty is the listing broker that there are any cooperating brokers. The buyer's deposit, which is intended to cover agents' commissions following the closing of the transaction, is, by statute, required to be held by the listing brokerage in trust. The circumstances

of a cooperating brokerage, therefore, are simply not relevant to the treatment of Agents' commissions where, in the cases in dispute in this proceeding, TRP Realty was not the listing brokerage and did not receive any deposit on the trade.

The Flow of Funds

[29] In the 3% of cases where TRP Realty was the listing broker acting for the seller, TRP Realty received a deposit which was placed in TRP Realty's real estate trust account. When the deal closed, if the amount of the deposit was less than all of the commissions due, the whole of the deposit was transferred from the real estate trust account into the commission account. The remaining payment for the balance of the commission due to the brokerage was also deposited to the commission account once received from the seller.

[30] If the amount of the deposit was more than all commissions due, the portion of the deposit associated with the total commissions was transferred from the real estate trust account into the commission account and a cheque for the portion representing the balance due to seller was dispersed to the seller within 10 days.

[31] In either case, within 10 days of closing, cheques or electronic transfers with respect to the parties' respective split of total commissions were dispersed to the outside brokerage, the TRP salespersons and TRP Realty in accordance with the agreed commission split. TRP Realty's portion of the commission was transferred from the commission account into TRP's operating account.

[32] Where TRP Realty was the cooperating brokerage and acted for the buyer (as it was in about 97% of cases), when the trade closed a cheque payable to TRP Realty was received from the listing broker or (in most cases) the builder and then deposited into the commission account. This represented the commissions due on the transaction to TRP Realty and the Agents.

[33] Within 10 days of closing, cheques or electronic transfers with respect to the parties' respective split of the cooperating brokerage commission were dispersed from the commission account to the Agent and to TRP Realty in accordance with the agreed commission split. As with the first scenario, TRP Realty's portion of the cooperating brokerage commission was transferred from the commission account and deposited into TRP Realty's operating account.

The Audited Financial Statements and Other Financial Presentations

[34] KPMG LLP audited TRP and TRP Realty's consolidated financial statements. The last audited financial statements are for the year ended December 31, 2016. KPMG's audit opinion was signed July 10, 2017 for that year and expresses the opinion that the consolidated financial statements present fairly, in all material respects, the consolidated financial position as at December 31, 2016.

[35] The notes to the financial statements provide the basis on which the consolidated financial statements were presented, including TRP Realty's revenue recognition policies and the basis on which it disclosed its cash and cash equivalents and restricted cash.

[36] Cash and cash equivalents are defined to include "cash on hand, demand deposits that can be withdrawn without penalty, and short-term highly liquid securities, such as debt securities with an initial maturity date of not more than three months from the date of acquisition that can be readily converted into known amounts of cash and are subject to an insignificant risk of change in value." Balances on deposit in TRP Realty's operating account and commission account are included as cash and cash equivalents in the audited financial statements.

[37] Excluded from cash and cash equivalents are "amounts held in trust as required by various purchase and sale agreements, which are separately disclosed as restricted cash." This category was identified as comprising only TRP Realty's real estate trust account.

[38] To similar effect, the consolidated statements of income and comprehensive income show "Revenue" amounts and "Cost of Revenue" amounts. Note 12 to the statements indicates that the "Revenue" amount reflects the "total commission revenue." Note 4(c) to the statements provides that "Cost of Revenue" includes agents' "salaries, bonuses and commissions." Note 4(c) goes on to stipulate that "agent commissions are generally paid at the time of closing on resale units and at the time the Company receives the first instalment on new units." It is clear from the amounts in issue that total commission income included in TRP Realty's revenue includes the Agents' commissions. This is distinguished from "Restricted Cash." Note 4(d) states that excluded from cash "are amounts held in trust as required by various purchase and sale agreements, which are separately disclosed as restricted cash." Again, it is clear from the amounts in issue that "restricted cash" includes only the amounts representing buyer deposits where TRP Realty is the listing brokerage.

[39] Firepower and Trilogy point out that Mr. Gidamy, as a member of the Board of TRP and TRP Realty, not only approved the financial statements but executed management's letter to KPMG in October 2016. The management letter signed by Mr. Gidamy represented and confirmed that:

- (a) the debtors have satisfactory title to all assets indicated;
- (b) there are no liens or encumbrances on the debtor's assets except those disclosed in notes to the financial statements;
- (c) there are no side agreements with any parties that have not been disclosed; and
- (d) management had no knowledge of any material unrecorded assets or liabilities or contingent assets or liabilities.

[40] The applicant's loan documentation, signed by Mr. Gidamy on behalf of TRP and TRP Realty, contains similar representations and warranties.

[41] The evidence also contains a presentation made by Mr. Gidamy to the Board of Directors regarding the fourth-quarter performance of the 2016 year, which was also delivered to Firepower and Trilogy in February 2017. That presentation reflects "gross receivables" of \$11 million (that is, a figure which included all of the amount credited to the commission account, not just the TRP Realty portion) securing Comerica debt of \$1.5 million and the Firepower debt of \$3.5 million.

Agents' commissions are show as a "cost of sales," in other words, as an unsecured debt obligation of TRP Realty.

[42] Firepower and Trilogy thus argue that the audited financial statements, the information provided by management to KPMG as auditor, as well as the information provided to the Board of Directors and to the secured creditors when negotiating the terms of their loans, all confirm that gross commissions are assets of TRP Realty and that commissions owed to the Agents are simply an unsecured debt of TRP Realty. The audited financial statements recognize that purchaser deposits (where TRP Realty is the listing brokerage) are 'restricted cash' held in trust. Nothing in the presentation of TRP Realty's financial statements or other financial presentations reflects a similar designation for Agents' commissions.

[43] The Agents rely heavily on the decision of Mr. Justice Cameron in *Eu v. Rosedale Realty Corp. (Trustee of)* (1997), O.R. (3d) 666 (Gen. Div.) [Commercial List] and a decision from the B.C.S.C., *Midland Pacific Properties Corp. (Trustee of), Re*, (1999), 69 B.C.L.R. (3d) 187, which followed *Eu*.

[44] In *Eu*, the agents had an agreement with the predecessor brokerage, First District, which specified that monies received on account of commissions earned by a salesperson "shall be paid by the Broker in trust." There was an agreement requiring First District to hold all commissions it received in a "commission trust account" in which it would hold the commissions for various persons or entities, including the employed and independent salespersons "under trust arrangements" other than the statutory real estate trust account. When the First District business was transferred to a new brokerage, Rosedale, the agents carried on as they had before. It appeared that neither the sale of assets from First District to Rosedale nor the contractual relationship between Rosedale and its agents was formalized to any great extent. In these circumstances, Cameron J. found that it made no business sense to place commissions into the commission trust account if they were not intended to be held in trust. Cameron J., therefore, found as a fact that the agents' relationships with Rosedale were "essentially the same as they had been with" First District, i.e., the explicit agreement between First District and its agents continued when Rosedale became the brokerage such that Rosedale held all pending commissions in a commission trust account explicitly designated and used for the benefit of Rosedale's agents.

[45] There are, in my view, three critical elements which distinguish the case at bar from the circumstances before Cameron J. in *Eu*:

- (1) the absence of any obligation on TRP Realty under its Contract with the Agents to hold commissions beneficially for the agents. Here, the Contract is clear that the relevant split of commissions earned are *owing* to the Agents once the deal closes but is conspicuously silent on how those funds will be held by the brokerage before becoming due and payable;
- (2) the absence of evidence that the commission account at TD/Comerica/RBC was, in fact, a trust account. The evidence is that the word "trust" appeared in the address line of the bank statements for a period of time but the evidence from RBC is that, as a matter of substance, the commission account was not, in fact, a trust account; and

- (3) the audited financial statements and other financial presentations made to the Board of TRP Realty and to commercial third parties unambiguously classify the commissions owing to TRP Realty and the Agents as gross revenues of TRP Realty and the Agents' split of those commissions as a cost of sales, that is, an unsecured debt owed to the Agents. This is clearly distinguished in the audited financial statements and other presentations from the treatment of purchaser deposits which are categorized as "restricted cash" and subject to a trust in favour of third parties.

[46] The court must act on such a preponderance of evidence as to show whether the conclusion the Agents seek to establish is substantially the most probable of the possible views of the facts, *Clarke v. The King* (1921), 61 S.C.R. 608 at p. 616. The question of the intention of TRP Realty in this case is a question of fact to be determined on the basis of the objective evidence, not subjective intentions formulated with the benefit of hindsight now that an unforeseen problem has arisen.

[47] Supporting the Agents' argument that the commissions were held in trust is:

- (a) the commissions were placed in a separate account which earned no interest and in respect of which there were no bank charges or fees;
- (b) statements of this account sent to TRP Realty had the words "commission trust" in the address line for a period of time; and
- (c) some of the standard form transaction documents contained reference to commissions being in a trust as provided in the Agents' agreement (although the Contract does not provide for any trust).

[48] While there is arguably scope for some ambiguity around the standard form transaction documents and bank records used in the business, these are relatively weak indicators of an inference of TRP Realty's intention. The best evidence of TRP Realty's intention is to be found in the company's Contract with the Agents and in the company's audited financial statements.

[49] The Contract does not require TRP Realty to hold commissions in trust for the Agents.

[50] There is a gravity and a formality to the presentation of audited financial statements which transcends ambiguity or inference. TRP Realty's management (Mr. Gidamy) was required to represent and confirm to the auditors that the information provided was accurate and not misleading. The auditors performed a review of the books and records of TRP Realty and provided a professional opinion that the financial statements fairly represent the financial position of TRP Realty. These financial statements were approved by the TRP Realty Board of Directors.

[51] What could be a clearer statement of TRP Realty's intention than the representations to the world in its audited financial statements that all the pending commissions in respect of transaction in which TRP Realty was not the listing broker:

- (a) are not held in trust (in contrast to deposits where TRP Realty is the listing brokerage);

- (b) are included in TRP Realty's gross revenues; and
- (c) to the extent of the Agents' split of the commissions, represent an unsecured debt owing to the Agents (a cost of sales)?

When weighed against the ambiguous inferences sought to be drawn from standard form documents provided by someone else (broker Wolf, not TRP Realty), notations included on address lines in bank statements and Mr. Gidamy's after the fact characterization of the status of the commissions (a characterization totally at odds with the representations he made to the company's auditors, to the Board of Directors and to entities such as the applicant), I am unable to conclude that the requisite intention to hold the commissions in the commission account in trust has been established.

[52] Unlike the factual conclusion reached by Cameron J. in *Eu*, the operation of TRP Realty's commission account does not make "commercial sense" only if it is a trust account. Commissions are important – they are the lifeblood of the business of TRP Realty and its only source of revenue. Commissions are the basis for the Agents' remuneration for the services they perform for the business. There is no doubt that when deals closed, the commissions were "earned" and the relevant split of this money was owed by TRP Realty to the Agents. There were, therefore, in these circumstances ample commercial, accounting and cash tracking and management reasons to direct the commissions into a separate account, altogether apart from whether they were being held in trust.

[53] In all of the circumstances, based on the objective evidence, I am unable to agree with the Agents that the requirement for certainty of intention to create a trust has been established. I conclude that the commissions, while clearly a debt owing to the Agents, are not held in trust and are, therefore, not excluded from TRP Realty's available assets subject to the Applicants' security.

Costs

[54] The Agents submit that if they do not succeed on their motion, they will lose millions of dollars in commissions, commissions that they have clearly earned. Through no fault of their own, resulting only from TRP's insolvency, the amount of the purchase price allocated to commissions (both TRP Realty's commissions and the Agents' commissions) will accrue to the benefit of the secured creditors.

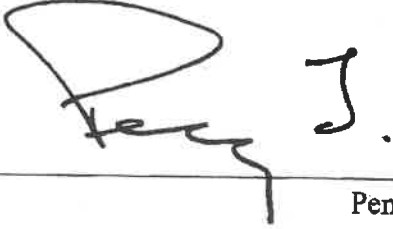
[55] The Agents further submit that they participated responsibly in advancing and pursuing their claims in a structured and orderly way. It was necessary, in any event, for this issue to be resolved for the benefit of all stakeholders, including affected persons not represented on this motion.

[56] As a result, the Agents ask that they be awarded their costs in any event.

[57] Neither the secured creditors nor the Receiver made any submissions on this point.

[58] I am in agreement with the Agents that an orderly, expeditious process for the resolution of this dispute was in the interests of all stakeholders. The Agents' participation has been responsible and of great assistance to the Court.

[59] In all of the circumstances, I find that costs shall be awarded to the Agents in the amount of \$45,000 to be paid out of the assets of TRP Realty. No costs are awarded against the Agents. The costs of the Receiver, and the allocation of the costs, shall be the subject of a subsequent application.


Penny J.

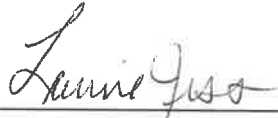
Date: November 30, 2018

Tab E

This is **Exhibit “E”** referred to in the

Affidavit of **Lori Bardos**

sworn before me, this 22 day of August, 2019



A COMMISSIONER, ETC.

Laurie Elizabeth Jess, a Commissioner, etc.,
Province of Ontario, for Silver Vale,
Barristers and Solicitors.
Expires May 24, 2022.

FILE #	FORMS TYPE	CLAIMANT	CPM % Total	TRADE ADDRESS	UNIT	ANALYST	MONTH/DOWN	CLOSING YEAR	PLACEMENT PRICE	TOTAL COMMA	NET	TOTAL COMMA
CP2017-014-008	Residential	Re/Max Brokerage	2.5%	25 Stratford St., Toronto, ON	308	11-Jun-18	30-Jul	2018	495,000.00	12,375.00	1,608.75	13,983.75
CP2017-014-031	Residential	Re/Max Professionals Inc.	2.5%	2120 Rathburn Road East, Mississauga, ON	38	20-May-18	29-Jun	2018	582,000.00	14,550.00	1,891.50	16,441.50
CP2017-014-037	Residential	HomeLife Romano Realty	2.5%	44 Clara Drive, Vaughan, ON	18	16-Mar-18	28-Jun	2018	775,000.00	19,375.00	2,518.75	21,893.75
CP2017-014-040	Residential	Sutton West Realty, Inc.	2.5%	3560 St. Clair Ave. E., Toronto, ON	405	22-Apr-18	25-May	2018	435,000.00	10,875.00	1,413.75	12,288.75
CP2017-014-049	Residential	HomeLife/Gold Trade Realty, Ltd.	2.5%	372 Highway 7E, Richmond Hill, ON	903	11-May-18	21-Jun	2018	438,000.00	10,950.00	1,423.50	12,373.50
CP2017-014-051	Residential	Right At Home Realty, Inc.	2.5%	4788 Audland Ave., Mississauga, ON	1509	21-Apr-18	10-Jul	2018	914,000.00	22,850.00	2,970.50	25,820.50
CP2017-014-064	Residential	Kingsway Real Estate	2.5%	1420 Dupont Street, Toronto, ON	4205	22-May-18	15-Aug	2018	430,000.00	10,750.00	1,397.50	12,147.50
CP2017-014-065	Residential	Property.ca Realty, Inc.	2.5%	21 Widmer St., Toronto, ON	1102	24-May-18	18-Jun	2018	2250/month	1,125.00	146.25	1,271.25
CP2017-014-070	Residential	Re/Max HomeVest	2.5%	481 Main Street, Toronto, ON	TH 18	3-May-18	22-Jun	2018	790,000.00	19,750.00	2,567.50	22,317.50
CP2017-014-112	Residential	Forest Hill Real Estate, Inc.	2.5%	1299 Glenasmole Road, Pickering, ON	1412	10-May-18	31-Jul	2018	625,000.00	15,625.00	2,011.25	17,636.25
CP2017-014-124	Residential	HomeLife, Miracle Realty	2.5%	75 King St. E., Mississauga, ON	433	5-Apr-18	4-Jul	2018	614,800.00	11,010.00	1,431.50	12,441.50
CP2017-014-129	Residential	Realosophy Realty, Inc.	2.5%	39 Queens Quay East, Toronto, ON	433	14-Apr-18	11-Jun	2018	800,000.00	18,000.00	2,340.00	20,340.00
CP2017-014-189	Residential	Re/Max Realtron Realty, Inc.	2.25%	688 Woodbine Ave., Toronto, ON	1102	19-Apr-18	1-Jul	2018	2200/month	1,100.00	143.00	1,243.00
CP2017-014-190	Lease	Re/Max Realtron Realty, Inc.	1/2 mth rent	9 Vahlhalla Inn Road, Brampton, ON		8-Jun-18	28-Aug	2018	710,000.00	17,750.00	2,307.50	20,057.50
CP2017-014-292	Residential	Search Realty Corp.	2.50%	22 Gerrard Court, Brampton, ON		12-May-18	5-Jul	2018	980,000.00	19,600.00	2,548.00	22,148.00
CP2017-014-494	Residential	Re/Max, Ballmark	2%	547 Milveon Blvd., Toronto, ON		31-Mar-18	23-Aug	2018	374,500.00	9,362.50	1,217.13	10,579.63
CP2017-014-503	Residential	Century 21 New Age Realty	2.50%	8256 Tulip Tree Drive, Niagara Falls, ON	1808	17-May-18	31-Jul	2018	482,000.00	12,050.00	1,566.50	13,616.50
CP2017-014-522	Residential	Royal LePage Signature Realty	2.50%	439 Champion Ave., Woodstock, ON	1808	30-May-18	15-Jun	2018	482,000.00	12,050.00	1,566.50	13,616.50
CP2017-014-526	Lease	JDL Realty, Inc. Brokerage	1/2 of 1 mth rent	Core Condos, 68 Shuter Street, Toronto, ON	915	15-Feb-18	6-Jul	2018	2150/month	1,075.00	139.75	1,214.75
CP2017-014-535	Residential	The Diamond Realty, Inc.	2.50%	Parlages Tower Condo, 210 Victoria St., Toronto, ON	915	7-May-18	29-Jun	2018	342,000.00	8,550.00	1,111.50	9,661.50
CP2017-014-643	Residential	Sutton Group Tower Realty	2.50%	24 Anson Avenue, Toronto, ON	308	15-May-18	18-Jun	2018	690,000.00	17,250.00	2,252.50	19,492.50
CP2017-014-664	Residential	Royal LePage New Concept	2.50%	20 Olive Avenue, Toronto, ON	308	8-Jun-18	1-Jul	2018	479,000.00	11,975.00	1,556.75	13,531.75
CP2017-014-656	Lease	McCann Realty Group	1/2 month rent	42 Kenneth Avenue, Toronto, ON		15-May-18	1-Jul	2018	3650/month	1,825.00	237.25	2,062.25
CP2017-014-659	Lease	Sutton Group Admiral Realty	1/2 month rent	36 Canell Heights Court, Thornhill, ON		4-Jun-18	1-Jul	2018	3400/month	1,700.00	221.00	1,921.00

TOTAL COMMA

NET

TOTAL COMMA

**FIREPOWER DEBT GP INC., AS AGENT vs. THEREDPIN,
INC. AND THEREDPIN.COM REALTY INC.**

Court File No.: CV-18-599644-00CL

*ONTARIO
SUPERIOR COURT OF JUSTICE
Commercial List*

IN THE MATTER OF 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*, R.S.O. 1990, C.C.43, AS AMENDED

PROCEEDING COMMENCED AT TORONTO

AFFIDAVIT OF LORI BARDOS

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**FIREPOWER DEBT GP INC., AS AGENT vs. THEREDPIN,
INC. AND THEREDPIN.COM REALTY INC.**

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PROCEEDING COMMENCED AT TORONTO

MOTION RECORD

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