

**ONTARIO
SUPERIOR COURT OF JUSTICE
(IN BANKRUPTCY AND INSOLVENCY)
COMMERCIAL LIST**

**IN THE MATTER OF section 243(1) of the *Bankruptcy and Insolvency Act*, RSC 1985,
c. B-3, as amended and section 101 of the *Courts of Justice Act*, RSO 1990, c. C43,
as amended**

B E T W E E N:

HSBC BANK CANADA

Applicant

- and -

DMI EXIM LIMITED

Respondent

FACTUM OF THE COURT-APPOINTED RECEIVER

April 16, 2024

THORNTON GROUT FINNIGAN LLP
TD West Tower, Toronto-Dominion Centre
100 Wellington Street West, Suite 3200
Toronto, Ontario M5K 1K7

D.J. Miller (LSO# 34393P)
Tel: (416) 304-0559
Email: djmiller@tgf.ca

Alexander Soutter (LSO#72403T)
Tel: (416) 304-0595
Email: asoutter@tgf.ca

Lawyers for the Court-appointed Receiver,
KPMG Inc.

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PART I - OVERVIEW

1. KPMG Inc., in its capacity as Court-appointed receiver and manager (the "**Receiver**"), without security, of all the undertaking, property, and assets of the Respondent seeks an order: (a) approving the Receiver's execution of the Sale Agreement (as defined below); (b) vesting title to the Real Property (as defined below) in the Purchaser (as defined below) upon the closing of the Transaction (as defined below); and (c) sealing the Confidential Appendices (as defined below).
2. The relief sought on the motion should be granted because the transaction contemplated by the Sale Agreement (the "**Transaction**") represents the highest and best offer for the Real Property. This offer was obtained following an appropriate sale procedure in accordance with the order dated August 1, 2023, that appointed the Receiver (the "**Appointment Order**"). The Appointment Order authorized the Receiver to market the Real Property by advertising, soliciting offers, and negotiating terms and conditions of sale as deemed appropriate in its discretion.
3. The Confidential Appendices contain sensitive commercial information, such as the proposed purchase price for the Real Property, and should be kept confidential until Transaction closes. Disclosing this information could impair the value to be obtained by the Receiver on any other sale transaction, if the Transaction does not close for any reason.

PART II - FACTS

4. On August 1, 2023, this Court granted the Applicant's application for the appointment of the Receiver.¹
5. The Respondent was a global marketer and distributor of food commodities such as chickpeas, among other things. It operated from the property municipally known as 10 Falconer Drive, Unit 3, Mississauga, Ontario ("**Real Property**"). The Respondent owns the Real Property.²
6. Following its appointment, the Receiver took steps to market the Real Property for sale pursuant to its duties under the Appointment Order. It conducted a request for proposal process and selected a broker, Avison Young Commercial Real Estate Services, LP, Brokerage (the "**Broker**") from the six commercial real estate brokers that participated in the process. The Broker was chosen based on its comprehensive proposal submitted to the Receiver, which included a market analysis for similar nearby properties, an expected sale price derived from recent comparable sales, an estimated timeframe for selling the Real Property, profiles of potential buyers, a detailed marketing and pricing strategy, the broker fee structure, listing duration and holdover terms, and an introduction to the sales team, highlighting their relevant experience.³
7. The Real Property was listed on the Multiple Listing Service on October 3, 2023.⁴

¹ First Report of the Receiver dated April 4, 2024 (the "**First Report**") at para 1 Motion Record ("**MR**"), Tab 2.

² First Report at paras 9 and 1, MR, Tab 2.

³ First Report at para 15, MR, Tab 2.

⁴ First Report at para 18, MR, Tab 2

8. The listing resulted in interest from 11 parties. Two formal offers to purchase the Real Property were made.⁵ A summary of these offers is set out in Confidential Appendix A to the First Report.
9. The Receiver determined that the offer from North Mediafix Corporation (the “**Purchaser**”) was the superior bid and, on December 22, 2023, entered into an Agreement of Purchase and Sale with the Purchaser (as amended, the “**Sale Agreement**”). The Sale Agreement is conditional upon the Receiver obtaining the relief sought on this motion.⁶

PART III - ISSUES & ARGUMENT

10. The issues on this motion are whether:
 - (a) the Court should approve the Sale Agreement and vest title to the Real Property in the Purchaser (it should); and
 - (b) the Court should seal the Confidential Appendices (it should).

A. The Court Should Grant the Approval and Vesting Order

11. In assessing whether to approve a proposed sale of assets by a Court-appointed receiver, Ontario courts have consistently applied the *Soundair* test.⁷ The Court should consider:
 - (a) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;

⁵ First Report at para 19, MR, Tab 2

⁶ Sale Agreement, Schedule “A”, para 3 – Appendix “B” to the First Report, Tab 2B.

⁷ *Royal Bank v Soundair Corp*, 1991 CanLII 2727 at [para 16](#) (ONCA) [*Soundair*].

- (b) the efficacy and integrity of the process by which offers are obtained;
 - (c) whether there has been unfairness in the working out of the process; and
 - (d) the interests of all parties.
12. Absent a violation of *Soundair* factors, the court should be “loathe to interfere with the business judgment of a Receiver and refuse to approve a transaction recommended by the Receiver acting properly in the fulfillment of its obligations as an officer of the court.”⁸
13. The *Soundair* test has been met. Listing condominium property, like the Real Property, on the Multiple-Listing Service has been accepted by this Court as an appropriate process for marketing such property in a receivership.⁹ There is no basis to impugn the efficacy, integrity, or fairness of the sale process chosen by the Receiver or the related steps taken by the Receiver. Further, the interests of all parties are served by the proposed Transaction. The Applicant also supports the proposed Transaction.¹⁰
14. Courts have held that sale processes in the context of receiverships are not to be held to a standard of perfection. Rather, a receiver will be found to be acting properly and making an appropriate effort to get the best price if the receiver carefully considers the available information and uses its expertise to determine how best to maximize value in the particular circumstances.¹¹ In this case, the Receiver was directly engaged in evaluating offers

⁸ *Eddie Bauer of Canada, Inc. (Re)*, 2009 CanLII 48527 at [para 22](#) (ONSC) read with *Morgante Canada Corp v Wolfhollow Properties Inc*, 2003 CanLII 7759 at [para 7](#) (ONSC).

⁹ *Kingsett Mortgage Corp v. 30 Roe Investment*, Endorsement of Justice Steele dated February 7, 2023 (Court File No. CV-22-00674810-00CL) (Ont. S.C.J. [Commercial List]) at [paras. 14, 16, 19, and 20](#).

¹⁰ First Report at para 23 (e), MR, Tab 2.

¹¹ *National Trust Co v 1117387 Ontario Inc*, 2010 ONCA 340 at paras [44](#) and [50](#).

received from prospective buyers, selecting a buyer, and negotiating and entering into the Sale Agreement with the Purchaser.¹² The Receiver has acted appropriately and is of the view that the Transaction represents the best result in the circumstances.¹³

B. The Court Should Seal the Confidential Appendices

15. The Court should seal Confidential Appendices “A” and “B” to the First Report (the “**Confidential Appendices**”) because they contain commercially sensitive information. Specifically, the Confidential Appendices contain a summary of the two formal offers made in respect of the Real Property and an unredacted copy of the Sale Agreement.
16. The Court has the jurisdiction to seal those appendices,¹⁴ and may do so when the *Sherman Estate* test is met:¹⁵
 - (a) there is a serious risk to an important public interest;
 - (b) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and
 - (c) as a matter of proportionality, the benefits of the order outweigh its negative effects.
17. The release of the commercially sensitive information in the Confidential Appendices prior to closing of the Transaction may prejudice any future sale process that the Receiver may undertake if the Transaction fails to close.

¹² First Report at para 12 (k), MR, Tab 2.

¹³ First Report at para 23 (b), MR, Tab 2.

¹⁴ *Courts of Justice Act*, RSO 1990, c C43, [s.137\(2\)](#).

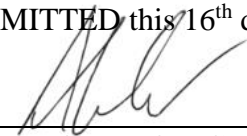
¹⁵ *Sherman Estate v Donovan*, 2021 SCC 25 at [paras 38](#) and [41](#) [*Sherman Estate*]. See also *Sierra Club of Canada v Canada (Minister of Finance)*, [2002] 2 SCR 522 at [para 53](#).

18. The commercial interest in maintaining the integrity of the sale procedure employed by the Receiver and maximizing the value of the Property is an important public interest that would be jeopardized if the Confidential Appendices are not sealed until the Transaction closes. There is no reasonably alternative means to prevent that jeopardy. The benefits of sealing the Confidential Appendices far outweigh the infringement on the open court principle in this case.
19. It is common to seal such commercially sensitive documents in insolvency proceedings.¹⁶

PART IV - CONCLUSION & ORDER SOUGHT

20. The Receiver respectfully requests, and recommends, that this Court make an order substantially in the form of the draft order enclosed in the Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 16th day of April 2024.



THORNTON GROUT FINNIGAN LLP
TD West Tower, Toronto-Dominion Centre
100 Wellington Street West, Suite 3200
Toronto, Ontario M5K 1K7

D.J. Miller (LSO# 34393P)
Tel: (416) 304-0559; Email: djmiller@tgf.ca

Alexander Soutter (LSO#72403T)
Tel: (416) 304-0595; Email: asoutter@tgf.ca

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¹⁶ See, for example: *Elleway Acquisitions Ltd v 4358376 Canada Inc*, 2013 ONSC 7009 at [paras 47 and 48](#); *GE Canada Real Estate Financing Business Property Company v 1262354 Ontario Inc*, 2014 ONSC 1173 at [para 32](#); and *Yukon (Government of) v Yukon Zinc Corporation*, 2022 YKSC 2 at [para 39](#); and *Re Comstock Canada Ltd.*, 2014 ONSC 493 at [para 16](#).

SCHEDULE "A"

No.	Caselaws
1.	<i>Royal Bank v Soundair Corp</i>, 1991 CanLII 2727
2.	<i>Eddie Bauer of Canada, Inc. (Re)</i>, 2009 CanLII 48527
3.	<i>Morgante Canada Corp v Wolfhollow Properties Inc</i>, 2003 CanLII 7759
4.	<i>Kingsett Mortgage Corp v. 30 Roe Investment</i>, Endorsement of Justice Steele dated February 7, 2023
5.	<i>National Trust Co v 1117387 Ontario Inc</i>, 2010 ONCA 340
6.	<i>Sherman Estate v Donovan</i>, 2021 SCC 25
7.	<i>Sierra Club of Canada v Canada (Minister of Finance)</i>, [2002] 2 SCR 522
8.	<i>Elleway Acquisitions Ltd v 4358376 Canada Inc</i>, 2013 ONSC 7009
9.	<i>GE Canada Real Estate Financing Business Property Company v 1262354 Ontario Inc</i>, 2014 ONSC 1173
10.	<i>Yukon (Government of) v Yukon Zinc Corporation</i>, 2022 YKSC 2
11.	<i>Re Comstock Canada Ltd.</i>, 2014 ONSC 493

SCHEDULE “B”
RELEVANT STATUTES

Courts of Justice Act, RSO 1990, c C.43

Documents public

137 (1) On payment of the prescribed fee, a person is entitled to see any document filed in a civil proceeding in a court, unless an Act or an order of the court provides otherwise.

Sealing documents

(2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

Court lists public

(3) On payment of the prescribed fee, a person is entitled to see any list maintained by a court of civil proceedings commenced or judgments entered.

Copies

(4) On payment of the prescribed fee, a person is entitled to a copy of any document the person is entitled to see.

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TD West Tower, Toronto-Dominion Centre
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