

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

PERCY LEVY

Plaintiff

- and -

NELBAR FINANCIAL CORPORATION,
ESSEX CAPITAL MANAGEMENT LTD.,
GEORGE NELSON ALLEN, ROBIN MORIARTY, BARBARA ALLEN,
WOODBINE DRIVING RANGE LIMITED, FORMERLY KNOWN AS
884085 ONTARIO LIMITED, 1272327 ONTARIO INC.,
NELSON ALLEN FINANCIAL CORPORATION and
KUKOKE HOLDINGS INC.

Defendants

Proceedings under the *Class Proceedings Act*, 1992

**SIXTH REPORT TO COURT OF THE
COURT-APPOINTED RECEIVER**

**SF PARTNERS INC.
400 – 4950 Yonge Street
Toronto, Ontario
M2N 6K1**

A. PURPOSE OF THIS REPORT

1. The purpose of this report is to:
 - (a) report to this Honourable Court with respect to the activities of the Receiver since the Receiver's Fifth Report dated June 17, 2002; and
 - (b) report to this Honourable Court with respect to the implementation by the Receiver of the Order of the Honourable Mr. Justice Nordheimer dated September 23, 2002.

B. BACKGROUND

Procedural Background

2. In order to understand the procedural history of this matter, including the actions taken by the Receiver thus far, the Court is referred to the previous five Receiver's Reports, which are attached hereto without exhibits.¹ However, in order to assist the Court, a general description of the background facts to this matter is set out below.

3. Generally, the administration of the two estates in question is largely complete. There are only two significant outstanding issues remaining to be dealt with in this receivership:

- (a) The Receiver is the holder of a potential and somewhat speculative cause of action against TD Securities Inc. ("TD Securities"). The Receiver requires advice and direction in relation to this cause of action; and

¹Attached hereto at Tab "A" are true copies of the prior Receiver's Reports.

- (b) The Receiver requires advice and direction with respect to the settlement or commencement of litigation in relation to certain issues surrounding a mortgage held against the real property known municipally as 17321 Woodbine Ave., Newmarket, Ontario.

Prior Court Orders

4. The Receiver was appointed pursuant to the Order of the Honourable Mr. Justice Cumming dated July 29, 1999. The powers of the Receiver were subsequently expanded in a second Order of Mr. Justice Cumming dated November 26, 1999.

5. Further Orders of this Honourable Court were made on July 13, 2001 and September 23, 2002². In the September 23, 2002 Order, the Court authorized the Receiver to settle the issues respecting Life Benefits Inc. ("LBI") on the terms outlined in paragraph 45 of the Fifth Report to Court of the Receiver and authorized and empowered the Receiver to take certain other actions with respect to the remaining issues on this receivership.

General Background

6. Nelbar Financial Corporation ("Nelbar") was in the business of seeking venture capital opportunities and investing funds on behalf of its clients in marketable securities of various types. Nelbar's clients contracted with Nelbar to receive a return on their capital in the form of interest payments payable by Nelbar at a specified rate. Nelbar apparently issued to its clients documents entitled "corporate investment certificates" specifying the rate of interest that its clients were to receive.

²Attached hereto at Tab "B" are true copies of all of the Orders as referred to above.

7. According to the corporate records of Nelbar, the sole shareholder and director of Nelbar is Nelson Allen ("Allen"). Allen has confirmed to the Receiver in sworn testimony that all investment decisions on the part of Nelbar were made by Allen at his sole discretion.

8. Nelbar invested some of its client funds in marketable securities through Essex Capital Management Ltd. ("Essex"), a securities brokerage related to Nelbar. Essex was incorporated on September 25, 1992 under the operating name of Nelbar Mutual Group Inc. The corporate name was subsequently changed to Essex on October 31, 1996 and it continued to operate under that name until its receivership.

9. Allen is also the sole director of Essex and Nelbar owns 100% of the issued common shares in the capital of Essex.

10. Essex acted as an introductory broker using TD Securities, a wholly owned subsidiary of the Toronto Dominion Bank, as its carrying broker. Pursuant to the terms of an Operating Agreement between Essex and TD Securities dated as of July 1, 1997 (the "Broker Agreement"), accounts carried by TD Securities were considered to be clients of TD Securities for accounting and regulatory purposes. The relevant provisions of the Broker Agreement are set out in more detail below.

11. Nelbar and Essex and their principals are alleged to have been involved in significant improprieties in dealing with client funds. Both civil and criminal prosecutions have been commenced against Nelbar and/or Allen in which it is alleged that Nelbar and Allen committed various acts of fraud and breach of trust against Nelbar's clients. Allen pleaded guilty to numerous charges and has been sentenced to more than 4 years in prison.

12. On March 12, 1999, the Superintendent of Financial Services, Financial Services Commission of Ontario obtained an Order pursuant to the *Loan and Trust Corporations Act* (the "LTCA"), instructing Nelbar to cease and desist conducting business. The basis for the Order was that Nelbar was operating as an unregistered deposit taker pursuant to the LTCA.

13. On March 22, 1999, the Ontario District Counsel of the Investment Dealers Association of Canada suspended the rights and privileges of Essex as a member of the association and directed Essex to immediately cease dealing with the public. On April 5, 1999, on the consent of Essex, it was further ordered that the suspension Order of March 22, 1999 (the "Suspension Order") be continued under further order of the District Council (the Suspension Order is still in effect).

14. On July 15, 1999, a group of former Nelbar investors (the "Class Action Creditors") commenced an Action against, *inter alia*, Nelbar, Essex and Allen alleging various improprieties. The Class Action Creditors were later certified as a class pursuant to the *Class Proceedings Act* pursuant to an Order of Mr. Justice Cumming.

15. As stated above, on a Motion brought by the Class Action Creditors, an Order was made on July 29, 1999 by this Honourable Court appointing the Receiver. On November 26, 1999, a further Order was made in which the authority of the Receiver was extended. As stated above, the activities of the Receiver were approved and various directions for the continuation of the receivership were authorized by two separate Orders of this Honourable Court dated July 13, 2001 and September 23, 2002.

C. **THE TD BANK ISSUES**

16. As authorized by the Court in the September 23, 2002 Order, all issues between the Receiver and LBI were settled on the terms set out in paragraph 45 of the Fifth Report to Court of the Receiver.

17. Pursuant to the September 23, 2002 Order however, one of the activities that the Receiver was authorized to proceed with was a continuation of investigations into certain matters involving TD Securities and LBI.

18. Although matters between LBI and the Receiver have been settled, an issue remains as to whether a cause of action against TD Securities, which was assigned to the Receiver by LBI, as part of the settlement, should be pursued.

19. Details of the TD Securities dispute are set out more fully in the Fifth Report to Court of the Receiver. However, for reference purposes, the relevant background is reproduced below in order to apprise the Court as to the status of the matter.

20. LBI is in the business of providing estate planning to chronically ill individuals. In or about 1999, LBI apparently required additional working capital as a result of an expansion of its business. LBI and Nelbar entered into a written agreement dated May 1, 1998 (the "LBI Shareholders Agreement") pursuant to which Nelbar undertook to make a combined equity/debt investment in LBI in the total sum of \$1,200,000. This investment was to consist of (i) a loan to LBI in the sum of \$900,000; and (ii) the purchase by Nelbar of 30% of the shares in the capital of LBI for a purchase price of \$300,000.

21. Pursuant to the terms of this agreement, LBI was required to repay this advance within five years. The total amount to be repaid to Nelbar was to have been \$1,200,000. Nelbar would, after repayment, retain ownership of the 30% of the shares of LBI to be issued in its favour.

22. In fact, Nelbar advanced \$740,000 to LBI between June 1, 1998 and July 16, 1998. Shares of LBI were issued to Nelbar representing 30% of the issued and outstanding share capital of LBI. This appears to represent (1) \$300,000 for shares; and (2) \$440,000 on account of \$900,000 loan to LBI.

23. On July 15, 1998, Nelbar purchased a treasury bond with a face value of \$460,000, which represented the balance of the loan proceeds that Nelbar had agreed to advance to LBI. The treasury bond was transferred into the Essex/LBI Account.

24. TD Securities has produced to the Receiver a copy of a document purporting to be an unlimited guarantee dated June 30, 1998 (the "Guarantee")³ pursuant to which LBI apparently guaranteed the repayment in full of any indebtedness owed by Nelbar to TD Securities. The Guarantee was apparently executed by Stuart Peikes, legal counsel and an authorized signing officer of LBI. In fact, information and documents obtained from TD Securities reveal that TD Securities held a number of guarantees executed by various parties in relation to the accounts held at TD Securities by Essex in the name of Nelbar.

25. LBI takes the position that the Guarantee is a fraud and/or a forgery and that its representative never signed, nor intended to sign a Guarantee by LBI of any indebtedness of

³Attached hereto at Tab "C" is a copy of the Guarantee dated June 30, 1998.

Nelbar to any party, but rather was to have been a personal guarantee by Stuart Peikes dealing only with any indebtedness of LBI to TD Securities.

26. TD Securities takes the position that the Guarantee of LBI was offered by Allen as part of a series of guarantees and is valid and binding and that its actions have been proper and lawful throughout this matter.

27. In addition, Allen testified under oath that:

- (a) the LBI Guarantee is valid and binding;
- (b) the execution of the Guarantee was specifically discussed in advance of its execution with representatives of LBI, and LBI specifically agreed to execute the Guarantee;
- (c) Mr. Peikes knew precisely what he was signing when he executed the Guarantee; and
- (d) correspondence confirming the execution and the effect of the Guarantee was subsequently received by Nelbar from LBI.

28. On July 16, 1999, TD Securities made written demand for repayment from LBI of the principal indebtedness of Nelbar in the amount of \$441,029.37 pursuant to the Guarantee purportedly executed by LBI.

29. Pursuant to its Broker Agreement with Essex, TD Securities had the right to offset negative balances in its client accounts against funds held in other Nelbar/Essex accounts. TD Securities purported to exercise this right by transferring funds from a number of Essex accounts

in order to cover the shortfall in two Nelbar accounts through a complicated series of transactions.

30. One of the accounts from which funds were transferred was the Essex/LBI Account. Specifically, on January 11, 2000, TD Securities unilaterally transferred \$200,475.64 from the Essex/LBI Account and applied it against a shortfall in the Nelbar accounts. On February 16, 2000, a further \$2,233.72 was again unilaterally withdrawn by TD Securities from the Essex/LBI Account and applied against the indebtedness of Nelbar to TD Securities. Apparently, these actions were taken by TD Securities pursuant to the terms of the Guarantee allegedly executed by LBI in favour of TD Securities.

31. Accordingly, it appears that, as of the date on which the funds were removed from the Essex/LBI Account, LBI may have had a cause of action against TD Securities for the improper removal of these funds from the Essex/LBI Account, if LBI is correct in its allegation that it did not give a guarantee of Nelbar's indebtedness. As part of the overall settlement with LBI, LBI's cause of action against TD Securities (if any) was assigned by LBI to the Receiver⁴ and LBI undertook to give its full co-operation to the Receiver⁵ in pursuing any action against TD Securities. The critical issue for determination is whether the Guarantee of June 30, 1998 is a valid and binding obligation of LBI in accordance with its terms.

⁴Attached hereto at Tab "D" is a true copy of the Assignment of Cause of Action.

⁵Attached hereto at Tab "E" is a true copy of an Undertaking to cooperate in TD Securities matter dated September 20, 2002.

The Receiver's Investigations

32. The Receiver has completed the following tasks as part of its investigation of the TD Securities/LBI issue:

- (a) A review of the books and records of Nelbar in the possession of the Receiver, consisting of 80 bankers boxes of documents;
- (b) A review of numerous documents forwarded to counsel by TD Securities relating to the legal relationship between TD Securities and Essex and the basis for the removal of the funds from the LBI/Essex Account;
- (c) An examination under oath of Stuart Peikes, an authorized representative of LBI;⁶
- (d) A review of documents provided by Mr. Peikes on his examination or in compliance with undertakings in relation thereto;
- (e) An examination under oath of Allen;
- (f) A review of TD Securities' files in connection with Nelbar, which review took place on December 18, 2002; and
- (g) A examination under oath of Robin Moriarty⁷, who was an employee of Nelbar and the witness to the signature of Mr. Peikes on the Guarantee in question.

⁶Attached hereto at Tab "F" is a true copy of excerpt from the transcript of the examination of Mr. Peikes.

⁷Attached at Tab "G" is a true copy of excerpt from the transcript of the examination of Robin Moriarty.

Receiver's Opinion re TD Bank Issues

33. As can be discerned from a review of the transcripts of the relevant witnesses, there is considerable disagreement as to what actually took place on June 30, 1998, being the date on which the Guarantee in question was signed. Mr. Peikes insists that he intended to execute only a personal Guarantee of the obligations of LBI in connection with the Essex/LBI Account. Mr. Peikes further insists that the handwritten notation found below the signature line on the Guarantee indicating that he was actually signing on behalf of LBI, was added to the document after he signed it and was not authorized.

34. On examination, Allen strenuously denied Mr. Peikes' position and took the position that there was an express agreement between Allen and Mr. Peikes that LBI would guarantee the obligations of Nelbar in favour of TD Securities. Allen stated on examination that it was intended by both LBI and Nelbar that the obligations of Nelbar that would be guaranteed by LBI were to be restricted to only the obligations of Nelbar to TD Securities arising strictly out of the existence of the Essex/LBI Account. A review of the text of the Guarantee in question reveals that this is not the nature of the Guarantee. In fact, the Guarantee is an unlimited guarantee of all obligation of Nelbar in favour of TD Securities, howsoever arising.

35. Ms. Moriarty stated, on examination, that she had no specific recollection of the execution of the Guarantee. However, she testified that Mr. Peikes was frequently in the Nelbar offices in or about the relevant time period and that she witnessed the execution of numerous documents on instructions received from Allen. Ms. Moriarty insisted that it was her normal practice to fill out all of the blank portions of documents, including the identity and capacity of corporate signing officers, prior to the execution by the signing officer of the corporation in

question. Ms. Moriarty identified all handwriting that appears on the subject Guarantee as her own with the critical exception of the notation "ASO" that appears beside Mr. Peikes' name. Ms. Moriarty was very emphatic in her assertion that she never in her career made handwritten alterations or additions to any document that had already been signed by Mr. Peikes or any other party, without that party being present and consenting to such alterations or additions.

36. Mr. Peikes, on his examination, identified the "ASO" notation that appears after his signature on the guarantee as his own handwriting. It is assumed that "ASO" stands for "authorized signing officer." This would tend to negate Mr. Peikes' version of events, namely, that Mr. Peikes intended to execute a personal Guarantee of the obligations of LBI. It should also be noted that Mr. Peikes is a practising solicitor in the Province of Ontario.

37. Mr. Peikes was offered the opportunity to provide an explanation for the presence of the words "ASO" on the Guarantee. Attached hereto is a copy of an e-mail received from Mr. Peikes⁸ in which he states that he was in a rush on the date in question, that he was accustomed to signing various documents in his capacity as a signing officer of LBI and that it was simply a mistake that he wrote "ASO" on this document. Mr. Peikes maintains his denial that it was never the intention of the parties that LBI would guarantee the obligations of Nelbar in favour of TD Securities. Mr. Peikes does not deny he wrote "ASO" but asserts that it was an error and was not intended to be there.

38. The Receiver's counsel conducted a detailed investigation of TD Securities' files in connection with Nelbar. The Receiver hereby confirms that, apart from an original of the Guarantee, there are no documents or correspondence in the TD Securities' file that shed any

⁸Attached hereto at Tab "H" is a true copy of the e-mail received from Mr. Peikes.

light on these issues. There is no documentation found by the Receiver indicating TD Securities knew that the Guarantee, as provided, was, at the time of receipt, intended to be other than as shown.

39. Counsel for TD Securities has advised counsel for the Receiver that it is not uncommon in the financial industry for the carrying broker to receive guarantees from various parties in connection with margin accounts held by the introductory broker. Apparently, it is not the practice of TD Securities to request such guarantees, unless there is a specific reason to do so in the circumstances of each case. Inquiries as to the circumstances surrounding such guarantees are typically not made by TD Securities.

40. The evidence suggests that, in this case, Nelbar provided the original Guarantee to TD Securities and TD Securities' personnel physically placed the Guarantee in a file folder in their file. There are no memoranda, inventories or lists of security held by TD Securities, transaction summaries or equivalent documents, or any other correspondence or documents in TD Securities' file referring to the Guarantee. Even after the decision was made by TD Securities to make demand on LBI in relation to the Guarantee, there are no internal memoranda in which the origin of the circumstances of execution of the Guarantee are discussed.

41. The Receiver has determined that a handwriting analysis of the Guarantee in question is not required. All handwriting on the Guarantee has been identified and is not controversial. Mr. Peikes signed the Guarantee and has confirmed he wrote the notation "ASO." All other handwriting on the Guarantee is that of Ms Moriarty.

42. The Receiver is accordingly of the opinion that the chance of success of any action commenced against TD Securities on the basis that the Guarantee is a fraud are extremely

uncertain. The success of such an action would clearly depend on the credibility of the various witnesses involved including Allen, who is now, or has completed, serving a term in prison, and Ms. Moriarty who was originally charged but subsequently had charges withdrawn against her. The credibility of Mr. Peikes as to why "ASO" was written by him beside his signature, and whether the Guarantee was fully completed when signed are the crux of any claim against TD Securities. In essence, any litigation commenced on the Guarantee will be determined on a credibility basis.

Receiver's Recommendation re: TD Securities Issues

43. Given the issue at hand and the fact that a full trial may well be required to resolve this issue, the Receiver does not believe there are sufficient funds on hand to undertake such litigation. Accordingly, the Receiver hereby recommends that this Honourable Court authorize it to offer the cause of action against TD Securities to any interested party(ies), using a similar procedure as a Trustee in Bankruptcy pursuant to s. 38 of the *Bankruptcy and Insolvency Act*. If no party is interested in purchasing the TD Securities litigation, the Receiver recommends that no further actions should be taken by it in this regard.

D. WOODBINE DRIVING RANGE ISSUES

44. This issue involves a driving-range/batting cage property (the "Property") with an appraised value of \$460,000, located in Newmarket, Ontario. Nelbar may be the holder of a beneficial interest in the first mortgage registered against title to this Property, and accordingly, an asset may exist which may have some potential for realization for creditors.

45. Nelbar's potential interest in the mortgage in question is unclear, as is the state of title to the Property generally. As a result, the Receiver is of the view that a preliminary Application to Court will be necessary for a declaration that the Receiver holds an interest in the subject mortgage before any formal proceedings, such as a power of sale, can be instituted by the Receiver in relation to the Property.

46. The issues surrounding the Property are complex. There are currently foreclosure and fraudulent conveyance proceedings outstanding in relation to the Property commenced by separate parties. The state of title is confused, at best, and indecipherable, at worst. Taxes are in arrears and tax sale proceedings have been commenced. Mortgages have been assigned more than once by the same mortgagee to different parties, for no discernable consideration. The only thing that is clear with respect to the Property is that Court intervention will be necessary to deal with these issues.

47. 884085 Ontario Limited, a corporation now controlled by Allen, was the owner of the Property between 1990 and July 16, 1999, when title to the Property was transferred to Kukoke Holdings Inc. ("Kukoke") pursuant to a *Deed/Transfer of Land* registered against title to the Property as Instrument No. R741066. 884085 changed its name to Woodbine Driving Range Limited ("WDR") in 1990.

48. The Property is currently occupied by an apparent third party tenant, Newmarket Driving Range Inc. ("NDR"), which operates a driving range and batting cages on the Property. One Dave Mitchell is the principal of NDR.

49. In order to understand the Receiver's position in relation to this matter, it is necessary to provide the Court with a summary of title to the Property. This summary shows that the consideration paid for the granting of, and the identity of the current holder of legal title to, the first mortgage in question is unclear.

Summary of Title to the Property

DOCUMENT & DATE	DETAILS	AMOUNT
First Mortgage dated March 30, 1989	- Instrument No.: R538797 - Registered in favour of 884295 Ontario Limited	\$500,000
Second Mortgage dated March 30, 1989	- Instrument No.: R538798 - Registered in favour of Nelson Allen Financial Corporation	\$500,000
Assignment of First Mortgage dated May 11, 1990	- Instrument No.: R542798 - Assigned to Toronto Dominion Bank	consideration stated to be \$500,000
Assignment of Second Mortgage dated May 31, 1991	- Instrument No.: R569182 - Assigned to Royal Bank of Canada	consideration stated to be \$500,000
Subsequent Assignment of First Mortgage, dated November 2, 1992	- Instrument No.: R606839 - Assigned to Royal Bank of Canada by Advanced Home Automation Inc., successor to 884295 Ontario Limited	consideration stated to be \$500,000
Second Subsequent Assignment of First Mortgage dated August 18, 1993	- Instrument No.: 624155 - First Mortgage assigned to Advanced Home Automation Inc. by Royal Bank of Canada	consideration stated to be \$500,000
Subsequent Assignment of Second Mortgage dated October 4, 1993	- Instrument No.: R627067 - Assigned to Yoon, Lee, Lee & Lee by Nelson Allen Financial Corporation	consideration stated to be \$500,000

DOCUMENT& DATE	DETAILS	AMOUNT
Subsequent Assignment of First Mortgage of February 2, 1998	- First Mortgage assigned to 1272327 Ontario Inc.	Allen alleges consideration of \$272,000 paid for this assignment; \$150,000 from Nelbar
Transfer dated July 16, 1999	- Instrument No.: R741066 - Property transferred from 884085 Ontario Limited to Kukoke	consideration stated to be \$500,000

Detailed Description of Title to The Property

50. On March 30, 1999, two separate mortgages, each in the principal amount of \$500,000, were registered against title to the Property in favour of 884295 Ontario Limited and Nelson Allen Financial Corporation respectively. Allen was the principal of Nelson Allen Financial Corporation, and an acquaintance of Allen, one Eric Bryant, was the principal of 884295 Ontario Limited. These mortgages were registered as Instrument Nos. R538797 (the "First Mortgage") and R538798 (the "Second Mortgage"), respectively.

51. The First Mortgage was assigned by 884295 Ontario Limited to the Toronto-Dominion Bank pursuant to an Assignment of Charge registered against title to the Property on May 11, 1990 as Instrument No. R542198. The Second Mortgage was assigned by Nelson Allen Financial Corporation to Royal Bank of Canada pursuant to an Assignment of Charge registered against title to the Property on May 31, 1991 as Instrument No. R569182.

52. The Receiver has no information as to the consideration, if any, paid for the granting of the First Mortgage or the Second Mortgage.

53. 884295 Ontario Limited subsequently changed its name to Advanced Home Automation Inc. by Articles of Amendment.

54. On November 2, 1992, Advanced Home Automation Inc. purported to assign the First Mortgage a second time, this time to Royal Bank of Canada, pursuant to an assignment of charge registered against title to the Property as Instrument No. R606839.

55. This assignment was registered on title to the Property despite the fact that the First Mortgage had already been assigned to the TD Bank and no reassignment of the First Mortgage from TD Bank back to Advanced Home Automation Inc. was registered. Accordingly, the validity of this assignment of mortgage is questionable.

56. On August 18, 1993 the First Mortgage was assigned a third time, this time from Royal Bank of Canada to Advanced Home Automation Inc. pursuant to an Assignment of Charge registered against title to the Property as Instrument No. 624155. No mention is made in this assignment of the fact that, pursuant to the prior-registered assignment of charge of May 11, 1990, the TD Bank was the registered holder of title to the First Mortgage.

57. The Receiver has no direct knowledge, or documentary evidence, as to the circumstances of these three assignments of the First Mortgage, nor was Allen able to provide any explanation for same on examination. If there was a subsequent re-assignment of the First Mortgage by the TD Bank to 884295 Ontario Limited, or Advanced Home Automation Inc., this re-assignment was not registered against title to the Property and the Receiver is not aware of any documentation evidencing same.

58. Allen testified that he subsequently purchased, in his own name, all of the shares of 884085 Ontario Limited, the corporation that owned the Property.

59. On October 4, 1993, the Second Mortgage was assigned by Nelson Allen Financial Corporation to four individuals, being the same four individuals who were the former principals of 884085 Ontario Limited, despite the fact that the Second Mortgage has previously been assigned to Royal Bank of Canada. The Royal Bank of Canada has co-operated with the Receiver in its investigations and has provided to the Receiver's counsel various account records and loan transaction enquiry printouts showing the circumstances of the payout of the Second Mortgage⁹. It appears that between May, 1995 and July 31, 1997, Nelson Allen Financial Corporation (which is not one of the corporations under receivership) made payment on account of the Second Mortgage in eight separate instalments of \$25,000 each. Pursuant to a Direction executed by Allen in 2001, the Royal Bank of Canada executed an assignment of the Second Mortgage to 1489702 Ontario Limited¹⁰. This assignment was not registered against title to the Property until March 24, 2003. A Corporation Profile Report shows that one, Keith Jasper is the sole officer and director of 1489702 Ontario Limited¹¹.

60. Allen further testified that the First Mortgage was subsequently purchased from the TD Bank jointly by Nelbar and Mr. Mitchell, for total consideration of approximately \$272,000, being the then-outstanding balance owed in relation to the First Mortgage by 884085 Ontario Limited.

⁹Attached hereto at Tab "I" are true copies of various account documentation received from the Royal Bank of Canada re the payout of the Second Mortgage.

¹⁰Attached hereto at Tab "J" is a true copy of the Direction re Title signed by Allen dated September, 2001 and a Document General re the assignment of the Second Mortgage signed on October 3, 2001.

¹¹Attached hereto at Tab "K" is a true copy of a Corporation Profile Report generated February 27, 2003.

61. According to Allen, Mr. Mitchell advanced \$150,000 of this total purchase price and Nelbar advanced the remainder. Gradually, Mr. Mitchell's proportionate interest in the First Mortgage was to be reduced on an "earn-out" basis according to a formula agreed to between the parties.

62. Accordingly, Allen testified that Nelbar is one of the beneficial owners of the First Mortgage.

63. Mr. Mitchell contacted counsel for the Receiver. He does not agree with Mr. Allen's testimony with respect to his involvement with the Property.

64. Mr. Mitchell has advised counsel for the Receiver that he was a Nelbar investor. He provided the total sum of \$300,000 to Nelson Allen to be invested on his behalf. Mr. Mitchell has advised that on June 26, 1993, NDR entered into a five-year lease (the "Lease") with WDR pursuant to which WDR leased the Property to NDR. The rent for the five-year term of the Lease, in the total amount of \$120,000, was pre-paid by NDR to WDR. At the end of the five-year term, WDR was to return the \$120,000 to NDR, without interest. WDR was obligated, pursuant to the terms of the Lease, to invest the \$120,000 and obtain a reasonable rate of return on those funds. The return on this investment would be retained by WDR.

65. On or about June 26, 1998, NDR and WDR entered into a new lease (the "Second Lease") with respect to the Property, pursuant to which WDR agreed to lease the Property to NDR for a further five-year term. The \$120,000 that WDR already held was to be applied to the rent for the new five-year term. Essentially, the parties agreed to continue the existing arrangements for a further five-year term.

66. It appears that, in essence, NDR obtained from WDR the right to possession of the Property, and the cash flow generated by it, in exchange for a \$120,000 deposit, which was to be invested by WDR for its own benefit. In return for the \$120,000 deposit, for which it received no return, NDR, received possession of the Property pursuant to the Lease and the Second Lease.

67. NDR has alleged, in a Statement of Claim referenced in the Receiver's earlier reports, that it has "taken out a substantial loan" to make renovations to the Property, including the construction of batting cages, in reliance on WDR's covenants contained in the Lease and the Second Lease. Mr. Mitchell has advised counsel for the Receiver that NDR has invested approximately \$200,000 in improving the Property. Mr. Mitchell further advises that the driving range/batting cage business operated from the Property is not profitable.

68. It appears that the term of the Second Lease has expired. To the best of the Receiver's knowledge, no new lease has been entered into. Accordingly, NDR may be a month-to-month tenant.

69. Mr. Mitchell did not agree that he provided any monies to Mr. Allen for the purpose of investing specifically in the First Mortgage against title to the Property, nor was he aware of any "earn-out" arrangement between himself and Mr. Allen. Although NDR did provide substantial funds to Allen to be invested, those funds consisted of the \$120,000 deposit paid to WDR, and other monies which were to be invested by Nelbar on behalf of NDR/Mitchell in the ordinary course.

70. The purchase of the First Mortgage by Nelbar/Mitchell is not reflected on title to the Property¹². Rather, the first mortgage was assigned to 1272327 Ontario Inc. on February 2, 1998. A Corporate Profile Report shows that Nelson Allen is the sole officer and director of 1272327 Ontario Inc.¹³ No documents relating to the transaction were located in the Receiver's files, and Allen was unable to produce any such documentation. Allen testified that Nelbar did, in fact, advance the funds for the purpose of obtaining an assignment of the First Mortgage from the TD Bank. Allen testified that as events surrounding the demise of Nelbar unfolded, neither Allen nor Nelbar's solicitors were able to attend to the drafting of documentation in relation to this particular transaction.

71. Counsel for the Receiver contacted the TD Bank in connection with the First Mortgage registered against title to the Property. TD Bank would only confirm that the subject mortgage was paid out on about February 2, 1998.

72. Counsel for the Receiver has been in contact with the two relevant TD Bank commercial banking centres, namely, London, Ontario and Oshawa, Ontario. Counsel for the Receiver has communicated with a senior banking officer based in London, being the TD Bank Commercial Lending Centre that had overall coverage of the TD Bank district that covers the Lindsay Branch (the branch that administered the mortgage in question). The TD Bank computer records do not indicate the identity of the party that paid out the mortgage or the circumstances surrounding the payout. Searches were completed of the bank's records at the Lindsay Branch, the London Commercial Banking Centre and the Oshawa Commercial Banking Centre. TD Bank has advised

¹²Attached hereto at Tab "L" are true copies of the parcel page for the Property, as well as all registered document respecting the First Mortgage.

¹³ Attached hereto at Tab "M" is copy of a Corporation Profile Report of 1272327 Ontario Inc. generated February 27, 2003.

counsel for the Receiver that the records in connection with this matter have either been lost or destroyed. Counsel for the Receiver has further been advised by representatives of TD Bank that no further information is available from the TD Bank in this regard. The Receiver is satisfied that TD Bank officials have completed their due diligence in connection with the payout of the TD Bank mortgage and a subpoena is not likely to afford additional information.

73. Counsel for the Receiver also contacted Lang, Michener, the law firm that acted for Allen in connection with the First Mortgage. It appears that, based on trust account records and copies of three Nelbar cheques provided to the Receiver's counsel by Lang, Michener, the total sum of \$195,329.59 was paid by Nelbar to TD Bank to obtain an assignment of the First Mortgage. These monies flowed through Lang, Michener's trust account to TD Bank. Lang, Michener has further provided counsel for the Receiver with some correspondence from the relevant time period, being December, 1997 through February, 1998. It is interesting to note that a further \$109,670.41 passed through Lang, Michener's trust account in the form of two cheques drawn by Allen personally, paid to Lang, Michener in trust, and then paid out to TD Bank by Lang, Michener. It is impossible to know for certain where these monies came from. On examination, Allen testified that three funds were a mixture of his personal funds and Nelbar's funds.

74. It appears that, at the direction of Allen, the First Mortgage was supposed to have been assigned by TD Bank to Mr. Allen's company, 1272327 Ontario Inc.

75. Based on the documentation provided by Lang, Michener, a copy of which is attached hereto¹⁴, the Receiver is satisfied that Nelbar delivered \$195,329.59 to the TD Bank for the purpose of acquiring TD's interest and directing the execution of an assignment of the First

¹⁴Attached hereto at Tab "N" is a true copy of the documentation provided by Lang, Michener.

Mortgage to a related corporation, namely 1272327 Ontario Inc. Accordingly, the Receiver has concluded that there is a basis for a claim that Nelbar is the beneficial owner of a portion of the First Mortgage.

76. Given the confused state of title to the Property, the Receiver is also of the opinion that an Application to Court will be required in order to obtain the appropriate Court Order declaring that Nelbar and/or the Receiver holds an interest in the First Mortgage and is entitled to a portion of the proceeds proportionate to its percentage of the total consideration paid to acquire the mortgage.

Current Status of Woodbine Property

77. Substantial realty tax arrears have accumulated in relation to the Property¹⁵. In order to avoid a tax sale, an unknown party has entered into a payment arrangement with the Town of Whitchurch-Stouffville in relation to the Property. The identity of this party is unknown as the Town of Whitchurch-Stouffville will disclose only the fact that a payment arrangement has been entered into but not the identity of the party making the payment.

78. The second mortgagee in relation to the Woodbine Property, 1489702 Ontario Limited, has commenced foreclosure proceedings in relation to the Property. Given the fact that Receiver holds a potential interest in the first mortgage, 1489702 will assume title to the Property subject to the potential interest of the Receiver. For that reason, the Receiver has taken no position with respect to the foreclosure proceedings.

¹⁵Attached hereto at Tab "O" is a true copy of the Tax Certificate generated as at October 17, 2002.

79. In addition, proceedings have been commenced by the current tenant of the Property, Newmarket Driving Range for an Order declaring the 1999 transfer of the Property to a company known as Kukoke Holdings to be a fraudulent conveyance. These proceedings were commenced by Statement of Claim issued on June 23, 2000. Mr. Mitchell has advised that the principals of Kukoke cannot be located and that no communication has been received from them in some time.

Appraisal of Woodbine Property

80. The Receiver commissioned an appraisal¹⁶ of the Property on April 28, 2004, a copy of which is attached hereto. The value of the Property according to this appraisal was \$460,000.

Receiver's Recommendation re: Woodbine Driving Range

81. The Receiver recommends that this Honourable Court empower the Receiver to realize upon Nelbar's beneficial interest in the First Mortgage on an "as-is, where-is" basis and to the highest bidder, with absolutely no representations or warranties to be made by the Receiver as to the validity or enforceability of the First Mortgage or any guarantee of any minimum realization therefrom. In the event no third party is interested in purchasing the First Mortgage or funding the Receiver to obtain the appropriate Court declaration, the Receiver recommends that no further action be taken with respect to the Woodbine Driving Range.

RRSP Plan – Robin Moriarty

82. As part of the assets under the administration of the Receiver, the Receiver took control over all known assets of Nelbar and Essex and any assets purportedly belonging to Mr. Allen or

¹⁶ Attached hereto at Tab "P" is a true copy of the Appraisal dated April 28, 2004.

Ms. Moriarty that could potentially be available to creditors of Nelbar and Essex for satisfaction of their claims. As part of this process, the Receiver assumed control over Ms. Moriarty's RRSP plan, which was administered by Essex. It should be noted, however, that even though the Receiver exercises effective control over Ms. Moriarty's RRSP, the receiver does not hold the funds in its possession.

83. At this time, the Receiver sees no reason why it should continue to hold Ms. Moriarty's RRSP funds. Ms. Moriarty has formally requested that her RRSP be released to her. Subject to any valid objections by any interested parties, the Receiver proposes to release Ms. Moriarty's RRSP to her forthwith following an Order of this Court authorizing it to do so.

Passing of Receiver's Accounts

84. As the administration of this estate is largely complete, the Receiver believes that the accounts of the Receiver and its counsel should be approved by the Court at this time. Copies of the Receiver's accounts, its counsel's Bill of Costs, and a Statement of Receipts and Disbursements will be presented to the Court separately.

Discharge of Receiver

85. In order to obtain closure on these matters, the Receiver recommends that it be deemed to be discharged upon the completion of the recommendations set out above with no further Court Order required.

Summary of Receiver's Recommendations

86. The Receiver hereby recommends that

- (a) this Honourable Court authorize it to offer the cause of action against TD Securities to any interested party(ies), using a similar procedure as a Trustee in Bankruptcy pursuant to s. 38 of the *Bankruptcy and Insolvency Act*. If no party is interested in purchasing the TD Securities litigation, the Receiver recommends that no further actions should be taken by it in this regard;
- (b) this Honourable Court empower the Receiver to realize upon Nelbar's beneficial interest in the First Mortgage against title to the Property on an "as-is, where-is" basis and to the highest bidder, with absolutely no representations or warranties to be made by the Receiver as to the validity or enforceability of the First Mortgage or any guarantee of any minimum realization therefrom. In the event no third party is interested in purchasing the First Mortgage or funding the Receiver to obtain the appropriate Court declaration, the Receiver recommends that no further action be taken with respect to the Woodbine Driving Range;
- (c) Ms. Moriarty's RRSP be released;
- (d) The Receiver's accounts be approved by this Court and a further allowance of \$10,000 in fees for the Receiver and \$7,500 for its counsel be approved by this Court for the finalization of the above-noted matters; and
- (e) The Receiver be deemed to be discharged with no further action on its part upon the completion of the above-noted recommendations.

DATED AT TORONTO, ONTARIO this day of September, 2004

SF Partners Inc.,
Court-Appointed Receiver of
Nelbar Financial Corporation and
Essex Capital Management Ltd.

Per: _____

Steven Goldberg, President