File No. CI 15-01- 98054

THE QUEEN'S BENCH
Winnipeg Centre

IN THE MATTER OF: The Appointment of a Receiver pursuant to Section 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985 c.B-3, as amended and Section 55 of *The Court of Queen's Bench Act*, C.C.S.M. c. C280

BETWEEN:

ROYAL BANK OF CANADA,

Plaintiff,

- and -

KELLER & SONS FARMING LTD. and
KELLER HOLDINGS LTD.

Defendants.

AFFIDAVIT OF GARY IVANY
SWORN: OCTOBER 2, 2015

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FRDOCS_5301711.19

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Defendants.

AFFIDAVIT OF GARY IVANY

I, GARY IVANY, of the City of Pickering, in the Province of Ontario, Director, Group Risk Management, Royal Bank of Canada,

MAKE OATH AND SAY THAT:

1. I am a Director, Group Risk Management with the Special Loans and Advisory Service Department of Royal Bank of Canada ("RBC").

2. I have personal knowledge of the facts and matters hereinafter deposed to by me in this motion by RBC for the appointment of a Receiver and other relief except where such matters are stated to be based upon

information and belief and where so stated, I verily believe the same to be true.

3. The Defendant, Keller & Sons Farming Ltd. ("Keller") is a corporation duly incorporated under the laws of the Province of Manitoba. Now shown to me and marked as **Exhibit 1** hereto is a true copy of the Manitoba Companies Office search for Keller dated September 21, 2015. It confirms that Markus Keller is the sole officer and director.

4. The Defendant, Keller Holdings Ltd. ("Holdings") is a corporation duly incorporated under the laws of the Province of Manitoba. Now shown to me and marked as **Exhibit 2** hereto is a true copy of the Manitoba Companies Office search for Holdings dated September 21, 2015. It confirms that Markus Keller is the sole officer and director.

5. It is my understanding from my review of the RBC files and meetings with Markus Keller that Keller operates a large potato farm covering approximately 6,440 acres in Manitoba with its main office in Carberry, Manitoba. While Keller is the operating company, Holdings owned some of the lands upon which Keller conducted its potato operation, although I am advised by Michael Dow of Fillmore Riley LLP ("Michael Dow") that some or all of the Holdings lands may have been recently transferred to Keller.

6. RBC and National Bank of Canada ("NBC") (RBC and NBC collectively the "Banks") have been providing various credit facilities to the Defendants since in or about 2011. Now shown to me and marked as **Exhibit 3** hereto is a true copy of the current RBC credit agreement dated April 25, 2014 together with an amendment dated November 14, 2014 (collectively the "RBC Credit Agreement").

7. The RBC Credit Agreement provided Keller with the following credit facilities:

(a) $3,000,000.00 revolving demand facility;

(b) $4,150,000.00 non-revolving term facility;

(c) $3,300,000.00 non-revolving term facility; and

(d) VISA business card to a maximum amount of $100,000.00.

8. In addition, RBC also provided a retail non-personal automobile term loan in the principal amount of $ 49,837.22 and RoyFarm mortgage loans in two equal principal amounts of $4,550,000.00 each.

(the indebtedness referred to in paragraphs 7 and 8 together with all accrued interest and costs are hereinafter collectively referred to as the "RBC Indebtedness").

9. Attached hereto as **Exhibits 4 and 5** are true copies of the automobile loan and RoyFarm mortgage loan agreements.

10. The security provided by Keller to RBC in support of the RBC credit facilities includes, *inter alia*, the following:

(a) General Security Agreement dated May 25, 2011;

(b) General Assignment of Leases and Rents dated May 25, 2011;

(c) Specific Assignment of Contracts dated May 25, 2011;

(d) Real Property Mortgage No 1159694/4 dated May 25, 2011 as amended thereafter;

(e) Real Property Mortgage No. 1289048/2 dated May 25, 2011 as amended thereafter;

(f) Real Property Mortgage No. 1291925/2 dated July 13, 2011 as amended thereafter;

(Mortgage No. 1159694/4, Mortgage No. 1289048/2 and Mortgage No. 1291925/2 are hereinafter collectively referred to as the "Keller Mortgages")

(g) Agreement as to Loans and Advances and Section 427 *Bank Act* security dated May 25, 2011; and

(h) Bailee Agreement dated on or about May 25, 2011

(the security set out in subparagraphs 10 (a) – (h) is hereinafter collectively referred to as the "RBC Keller Security").

11. With respect to the RBC Keller Security:

(a) Attached hereto as **Exhibit 6** hereto is a true copy of the General Security Agreement dated May 25, 2011 pursuant to which Keller granted RBC a security interest in all of its present and after-acquired personal property;

(b) Attached hereto as **Exhibit 7** hereto is a true copy of the General Assignment of Leases and Rents dated May 25, 2011;

(c) Attached hereto as **Exhibit 8** is a true copy of the Specific Assignment of Contracts dated May 25, 2011;

(d) Attached hereto as **Exhibit 9** is a true copy of the Real Property Mortgage No 1159694/4 dated May 25, 2011 as amended thereafter;

(e) Attached hereto as **Exhibit 10** is a true copy of the Real Property Mortgage No. 1289048/2 dated May 25, 2011 as amended thereafter;

(f) Attached hereto as **Exhibit 11** to is a true copy of the Real Property Mortgage No. 1291925/2 dated July 13, 2011 as amended thereafter; and

(g) Attached hereto as **Exhibit 12** is a true copy of the Agreement as to Loans and Advances and Section 427 *Bank Act* security dated May 25, 2011.

12. By virtue of a Guarantee and Postponement of Claim dated May 25, 2011, Holdings guaranteed payment on demand to RBC of all debts and liabilities, present or future, direct or indirect, absolute or contingent, matured or not, at any time owing by Keller to RBC limited to the principal sum of $30,000,000.00 plus interest (the "RBC Holdings Guarantee").

13. Attached hereto as **Exhibit 13** is a true copy of the RBC Holdings Guarantee.

14. As security for the RBC Holdings Guarantee, Holdings provided to RBC the following:

    (a) General Security Agreement dated May 25, 2011 pursuant to which Holdings granted RBC a security interest in all of its present and after-acquired personal property;

    (b) General Assignment of Leases and Rents dated May 25, 2011;

    (c) Real Property Mortgage No. 1159697/4, as amended thereafter dated May 25, 2011;

    (d) Real Property Mortgage No. 1289056/2 dated May 25, 2011, as amended thereafter (Mortgage No. 1159697/4 and Mortgage No. 1289056/2 collectively the "Holdings Mortgages")

    (the Keller Mortgages and the Holdings Mortgages collectively the "Mortgages") (the security set out in subparagraphs 14 (a) – (d) is hereinafter collectively referred to as the "RBC Holdings Security").

15. With respect to the RBC Holdings Security:

(a) Attached hereto as **Exhibit 14** to is a true copy of the General Security Agreement dated May 25,2011 pursuant to which Holdings granted RBC a security interest in all of its present and after-acquired personal property;

(b) Attached hereto as **Exhibit 15** is a true copy of the General Assignment of Leases and Rents dated May 25, 2011;

(c) Attached hereto as **Exhibit 16** is a true copy of the Real Property Mortgage No. 1159697/4 dated May 25, 2011, as amended thereafter;

(d) Attached hereto as **Exhibit 17** is a true copy of the Real Property Mortgage No. 1289056/2 dated May 25, 2011, as amended thereafter.

16. The records of RBC disclose that it has duly advanced the credit facilities contemplated by the RBC Credit Agreement to Keller which has been guaranteed by Holdings.

17. NBC has also provided credit facilities to Keller which are the subject of a separate loan agreement between Keller and NBC. Attached hereto

as **Exhibit 18** is a true copy of a loan agreement between Keller and NBC dated March 22, 2013 (collectively the "NBC Loan Agreement").

18. The security provided by Keller to NBC in support of the NBC credit facilities includes, *among other things*, the following:

(a) General Security Agreement dated May 26, 2011;

(b) Inventory and Receivables Security Agreement dated May 26, 2011;

(c) General Assignment of Leases and Rents dated May 26, 2011;

(d) Specific Assignment of Contracts dated May 25, 2011;

(e) The Keller Mortgages; and

(f) Agreement as to Loans and Advances and Section 427 *Bank Act* security dated May 25, 2011;

(the security set out in subparagraphs 18 (a) – (f) are hereinafter collectively referred to as the "NBC Keller Security").

19. By virtue of a Guarantee and Postponement of Claim dated May 26, 2011, Holdings guaranteed payment on demand to NBC of all debts and liabilities, present or future, direct or indirect, absolute or contingent, matured or not, at any time owing by Keller to RBC in an unlimited amount plus interest (the "NBC Holdings Guarantee").

20. Attached hereto as **Exhibit 19** is a true copy of the NBC Holdings Guarantee.

21. As security for the NBC Holdings Guarantee, Holdings provided to NBC the following:

(a) General Security Agreement dated May 26,2011 pursuant to which Holdings granted RBC a security interest in all of its present and after-acquired personal property;

(b) General Assignment of Leases and Rents dated May 26, 2011;

(c) The Holdings Mortgages

(the security set out in subparagraphs 21 (a) – (c) are hereinafter collectively referred to as the " NBC Holdings Security").

22. Pursuant to an Amended and Restated Intercreditor Agreement made as of June 5, 2014, (the "Intercreditor Agreement") RBC and NBC have agreed that the Mortgages are held in favour of RBC both on its own behalf and as agent for and on behalf and for the benefit of NBC. Furthermore, both RBC and NBC have agreed to share, *pari passu*, all proceeds from the General Assignments of Rents and Leases and Assignments of all Contracts with Elk Haven Partnership executed by Keller and Holdings (collectively the "*Pari Passu* Security").

23. Attached hereto as **Exhibit 20** to a true copy of the Intercreditor Agreement.

24. The Intercreditor Agreement further provides that any enforcement of the *Pari Passu* Security shall be carried out by RBC alone and that RBC may take any and all realization actions available to it including, without limitation, appointing a Receiver or Receiver-Manager to realize upon the RBC Security, it being understood that any realization by RBC with respect to the *Pari Passu* Security shall be for the benefit of both RBC and NBC.

25. As previously set out herein, the initial financing to Keller was provided by the Banks in 2011. Subsequently. Keller has been in financial difficulty for the last number of years. As a result the Banks provided additional financing. In particular, at Keller's request, the Banks advanced an additional $3,000,000 ($1,500,000 each) to Keller in April 2012 and RBC advanced an additional $3,300,000 in April 2014. Most if not all the additional financing was used to fund losses and otherwise pay bills associated with Keller's unprofitable operations.

26. Notwithstanding the additional financing Keller continued to flounder. Keller asked RBC for an additional loan of $3,000,000 in the fall of 2014. RBC advised that it was not prepared to advance any further monies.

27. Furthermore in or about March 2015 RBC advised Keller that RBC wished to be paid out and that Keller needed to make arrangements in that regard as soon as was reasonably possible.

28. On March 28, 2015 RBC and NBC, with the consent of Keller, jointly retained the services of Ernst & Young Inc. ("EY") to assist them in their dealings with Keller. EY is an experienced national insolvency firm with broad experience in insolvencies such as this. EY had been previously retained by NBC to assist NBC with its dealings with Keller. From and after March 28, 2015 EY has provided advice to the Banks.

29. Since that time, Keller has retained Bruce Taylor of Aikins LLP, an experienced insolvency lawyer, and with the help of Andy Wilton, Keller's financial advisor, Keller has been attempting to make alternate financing arrangements and/or arrangements to pay out the Banks.

30. As Keller had no funds to fund the 2015 potato crop, it entered into a lease (the "Lease") with Shilo Farms Ltd. ("Shilo") for the 2015 crop year whereby for a prescribed rent, Shilo would pay all of the expenses for the 2015 crop. In return, among other things, Shilo would receive all of the crop proceeds and be entitled to store the crop in Keller's storage bins.

31. Now shown to me and marked as **Exhibit 21** to this my Affidavit is a true copy of the Lease among Keller, Holdings and Shilo.

32. Notwithstanding RBC's advice to Keller in March, 2015 of its desire to be paid out, Keller has not provided any proposal sufficient to pay out the Banks in full.

33. Accordingly, RBC demanded its loans from Keller and from Holdings on July 17, 2015 in the aggregate amount of $15,901,643.17 plus accrued interest and costs.

34. Attached hereto as **Exhibit 22** are true copies of the RBC demands to both Keller and Holdings together with Notices of Intent to Realize on Security pursuant to section 21 of the *Farm Debt Mediation Act* (Canada) (the "FDMA") (the "FDMA Notices").

35. NBC also demanded its loans from Keller and from Holdings on July 22, 2015 in the aggregate amount of $8,407,703.41 plus accrued interest and costs.

36. Attached hereto as **Exhibit 23** are true copies of the NBC demands to both Keller and Holdings from Thornton Grout Finnigan LLP, counsel for NBC together with FDMA Notices.

37. Therefore the total debt owing by Keller to the Banks is approximately $24,309,347.08 together with further accrued interest and costs.

38. Keller and Holdings applied for a stay of proceedings under the FDMA which was initially granted by Farm Debt Mediation Service

("FDMS"). RBC advised FDMS that in its view, and in the view of NBC, there was no possible benefit to having FDMS attempt to mediate a solution and requested that the stay of proceedings be terminated. The FDMS agreed with the Banks and terminated the stay of proceedings. Keller and Holdings then appealed the decision to terminate the stay of proceedings. However, subsequently, Keller and Holdings withdrew their appeal. As such, the provisions of the FDMA no longer apply to this matter.

39. Attached hereto as **Exhibit 24** is a true copy of the BIA Notice of Intention to Enforce Security dated August 11, 2015issued by RBC to each of Keller and Holdings.

40. Attached hereto as **Exhibit 25** are true copies of consents to immediate enforcement executed by each of Keller and Holdings waiving the notice period in the BIA Notice of Intention to Enforce Security..

41. Attached hereto as **Exhibit 26** is a true copy of the BIA Notice of Intention to Enforce Security dated August 17, 2015, issued by NBC to each of Keller and Holdings.

42. RBC then filed in the Court of Queen's Bench (Brandon Centre) an Application for Leave under *The Family Farm Protection Act* (Manitoba) (the "FFPA") requesting that leave be granted to RBC to pursue any and

all actions available to RBC at law or in equity pursuant to the Mortgages including, without limiting the generality of the foregoing, the appointment of a Receiver or Receiver-Manager (the "FFPA Application"). The reason the FFPA Application was filed in Brandon is that the FFPA requires that the FFPA Application be filed in the judicial district in which the affected farmer resides.

43. With the consent of Keller the FFPA file has been transferred to the Court of Queen's Bench (Winnipeg Centre).

44. The Manitoba Farm Industry Board (the "FFPA Board") has issued its report to the Court advising:

(a) Keller has waived its rights under the FFPA and has consented to RBC obtaining leave under the FFPA immediately;

(b) The parties do not require mediation by the Board; and

(c) RBC should be entitled to make immediate application to the Court for leave under the FFPA.

45. Attached hereto as **Exhibit 27** is an Order from the Court of Queen's Bench (Winnipeg Centre), with the consent of Keller, granting leave to RBC to pursue any and all actions available to RBC at law or in equity pursuant to the Mortgages including, without limiting the generality of the

foregoing, the appointment of a Receiver or Receiver-Manager (the "FFPA Order").

46. The demands issued by RBC and NBC in the aggregate sum of $24,309,347.08 aforesaid, together with accrued interest and costs, remain outstanding as of this date. Accordingly I do verily believe that the RBC Security is enforceable and RBC is entitled to its remedies under the RBC Security including, *inter alia*, the appointment of a Receiver or Receiver-Manager.

47. Since the registration of the Mortgages certain of the lands have been sold with the consent of the Banks(collectively the "Sold Parcels") and other parcels have been added from parts of the Sold Parcels (the "Additional Parcels")

48. Attached hereto as **Exhibit 28** are true copies of Land Titles Office searches for each of the properties (aside from the Sold Parcels but including the Additional Parcels) subject to the Mortgages. Aside from utility and similar types of caveats, these properties are subject only to the Mortgages and the following subsequent encumbrances:

(a) with respect to virtually all of the Keller and Holdings lands, Mortgage Nos. 1203492/4 and 1378561/2 in favor of Karen Elizabeth Keller in the principal sum of $1,078,000.00

registered May 22, 2015. I am advised by Michael Dow that Karen Elizabeth Keller is the former spouse of Markus Keller;

(b) with respect to Certificate of Title No. 1829782/4, Caveat No. 1207174/4 in favor of Shilo Farms evidencing the Lease registered September 21, 2015; and

(c) Personal Property Security Notice No. 1290006/2 in favor of Concentra Financial Services Association registered June 16, 2011.

49. Attached hereto as **Exhibit 29** is a true copy of the Manitoba Personal Property Security Registry ("PPSR") search dated September 23, 2015 with respect to Keller. Other than registrations for specific pieces of equipment the only general security registrations are as follows (and are subsequent to the registrations of the Banks):

(a) PPSR Registration No. 201108599800 evidencing a General Security Agreement in favor of Redfern Farm Services Ltd. registered on May 27, 2011; and

(b) PPSR Registration No. 201110290905 evidencing a General Security Agreement in favor of Farm Credit Corporation registered on June 21, 2011.

50. Attached hereto as **Exhibit 30** is a true copy of the PPSR search dated September 23, 2015 with respect to Holdings. The only registration are in favor of RBC.

51. Attached hereto **Exhibit 31** to is a true copy of a *Bank Act* security search for Keller confirming *Bank Act* security registered only in favour of RBC and NBC.

52. The records of RBC disclose that as of September 18, 2015, the indebtedness owing under the RBC Credit Facilities is $15,830,004.47, particulars of which are as follows:

(a) Revolving demand facility in the principal sum of $2,505,773.26 together with interest on the said sum of $2,505,773.26 at RBC's prime lending rate for Canadian Dollar commercial loans as declared by the Plaintiff from time to time ("Prime") plus 6.0% per annum from September 18, 2015 until payment, both before and after default and judgment;

(b) Mortgage loan in the principal sum of $4,175,221.02 together with interest on the said sum of $4,175,221.02 at 3.50% per annum, calculated half-yearly, not in advance, both before and after maturity, default and judgment;

(c) Mortgage loan in the principal sum of $4,254,186.88 together with interest on the said sum of $4,254,186.88 at 5.5% per annum calculated half-yearly, not in advance, both before and after maturity, default and judgment;

(d) Non-revolving term facility in the principal sum of $33,699.08 together with interest on the said sum of $33,699.08 at 5.69% per annum from September 18, 2015 until payment, both before and after maturity, default and judgment;

(e) Non-revolving term facility in the principal sum of $4,294,812.25 together with interest on the said sum of $4,294,812.25 together with interest at Prime plus 6.0% per annum from September 18, 2015 until payment, both before and after maturity, default and judgment;

(f) Non-revolving term facility in the principal sum of $533,858.85 together with interest on the said sum of $533,858.85 together with interest at Prime plus 6.0% per annum from September 18, 2015 until payment, both before and after maturity, default and judgment;

(g) VISA facility in the principal sum of $32,453.13 together with interest on the said sum of $32,453.13 at 19.99% from

September 18, 2015 until payment, both before and after default and judgment.

53. Based upon the facts set out herein:

(a) there is clear default under the RBC Credit Agreement and the NBC Credit Agreement which Keller is unable to remedy;

(b) Holdings is also in default under the Guarantee which Holdings is unable to remedy; and

(c) RBC has lost confidence in the defendants and their ability to manage their operations.

54. I have also been advised by Markus Keller that Keller does not have the funds to continue to carry on the potato farming operation and as previously set out herein the Banks are not prepared to advance any further loans. Furthermore he has advised me that there are various treatments that he believes are required to be applied to the Keller lands prior to the winter. As Keller does not have the funds to pay for these treatments I believe that a Receiver or Receiver-Manager is urgently required to take control of, and deal with these matters prior to the onset of winter.

55. As further evidence of Keller's insolvency attached hereto as **Exhibit 32** is a true copy of a Requirement to Pay dated July 22, 2015 issued by Canada Revenue Agency to RBC for unpaid GST in the sum of $82,907.40.

56. I believe that EY is qualified to act as Receiver or Receiver-Manager of Keller and Holdings and has consented to act in that capacity. Attached hereto as **Exhibit 33** is a true copy of EY's consent.

57. I make this Affidavit in good faith and in support of RBC's motion to appoint a Receiver or Receiver-Manager of the all of the undertakings, properties and assets of the Defendants.

SWORN before me at the City of Toronto, in the Province of Ontario, this 2nd day of October, 2015.	)	
A Notary Public in and for the Province of Ontario.	)	**Gary Ivany**