District of British Columbia
Division No. 3 - Vancouver
Court No. ____________
Estate No.11-2634864

IN THE SUPREME COURT OF BRITISH COLUMBIA
IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF THE BANKRUPTCY OF ENCOREFX INC.

NOTICE OF MOTION

TAKE NOTICE that a Motion will be made by Ernst & Young Inc. ("**EY**"), in its capacity as trustee in bankruptcy (the "**Trustee**") of EncoreFX Inc. ("**EncoreFX**"), coming on for hearing via teleconference with the Courthouse at 800 Smithe Street, in the City of Vancouver, in the Province of British Columbia, on April 28, 2020 at 10:00 am for the orders set out in Part 1 below.

Part 1: ORDERS SOUGHT

1. An Order abridging the time for service and hearing of the within Notice of Motion.

2. Directions, pursuant to sections 18, 19, 30 and 34(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "***BIA***"), as to the Trustee's power to do the following prior to the appointment of inspectors:

   a. to disclaim all of the forward contracts and options resulting in the ITM positions of the ITM Clients (as defined below) (together the "**Contracts**") on a date determined by the Trustee or this Honourable Court; and

   b. to enter into the US Subsidiary LOI with the Purchaser (as defined below).

3. Directions, pursuant to s. 34(1) of the *BIA*, as to the Trustee's proposed Protocol (as defined below) for convening the first meeting of creditors of EncoreFX.

4. An Order, in substantially the form of draft Order attached hereto as **Schedule "A"**, permitting the Trustee to act in accordance with the directions provided under paras. 2 and 3 above.

5. An Order, in substantially the form of draft Order attached hereto as **Schedule "B"**, that the Affidavit of Peter Venetsanos, made April 23, 2020, including all Exhibits thereto, be filed under seal pending further Order of the Court.

6. Such further relief as the circumstances may require and as this Honourable Court deems appropriate.

Part 2: FACTUAL BASIS

1. Unless otherwise indicated, the Trustee adopts the definitions as used in its report filed in this matter, effective as at April 22, 2020 (the "**Trustee's Report**").

<u>Introduction</u>

2. EncoreFX Inc. ("**EncoreFX**" or the "**Company**"), is a Victoria, British Columbia based financial services company providing foreign exchange ("**FX**") risk management services and cross-border payment solutions.

3. On March 30, 2020 (the "**Bankruptcy Date**"), EncoreFX filed an assignment into bankruptcy. EY consented to act as the licensed insolvency trustee in the estate of EncoreFX (the "**Estate**").

4. On March 30, 2020, the Office of the Superintendent of Bankruptcy ("**OSB**") fixed April 16, 2020, as the original date to hold the first meeting of creditors of EncoreFX (the "**Original FMOC**") by teleconference in the estate of the Company.

5. On April 9, 2020, the Trustee, sought and obtained approval from the OSB for an extension of the date for the Original FMOC to May 7, 2020 (the "**May 7 FMOC**"). The special circumstances cited by the Trustee in its request included:

   (a) the COVID-19 pandemic and, in particular, rules and policies of our Provincial Government, the OSB and most companies that prohibit large gatherings of people and meetings of creditors must be convened by way of teleconference;

   (b) the Trustee expected a large number of creditors in attendance at the Original FMOC given the Company's large and broad number of stakeholders, including ITM (as defined below) customers pronounced by the fact that there was no requirement to attend in person and people are required to work from home; and

   (c) given the large number of expected attendees and required format for the Original FMOC, the Trustee was of the view that it would not be possible to administer a meeting with proper roll calls or sign-in, permit for the control of late attendees, review proofs of claim received at or just before the Original FMOC, or to count and record votes at the meeting.

6. The Trustee sought the extension to permit it to apply to Court, on notice to the OSB, for approval of a procedural order setting out a protocol for convening the meeting by videoconference that requires:

   (a) notice in advance of intent to attend the May 7 FMOC to permit a roll call;

(b) proofs of claim and proxies to be delivered within a reasonable period in advance of the May 7 FMOC to permit the May 7 FMOC to occur on an orderly basis; and

(c) procedural matters as to the conducting of the meeting, including calling for motions and voting at the May 7 FMOC.

7. On April 14, 2020, the Trustee drafted and sent a protocol for convening the May 7 FMOC (the "**Protocol**") to the OSB for its review and consideration.

8. Given that a May 7 FMOC has not yet been convened in this matter, there are currently no inspectors appointed in the Estate.

History of EncoreFX

9. EncoreFX is a Federal Corporation incorporated under the *Canada Business Corporations Act*. EncoreFX Ltd., EncoreFX (Australia) Pty Ltd., and EncoreFX (NZ) Limited are wholly owned foreign subsidiaries of EncoreFX.

10. EncoreFX was incorporated on September 15, 2014, and began operating with its head office in Victoria, British Columbia. Over the next few years, EncoreFX opened branch offices in the cities of Vancouver, Calgary, Edmonton, Saskatoon, Regina, Winnipeg, Toronto, Ottawa, Kitchener, and Mississauga. EncoreFX employed a workforce of approximately 150 personnel as at the Bankruptcy Date.

11. EncoreFX also established subsidiaries in Australia and New Zealand due to those countries having similar economic conditions to Canada and the subsidiaries carried on significant operations in those countries.

12. EncoreFX further established EncoreFX Ltd. (the "**US Subsidiary**"), a United States subsidiary incorporated in Washington State in the United States. In recent years, the US Subsidiary underwent a lengthy process to obtain licenses

13. As discussed above, EncoreFX Inc. is in the business of providing FX risk management and cross-border payment services predominantly to SME clients that import or export products from/to foreign markets and base their pricing on foreign currencies. EncoreFX sold the following FX risk management services to its clients to mitigate their exposure to fluctuating FX rates: FX spot transactions; and FX derivative contracts (including forward contracts and options) (the "**The EncoreFX Derivatives**").

The EncoreFX Derivatives

14. The EncoreFX Derivatives are referred to as "over-the-counter" derivatives, because they are not traded on a market or securities exchange, but rather negotiated with each counterparty (EncoreFX and its client) at the time they are consummated.

15. The 'market value' of all of the EncoreFX Derivatives products sold to clients fluctuates every second of every day once entered into due to movements in underlying FX rates; and at

any given time, the market value is out-the-money ("**OTM**"), in-the-money ("**ITM**") or at-the-money ("**ATM**").

16. For an example of the way in which the FX Derivatives were to operate, see paras. 22 to 25 of the Trustee's Report.

The Treasury Function

17. EncoreFX's Treasury Department was responsible for continually monitoring the aggregate FX exposure that arose from the sale of EncoreFX Derivatives to clients.

18. The Treasury Department used sophisticated trading platforms to monitor this exposure and assess overall netting of EncoreFX Derivatives bought and sold to clients. Netting was only allowed if the currencies and contract tenures were the same.

19. Once netting was factored in and/or when currency exposures reached a predetermined threshold outlined in the Company policy, the Treasury Department would book hedging transactions with one of its third-party banking counterparties (the "**Liquidity Providers**") to eliminate the Company's FX exposure.

20. EncoreFX had signed standard the International Swaps and Derivatives Association, Inc. ("**ISDA**") agreements (the "**ISDA Agreements**") with its Liquidity Providers that required it post security or 'margin' to cover the credit and market risk that Liquidity Provider were taking on when entering into FX derivative contracts with EncoreFX.

21. EncoreFX was required to post initial margin with its Liquidity Provider, which was generally a percentage of the notional value of the contract booked.

22. EncoreFX was also required to post OTM margin with Liquidity Providers equal to the value of all OTM contracts.

The Credit Function

23. In order to be competitive within its industry, EncoreFX offered credit to certain clients booking EncoreFX Derivatives. The credit terms offered included no initial margin and OTM limits up to a predetermined amount.

24. Prior to granting credit to clients, EncoreFX's Credit Department would perform a detailed credit assessment and would extend terms that were in line with the client's financial strength.

25. Once the assessment was finalized, EncoreFX would issue and the client would sign a Credit Facility Agreement that outlined the terms under which credit was granted.

26. Credit terms were reviewed by the Credit Department on a periodic basis (i.e. quarterly or annually) depending on the client's credit classification.

Secured Indebtedness to Gustavson Capital Corporation

27. Gustavson Capital Corporation ("**GCC**"), is the senior creditor with a security registration against EncoreFX. As at March 30, 2020, GCC was owed approximately $35,575,000 pursuant to a loan agreement secured by way of general security agreement (the "**GSA**") dated September 15, 2014 between GCC and EncoreFX.

28. The Trustee has obtained an independent legal opinion and security review of the GSA from Nathanson Schachter & Thompson LLP, who provided an opinion that, subject to customary qualifications, the GSA is valid and enforceable, including as against the Trustee.

29. The Trustee is not currently aware if GCC's intends to exercise remedies to realize upon its security (including by way of the appointment of a receiver).

Reasons for Insolvency

30. Beginning in March 2020, global FX markets began to observe atypical levels of volatility mainly driven by the impact that COVID-19 was having on the global economy. In particular the US Dollar (USD) strengthened in a significant way against some of the world's most traded currencies, including against the Canadian, Australian and New Zealand dollars in which the majority of the EncoreFX Derivatives were booked.

31. Due to this extreme market volatility, a number of EncoreFX's clients (and its subsidiaries' clients) were OTM on their transactions; and as a consequence, EncoreFX was left OTM with its Liquidity Providers.

32. Under the terms of its ISDA Agreements, EncoreFX was required to pay significant additional margin to its Liquidity Providers to cover the value of OTM contracts.

33. Many of EncoreFX's clients had exceeded the OTM thresholds outlined in their Credit Facility Agreements and were subject to margin calls (the "**OTM Clients**"). The Trustee is advised that EncoreFX attempted to work with many of the OTM Clients to address margin calls owing however many clients' businesses had been negatively impacted by COVID-19 and they were unable to honour the terms of their Credit Facility Agreements.

34. In the days leading up to the Bankruptcy Date, the Trustee is advised that management determined that even if all OTM amounts owing could be collected from clients over time, there was no short-term liquidity available to the Company to meet its obligations and EncoreFX made the decision suspend all trading activity as at Sunday, March 29, 2020 (prior to the opening of trading on Monday, March 30, 2020).

35. The Trustee notes that it was first approached by the Company with respect to the financial distress of the Company on March 26, 2020; and thereafter, in the days that followed entertained several discussions to consider various restructuring options available to EncoreFX, both formally and informally. The decision to suspend trading (with respect to new transactions) and to file the assignment into bankruptcy was made on the eve of Sunday, March 29.

36. The Australian and New Zealand subsidiaries were also placed into Voluntary Administration (formal insolvency proceedings in those Countries). EY is acting as the Administrator in insolvency proceedings of the Australia and New Zealand entities.

<u>Sales Process and the LOI</u>

37. Numerous parties have approached the Trustee immediately following the Bankruptcy Date with expressions of interest to acquire all or parts of EncoreFX. The Trustee, through a senior representative of EY Corporate Finance, also approached fifteen parties including potential strategic inquirers to solicit their interest in an acquisition of EncoreFX.

38. The Trustee is of the view that if a sale of EncoreFX is to happen, it is critical that it occur urgently. The value of EncoreFX is in its client base, its administrative infrastructure, management and its financial professionals. The cease trading and bankruptcy of EncoreFX has profoundly affected its reputation and has caused its clients to find new counterparties to trade with and there is a very narrow window to retain key personnel before they find alternative employment.

39. In recognition that a sale of part or all of EncoreFX would require the approval of inspectors or this Honourable Court, the Trustee initiated and is carrying out an informal process to acquire all or certain assets of EncoreFX on an expedited basis.

40. To date, the Trustee had executed non-disclosure agreements ("**NDA**") with twelve (12) distinct parties; and provided those parties with a summarized Confidential Information Memorandum ("**CIM**"), preliminary information about EncoreFX, and made itself and management available on short notice (24 hours a day, 7 days a week) to answer any questions and respond to information requests.

41. To date, the Trustee has received one "binding" letter of intent ("**LOI**") from a United States-based strategic investor (the "**Purchaser**") to acquire 100% of the shares of the Company's US Subsidiary (the "**US Subsidiary LOI**"). The key details of the US Subsidiary LOI are summarized below:

    (a) purchase price of USD $200,000 <u>in addition</u> to net working capital estimated at approximately USD $1,000,000 based on the US Subsidiary's draft March 31, 2020 financial statements;

    (b) satisfactory completion of due diligence;

    (c) standard and customary closing conditions; and

    (d) a transition services agreement in which the Purchaser will reimburse the Company for any reasonable fees of the Trustee directly related to the US Subsidiary as well as reasonable expenses required to keep the US Subsidiary operational and in regulatory compliance.

42. The US Subsidiary has had minimal activity and has also ceased trading. The primary assets of the US Subsidiary consist numerous licenses required to trade currencies in a number of

States. A forecast prepared by management for the remainder of 2020 that projects operating cash requirements of USD $278,000 and no revenues.

43. In order to maintain compliance with respect to its State licenses, the US Subsidiary is required to, *inter alia*, maintain net equity of at least USD $1,000,000 at all times. The US Subsidiary does not have the resources on a stand-alone basis to incur these expenses and maintain the net equity requirement and the only alternative to the US Subsidiary LOI is for the US Subsidiary to "surrender" or withdraw its licenses and wind-down, which would generate no value for the benefit of the Estate respecting the licenses.

44. Given that the Purchaser is a United States public company and has public company disclosure requirements, it has asked the Trustee for confidentiality with respect to its identity.

45. The Company is currently in discussions with one or more parties respecting a possible acquisition of the Company's Canadian operations.

<u>The ITM Clients</u>

46. Approximately 190 EncoreFX clients have ITM transactions with mark-to-market gains (or liabilities to EncoreFX) of approximately $17,900,000 CAD (the "**ITM Clients**").

47. As and when the ITM transactions settle or are liquidated, it is likely the ITM Clients will become unsecured creditors against the Company in respect of their ITM positions.

48. While the transaction(s) that have resulted in the ITM positions are EFCs and the ITM Clients can liquidate those positions at any time (crystallizing an unsecured claim), the Trustee is concerned that if it does not close out these transactions on an urgent basis (and prior to the appointment of inspectors), certain parties may assert that the Trustee implicitly adopted the ITM contracts (where the Estate may have an inability to settle the contracts for lack of capital). Whereas 100% of the OTM contracts can be closed out by the Company for non-performance by the OTM Clients pursuant to the Credit Termination Letter, no similar default has been committed by the ITM Clients. By closing out the transaction(s) resulting in the ITM positions, the Trustee will crystallize the position of the ITM Clients as unsecured creditors against the Estate. Unlike the OTM, the ITM cannot forward trade at today's FX rates to offset the unsecured claim associated with the FX gain realized and foregone on the EncoreFX forward contract.

49. In these unique circumstances, the closing out of positions of ITM Clients prior to the appointment and direction of the inspectors which may impair the value of the estate's assets is not taken lightly by the Trustee; however, given certain positions advanced by legal counsel representing clients that could seek to hold the Trustee personally responsible, the Trustee is seeking the approval of this Honourable Court to notify all ITM Clients by letter that EncoreFX will close-out the transaction(s) resulting in the ITM positions of ITM Clients at the expiry of seven (7) days following the date of Court approval unless the ITM Client acknowledges, in writing, that it does not want the ITM transaction(s) resulting in the ITM positions closed out and it indemnifies and hold harmless the Estate and Trustee, personally, for any losses realized in connection with the continuance of the contract to maturity.

Part 3: LEGAL BASIS

1. *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "***BIA***"), Sections 18, 19, 30 and 34.

2. *Bankruptcy and Insolvency General Rules*, C.R.C. 1978, Rule 11.

<u>Application for Directions</u>

3. A trustee may apply to the Court for directions in relation to any matter affecting the administration of the estate of a bankrupt and the Court shall give in writing such directions, if any, as to it appear proper in the circumstances.

BIA, s. 34(1)

4. Applications for directions have been made on a great variety of matters, including: as to the validity of an assignment, *Canadian Steering Wheel Co., Re* (1921), 2 C.B.R. 47 (S.C.C.); as to the disposal of shares and other matters in the bankruptcy of a stockbroker, *R.P. Clark & Co. (Vancouver) Ltd., Re* (1931), 13 C.B.R. 118 (B.C.S.C.); as to termination of oil and gas leases, *Publix Oil & Gas Ltd. (Trustee of) v. Hinds* (1937), 18 C.B.R. 379 (Alta. S.C.); and as to payment of claims incurred prior to bankruptcy by a creditor's committee, *Fairweathers Ltd., Re* (1922), 2 C.B.R. 458 (Ont. S.C.).

5. Here, the Trustee is seeking directions as to its authority, prior to the appointment of inspectors, to:

    a. disclaim all of the Contracts (for clarity, just the ITM contracts) and to close-out all transactions resulting therefrom (the "**Close-Out**"); and

    b. enter into the LOI.

6. In addition, the Trustee is seeking directions as to the Protocol proposed for the May 7 FMOC.

7. As these actions directly affect the administration of the Estate of EncoreFX, the Trustee is permitted to seek directions from this Honourable Court.

<u>The Trustee's Powers Prior to the Appointment of Inspectors</u>

<u>S. 18 and s. 19 of the *BIA*</u>

8. Prior to the Appointment of inspectors, the trustee is permitted to take certain action and conservatory measures when necessary and in the interest of the estate of the bankrupt.

BIA, s. 18 and s. 19

9. Under s. 18 of the *BIA*, the trustee may, when necessary and in the interest of the estate of the bankrupt:

a. take conservatory measures and summarily dispose of property that is perishable or likely to depreciate rapidly in value; and

b. carry on the business of the bankrupt until the date fixed for the first meeting of the creditors.

10. Under s. 19(1) of the *BIA*, the trustee may, prior to the first meeting of the creditors, obtain such legal advice and take such Court proceedings as it may consider necessary for the recovery or protection of the property of the bankrupt.

11. Under s. 19(2) of the *BIA*, the trustee may, in the case of an emergency and where the necessary authority cannot be obtained from the inspectors, obtain such legal advice and institute such legal proceedings and take such action as it may deem necessary in the interests of the estate of the bankrupt.

12. In regard to property that is perishable or likely to depreciate rapidly in value, it is well established that the trustee may summarily dispose of such property in the interest of the bankrupt's estate, and, in the event of an emergency, the trustee may, without the inspectors' permission, take necessary measures to protect the estate.

Canada (Attorney General) v. Roy, 2007 FCA 410, at para. 59

13. In *National Capital Region, Ottawa Rough Riders Professional Football Club Ltd., Re* (1995), 31 CBR (3d) 136, the Court was required to consider approval of the sale of assets of the Ottawa Rough Riders prior to the first meeting of creditors. In the context of s. 18 and s. 19 of the *BIA*, Chadwick Sr. J. stated the following:

> [16] *The normal procedure would be for the creditors to appoint their inspectors at the first meeting of creditors and for the trustee to present the proposed purchase and sale to the creditors and the inspectors for their approval. Unfortunately this cannot be done and the trustee has moved pursuant to ss. 18 and 19 of the Bankruptcy and Insolvency Act on the basis that this is an urgent situation and further the property will depreciate rapidly in value if the transaction is not completed.*
>
> [17] *Section 19 of the Bankruptcy and Insolvency Act provides that the trustee may prior to the first meeting of creditors obtain such legal advice and take such court proceedings as he may consider necessary for the recovery or protection of the bankrupt.*
>
> [22] *In considering ss. 18 and 19, I have attempted to use a common sense approach to the interpretation of these sections. Considering this application by the trustee, I must take into consideration the other transactions involving the Canadian Football League and other creditors who are either secured or have priority interest by statute. These transactions are confirmed in a settlement agreement and the Canadian Football League membership agreement, which were filed as Exhibits. In my view, the transaction cannot be looked at only by a review*

of the agreement of purchase and sale but all of these other agreements must be taken into consideration in deciding whether the proposal makes good business sense.

S. 30(3) of the *BIA*

14. Pursuant to s. 30(3) of the *BIA*, if no inspectors are appointed, the trustee may do all or any of the things referred to in s. 30(1) "*Powers exercisable by the trustee with permission of inspectors*".

15. The authorities in Canada where the Court has considered s. 30(3) of the *BIA*, are decisions involving circumstances whereby the creditors do not appoint an inspector in bankruptcy.

Global Royalties Ltd. v. Brook, 2016 ONSC 6277, at paras 3 and 29

Lehman (Re), 2018 BCSC 2266, at paras 29 to 31

16. However, there is some authority that s. 30(3) of the *BIA* may be relied upon to allow a trustee to take certain action prior to the first meeting of creditors, and prior to the appointment of inspectors.

17. The Honourable Mr. Justice Lloyd Houlden, Mr. Justice Geoffrey Morawetz & Janis Sarra ("**Houlden & Morawetz**"), *Bankruptcy and Insolvency Law of Canada*, 4th Edition, L.W. Houlden and Geoffrey B. Morawetz, state the following regarding the purpose of section 30(3) of the *BIA*:

Section 30 confers twelve specific powers on the trustee that it may exercise with the permission of the inspectors. The predecessor section to s. 30 required the permission of the inspectors to be given in writing, but this requirement is no longer the case. Sections 30(1) and 30(2) set out the powers that may be exercised by the trustee with the permission of the inspectors; however, it is not in every bankruptcy that inspectors are appointed. When an estate is small and creditors do not believe that recovery is likely, they may not expend the time or resources to have inspectors appointed. ***The addition of subsection (3) in 2009 provides that in the absence of inspectors, the trustee can act unilaterally so that an estate is not left in limbo when inspectors are not appointed.***

[…]

With the permission of the court, and before the appointment of inspectors, the trustee may make necessary advances, incur obligations, and borrow money and give security on the debtor's property. ***If there is cause, the court can permit the trustee to exercise the powers set out in s. 30 prior to the appointment of inspectors. Thus, it has been held that in matters of emergency or other valid cause, the court may authorize the trustee to dispose of the assets of the estate before the appointment of inspectors****: Re Thornton, Davidson & Co. (1920), 1*

C.B.R. 381 and 383 (Que. S.C.); Re Eastern Paper Co. (1923), 3 C.B.R. 722 (Que. S.C.); and see notes on s. 18(a), ante.

(emphasis added).

18. Although Houlden & Morawetz state the Court can permit a trustee to exercise its powers under 30(1) prior to the appointment of inspectors, the Canadian authorities are limited to circumstances in which the trustee is disposing of assets and relying upon s. 18 and/or s. 19 of the *BIA* in doing so.

Right to Disclaim a Bankrupt's Contracts

19. It has been well-established in both English and Canadian law that a trustee, or receiver, can disclaim executory contracts of a bankrupt, and must make an election to either continue performance of the contract or disclaim the contracts and render no further performance.

New Skeena Forest Product Inc. v. Kitwanga Lumber Co., 2005 BCCA 154, at paras. 31 and 32

Orphan Well Association v Grant Thornton Ltd., 2019 SCC 5, at para. 95

20. A trustee's right to disclaim a bankrupt's contracts has been confirmed in the case of swap agreements. In *North America Steamships Ltd. (Re),* 2007 BCSC 267, Justice Tysoe considered the ability of the trustee to continue with certain swap agreements rather than disclaim them. Even though the contracts contained a termination clause in the event of bankruptcy, Tysoe J. held that the trustee did have the option to disclaim or affirm the swap agreements:

[13] *In the present case, counsel for the Trustee submits that these authorities do not apply in the present circumstances because the Geneva/Pioneer Swap Agreements contain provisions allowing Geneva and Pioneer to terminate the Swap Agreements as a result of the bankruptcy of the Bankrupt. In other words, the contracting parties turned their minds to the possibility of one of them becoming bankrupt and provided a remedy for the protection of the non-bankrupt party. With respect, I do not accept this submission.*

[14] *While Geneva and Pioneer have the option of terminating the Swap Agreements as a result of the bankruptcy, they are entitled to know whether the Trustee is prepared to commit the assets in the bankruptcy estate towards the obligations of the Bankrupt under the Swap Agreements if they do not choose the termination option. In my view, nothing turns on whether the bankruptcy of one of the contracting parties does constitute a breach of the contract or otherwise entitles the other party to terminate the contract.*

[15] *There is potentially an important difference between the termination of the contract in accordance with its provisions and the contract coming to an end due to frustration of the contract. In the present case, there is a significant difference*

> *between the two alternatives. If Geneva and Pioneer were to terminate the Swap Agreements in accordance with their provisions at the present time, they would have to make a significant payment to the Trustee. On the other hand, if the Swap Agreements are frustrated, they are entitled to treat them at an end without making any further payment.*
>
> [16] ***Another way of looking at the point is to consider the right of the trustee in bankruptcy to disclaim a contract entered into by the bankrupt, in which case the other party to the contract may claim as an unsecured creditor of the bankrupt in respect of the damages suffered by it****. The B.C. Court of Appeal recently had occasion to consider the right of trustees in bankruptcy to disclaim contracts in the decision of New Skeena Forest Products Inc. v. Don Hull & Sons Contracting Ltd., 2005 BCCA 154. The Court said the following at ¶ 29: [quote omitted]*
>
> [17] ***A trustee in bankruptcy has two alternatives with respect to contracts entered into by the bankrupt. The trustee can either affirm or disclaim the contract****. Support for this proposition is found in Saan Stores Ltd. v. United Steelworkers of America, Local 596 (Retail Wholesale Canada, Canadian Service Section Division) (1999), 1999 CanLII 911 (NS CA), 172 D.L.R. (4th) 134 (N.S.C.A.) at p. 151: [quote omitted].*
>
> (Emphasis added).

21. If the trustee elects to disclaim the bankrupt's contracts, the third party affected by the disclaimer has a claim of damages against the bankrupt's estate. In any event, the receiver must exercise proper discretion in disclaiming the bankrupt's contracts. Ultimately the trustee/receiver may face the allegation it could have realized more by performing the contract rather than terminating it or that it breached its duty by dissipating the debtor's assets.

Forjay Management Ltd. v 0981478 B.C. Ltd., 2018 BCSC 527, at paras. 37 to 39

22. Disclaimer principles, as found in numerous authorities, were summarized by Justice Burnyeat in *bcIMC Construction Fund Corp. v. Chandler Homer Street Ventures Ltd.*, 2008 BCSC 897, at paras. 53 to 57. Burnyeat J. summarized the relevant considerations as follows:

> [58] *I am satisfied that the decisions referred to establish the following propositions: (a) the Receiver and Manager is not bound by the Contracts of either Chandler or Cook entered into before the receivership unless it decides to be bound by them; (b) the Receiver and Manager should and did seek leave of the Court before disclaiming the Contracts; (c) Chandler and Cook will remain liable for any damages if the Contracts are disclaimed by the Receiver and Manager; (d) any duty to preserve the goodwill of Chandler and/or Cook is owed to those entities and not to the creditors of Chandler and Cook; (e) the ability to disclaim contracts applies even if the party contracting with the debtor has an equitable interest as a result of the contract; and (f) if a receiver and manager decides in its discretion to be bound*

by the contracts of a company entered into before the receivership, then the receiver and manager be liable for the performance of those contracts.

23. Here, the Trustee is seeking to disclaim all of the Contracts and to effect the Close-Out resulting therefrom.

24. The authority for the Trustee to disclaim the Contracts and to effect the Close-Out would normally be approved by the inspectors.

25. As no inspectors have been appointed, and as the authority is uncertain, the Trustee is seeking direction from this Honourable Court.

26. The Trustee asserts that, in relation to the Close-Outs, this is a matter which needs to be addressed on an urgent basis.

27. The 'market value' of all of the EncoreFX Derivatives products sold to clients fluctuates every second of every day once entered into due to movements in underlying FX rates.

28. The Trustee is of the view that the Contracts cannot, with certainty, be performed by the Estate if the Contracts were allowed to run to their maturity.

29. The Trustee is concerned if it does not close out the Contracts on an urgent basis (and prior to the appointment of inspectors), certain parties may assert the Trustee implicitly adopted the Contracts. By closing out the transaction(s) resulting in the ITM positions, the Trustee will crystallize the position of the ITM Clients as unsecured creditors against the Estate.

30. Accordingly, the customers who have open Contracts with the Estate must have certainty as to the treatment of the Contracts given the volatile fluctuations in the currency markets caused by the worldwide pandemic.

31. The Trustee also requires certainty as to what customers may owe money to the Estate (once the Contracts have been closed). These amounts should be crystalized and not be subject to volatile currency fluctuation.

<u>The US Subsidiary LOI</u>

32. The authority for the Trustee to enter into the US Subsidiary LOI would normally be approved by the inspectors.

33. Here, the Trustee has described the assets which are the subject of the US Subsidiary LOI (the shares of the US sub) (the "**Shares**") as a "melting ice-cube". The longer the estate waits to realize on the Shares, will result in the less value attributed to the asset. In some sense the Shares are as perishable as contemplated under s. 18(a) of the *BIA*.

34. Using a common sense approach to the interpretation of the sections of the *BIA* referred to above, the Court should permit the Trustee to pursue the LOI.

The Sealing Order

35. The Court has the authority to Order that certain materials filed with the Court be sealed on the Court file. The Supreme Court of Canada has stated that such an Order can be made where:

    a. such a ban is *necessary* in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and

    b. the salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban.

Sierra Club of Canada v. Canada (Minister of Finance), 2002 SCC 41 ("***Sierra Club***"), at para. 53

36. The need to keep confidential Affidavit #1 of Peter Venetsanos and the US Subsidiary LOI fits squarely within the test established by *Sierra Club*. The US Subsidiary LOI details as to the commercial terms of the sale of EncoreFX's US Subsidiary and contains a confidentiality clause.

37. Disclosure of the US Subsidiary LOI would be in breach of its confidentiality clause and be prejudicial to the commercial interest of the parties thereto.

The Protocol

38. We are in somewhat unchartered territory in holding a first meeting of creditors during a worldwide pandemic.

39. With the assistance of the OSB, the Trustee has developed the Protocol for the May 7 FMOC.

40. Given the diversion from the general rules regarding the holding of a May 7 FMOC, and to endorse the Protocols agreed to by the Trustee and the OSB, directions from this Honourable Court are being sought.

41. As the Protocol during the May 7 FMOC directly affects the administration of the Estate, the Trustee is permitted to seek directions from this Honourable Court.

Conclusion

42. Based on the foregoing, it is appropriate for this Honourable Court to provide directions in the circumstances and grant the Orders sought.

Part 4: MATERIAL TO BE RELIED ON

1. Affidavit of Peter Venetsanos, made on April 23, 2020.
2. First Report of Ernst & Young Inc., Trustee of EncoreFX Inc, April 22, 2020 .

3. Such further materials as may be filed with this Honourable Court .

The applicant estimates that the application will take 3 hours.

☐ This matter is within the jurisdiction of a registrar in bankruptcy.

☒ This matter is not within the jurisdiction of a registrar in bankruptcy.

Dated: April 24, 2020

____
Signature of William E. J. Skelly
☐ applicant ☒ lawyer for applicant

Name and address of solicitor for Ernst & Young Inc., in its capacity as trustee in bankruptcy of EncoreFX Inc.:

MLT Aikins LLP.
2600 – 1066 West Hastings Street
Vancouver, BC V6E 3X1
Telephone: 604-682-7737
Attn: William E.J. Skelly

____
Registrar in Bankruptcy

SCHEDULE "A"

District of British Columbia
Division No. 3 - Vancouver
Court No. ____________
Estate No.11-2634864

IN THE SUPREME COURT OF BRITISH COLUMBIA
IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF THE BANKRUPTCY OF ENCOREFX INC.

ORDER MADE AFTER APPLICATION

	)	The Honourable	)
BEFORE	}	Madam Justice Fitzpatrick	}April/28/2020
	)		)

ON THE APPLICATION of Ernst & Young Inc. (the "**Trustee**"), in its capacity as trustee in bankruptcy of EncoreFX Inc. ("**EncoreFX**"), coming on for hearing via teleconference with the Law Courts, 800 Smithe Street, in the City of Vancouver, in the Province of British Columbia on April 28, 2020, and on hearing William E.J. Skelly, counsel for the Trustee, and those other counsel listed on **Schedule "A"** hereto;

THIS COURT ORDERS that:

1. The time for service of the Notice Motion for this Order is hereby abridged and validated so that this Notice of Motion is properly returnable today and further service is hereby dispensed.

2. The Trustee is at liberty to disclaim all of the in the money positions of EncoreFX customers who have entered into forward currency contracts and options with market-to-market gains, on a date determined by the Trustee.

3. The Trustee is at liberty to enter into the "Letter of Intent", in substantially the form as Exhibit "A" to the Affidavit of Peter Venetsanos, made on April 23, 2020, and filed in these proceedings.

4. The Trustee is at liberty to implement the "Protocol" for the first meeting of creditors of EncoreFX, in substantially the form as **Schedule "B"** hereto .

THE FOLLOWING PARTIES APPROVE THE FORM OF THIS ORDER AND CONSENT TO EACH OF THE ORDERS, IF ANY, THAT ARE INDICATED ABOVE AS BEING BY CONSENT:

____
Signature of lawyer for the Trustee
William E.J. Skelly

BY THE COURT

____
REGISTRAR

SCHEDULE "B"

District of British Columbia
Division No. 3 - Vancouver
Court No. ____________
Estate No.11-2634864

IN THE SUPREME COURT OF BRITISH COLUMBIA
IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF THE BANKRUPTCY OF ENCOREFX INC.

SEALING ORDER

BEFORE The Honourable Madam Justice Fitzpatrick	)))	28/April/2020

ON THE APPLICATION of Ernst & Young Inc. (the "**Trustee**"), in its capacity as trustee in bankruptcy of EncoreFX Inc., coming on for hearing via teleconference at Vancouver, British Columbia on April 28, 2020, and on hearing William E.J. Skelly, counsel for the Trustee and those other counsel listed on **Schedule "A"** hereto;

THE COURT ORDERS AND DECLARES THAT:

1. Access to Sealed Items Permitted by:

   a. Further Court Order.

2. Items to be sealed:

Document Name:	**Date Filed:**	**Number of copies filed, including any extra copies for the judge.**	**Duration of Sealing Order:**	**Sought**	**Granted**	
					Yes	**No**
1.Entire File						
2. SpecificDocuments a. Affidavit #1 of Peter Venetsanos sworn April 23, 2020		2	Until further Court Order	X		
3. Clerks Notes						

4. Order						

3. Endorsement of the Order by counsel appearing on this application, except for counsel for the Trustee, is hereby dispensed with.

THE FOLLOWING PARTIES APPROVE THE FORM OF THIS ORDER AND CONSENT TO EACH OF THE ORDERS, IF ANY, THAT ARE INDICATED ABOVE AS BEING BY CONSENT:

____
Signature of William E.J. Skelly
Lawyer for Ernst & Young Inc., in its capacity
as trustee in bankruptcy of EncoreFX Inc.

BY THE COURT

____
REGISTRAR