

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

**PEAKHILL CAPITAL INC.**

Applicant

- and -

**1000093910 ONTARIO INC.**

Respondent

APPLICATION UNDER SUBSECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED, AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED

**FACTUM OF THE RECEIVER**

June 6, 2024

**BENNETT JONES LLP**

One First Canadian Place  
Suite 3400, P.O. Box 130  
Toronto, Ontario  
M5X 1A4

**Sean Zweig** (LSO# 57307I)

Tel: (416) 777-6254

Email: [zweigs@bennettjones.com](mailto:zweigs@bennettjones.com)

**Aiden Nelms** (LSO#: 74170S)

Tel: (416) 777-4642

Email: [nelmsa@bennettjones.com](mailto:nelmsa@bennettjones.com)

Lawyers for KSV Restructuring Inc., solely in  
its capacity as Court-appointed Receiver and  
not in its personal capacity

**TO: THE SERVICE LIST**

## **PART I: OVERVIEW**

1. On September 13, 2023, the Court granted an order (the “**Receivership Order**”) pursuant to subsection 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, as amended (the “**BIA**”) and section 101 of the Ontario *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended (the “**CJA**”), appointing KSV as Receiver over 1000093910 Ontario Inc. (the “**Debtor**”) and all of the Property (as that term is defined in the Receivership Order), including the property municipally known as 20 Regina Road, Vaughan, Ontario (the “**Real Property**”). The Receivership Order and the Receiver’s appointment became effective on October 2, 2023.
2. The Debtor’s senior secured creditor is Peakhill Capital Inc. (“**Peakhill**”) who made a secured loan to the Debtor in the principal amount of \$19 million (the “**Peakhill Loan**”). The Debtor is indebted to Peakhill for approximately \$20 million, plus interest, costs and expenses which are continuing to accrue.
3. On December 20, 2023, this Court granted an order (the “(the “**Bidding Procedures and Stalking Horse APS Approval Order**”)”, among other things:
  - (a) approving the sale process in respect of the Real Property (the “**Sale Process**”) and the bidding procedures appended as Schedule “A” to the Bidding Procedures and Stalking Horse APS Approval Order (the “**Bidding Procedures**”); and
  - (b) approving the agreement of purchase and sale dated as of November 13, 2023 (the “**Stalking Horse APS**”), among the Receiver, as vendor, and 2557004 Ontario Inc. (the “**Purchaser**”), as purchaser, solely for the purposes of acting as the stalking horse bid in the Sale Process.
4. The Bidding Procedures and Stalking Horse APS Approval Order was appealed by the Debtor (the “**Appeal**”) to the Court of Appeal for Ontario (the “**Court of Appeal**”). The Appeal was dismissed by the Court of Appeal on April 2, 2024.
5. Following the dismissal of the Appeal, the Receiver conducted the Sale Process in accordance with the Sale Process Approval Order, and now brings this motion seeking: (i) an order (the “**Approval and Vesting Order**”), among other things, approving the sale transaction (the

“**Transaction**”) contemplated by Stalking Horse APS the Purchaser (as may be amended, the “**Sale Agreement**”), and vesting in the Purchaser all of the Debtor’s rights, title and interest in and to the property described in the Sale Agreement; and (ii) an order (the “**Distribution and Discharge Order**”), among other things:

- (a) authorizing the Receiver to:
  - (i) first, pay the \$140,000 work fee (the “**Work Fee**”) owing to Jones Lang LaSalle Real Estate Service, Inc. (“**JLL**”) in accordance with the terms of the listing agreement (the “**Listing Agreement**”) by and between JLL and the Receiver;
  - (ii) second, make one or more distributions from the sale proceeds of the Transaction (the “**Sale Proceeds**”) to repay in full the amounts owing to Peakhill in respect of the Debtor’s obligations to it; and
  - (iii) third, following the repayment of Peakhill in full, authorizing the Receiver to make one of more distributions from the Sale Proceeds to partially repay the amounts owing to Zaherali Visram in respect of the Debtor’s obligations to him;
- (b) approving the Second Report of the Receiver dated May 31, 2024 (the “**Second Report**”);
- (c) approving the fees and disbursements of the Receiver and its counsel, Bennett Jones LLP (“**Bennett Jones**”), including the \$150,000 fee accrual (the “**Fee Accrual**”) (as defined below), as detailed in the fee affidavits (together, the “**Fee Affidavits**”) appended to the Second Report;
- (d) discharging the Receiver upon the filing of a certificate with the Court certifying that all outstanding matters in these receivership proceedings (the “**Receivership Proceedings**”) have been completed to the satisfaction of the Receiver (the “**Discharge Certificate**”); and

- (e) releasing and discharging the Receiver, upon the filing of the Discharge Certificate, from any and all liabilities that it now has or may hereafter have by any reason of, or in any way arising out of, its acts or omissions while acting as Receiver, save and except for its gross negligence or willful misconduct.

## **PART II:           FACTS**

6. The facts underlying these proceedings are more fully set out in the First Report of the Receiver dated December 13, 2023 and the Second Report.<sup>1</sup> For this motion, the Receiver is relying upon the Second Report.

7. Capitalized terms not otherwise defined herein have the meanings ascribed to them in the Second Report or the Sale Agreement, as applicable.

### **A. Background and Overview**

8. The Debtor is an Ontario corporation, with its principal asset being the Real Property.<sup>2</sup>

9. The Real Property is an industrial property which has a non-arm's length tenant, Countertop Solutions Inc. ("**Countertop**").<sup>3</sup> Countertop is party to a lease (the "**Lease**") with the Debtor that expires on April 30, 2032 and requires it to pay monthly rent of \$34,375. Rent has not been paid by Countertop since the commencement of the Receivership Proceedings despite several requests and demands by the Receiver.<sup>4</sup>

10. On May 28, 2024, Peakhill, in accordance with the Termination Agreement (re; lease) by and between the Debtor, Countertop and Peakhill dated April 2022, provided Countertop with written notice that the Lease had been terminated and that Countertop was to vacate the premises by June 10, 2024.<sup>5</sup>

11. As previously noted, Peakhill is the Debtor's senior secured creditor and holds a first mortgage on the Real Property (the "**Peakhill Mortgage**"). In addition to Peakhill, Zaherali

---

<sup>1</sup> Second Report of the Receiver dated May 31, 2024 [Second Report].

<sup>2</sup> *Ibid* at section 2.0 at para 1.

<sup>3</sup> *Ibid* at section 2.0 at para 3.

<sup>4</sup> *Ibid* at section 2.0 at para 4.

<sup>5</sup> *Ibid* at section 2.0 at para 6.

Visram has a \$4 million charge (as amended by Instrument No. YR2598469 registered on title to the Real Property) registered on the Real Property subordinate to the Peakhill Mortgage.<sup>6</sup>

12. According to the Debtor, as of October 11, 2023, the Debtor's only unsecured creditor was in respect of property taxes owing to the City of Vaughan for \$162,786. These amounts remain unpaid and will be satisfied with the Sale Proceeds of the Transaction on closing.<sup>7</sup>

13. The Receivership Order was sought and obtained by Peakhill as a result of the Debtor defaulting and breaching the terms of the Peakhill Loan and related security, including the Peakhill Mortgage, by, among other things:

- (a) failing to repay the outstanding amount owing on the Peakhill Loan on its maturity date on May 1, 2023; and
- (b) failing to pay the full monthly interest payments owing on the Peakhill Loan for the month of August 1, 2022.<sup>8</sup>

14. The Receivership Order was obtained on consent and only became effective on October 2, 2023 once the Debtor breached the terms of the Terms for Consent Order for Appointment of Receiver which were appended to the Endorsement of the Honorable Justice S. Lavine dated September 13, 2023.<sup>9</sup>

## **B. The Bidding Procedures and Stalking Horse APS Approval Order and The Court of Appeal**

15. On December 20, 2023, the Court granted the Bidding Procedures and Stalking Horse APS Approval Order which, among other things, approved the Sale Process and related Bidding Procedures.<sup>10</sup> On December 29, 2024, the Debtor served and filed a Notice of Appeal in connection with the Bidding Procedures and Stalking Horse APS Approval Order. Following receipt, the

---

<sup>6</sup> *Ibid* at section 3.1 at paras 1-2.

<sup>7</sup> *Ibid* at section 3.2 at para 1.

<sup>8</sup> The Affidavit of Remy Caruso sworn August 29, 2023 at para 13.

<sup>9</sup> Second Report, *supra* note 1 at section 1.0 at para 1.

<sup>10</sup> *Ibid* at section 1.0 at para 4.

Receiver advised the Debtor that it was of the view that leave to appeal was required. As a result, on January 3, 2024, the Debtor brought a motion seeking:

- (a) the advice and directions of the Court of Appeal as to whether leave to appeal the Bidding Procedures and Stalking Horse APS Approval Order was required; and
- (b) if leave was required, an order granting leave to appeal.<sup>11</sup>

16. On January 24, 2024, the Court of Appeal determined that the Debtor had an automatic right of appeal (the “**Appeal Motion Decision**”). On April 2, 2024, the Court of Appeal dismissed the Appeal.<sup>12</sup>

### **C. The Sale Process and the Transaction**

17. As previously noted, the principal asset of the Debtor is the Real Property.<sup>13</sup>

#### **(i) The Sale Process**

18. The Bidding Procedures and Stalking Horse APS Approval Order approved the retention of Jones Lang LaSalle (“**JLL**”) as the listing agent for the Real Property.<sup>14</sup> JLL carried out the Sale Process in accordance with the Bidding Procedures and Stalking Horse APS Approval Order which efforts included, among other things, distributing a teaser (the “**Teaser**”) to potential purchasers which included a bid process letter and a form of non-disclosure agreement (an “**NDA**”) that interested parties were required to sign in order to obtain access to a virtual data room (the “**VDR**”).<sup>15</sup>

---

<sup>11</sup> *Ibid* at section 4.1 at para 7.

<sup>12</sup> *Ibid* at section 4.1 at paras 8 and 9.

<sup>13</sup> *Ibid* at section 1.0 at para 2.

<sup>14</sup> *Ibid* at section 1.0 at para 4(b).

<sup>15</sup> *Ibid* at section 4.2 at para 1.

19. As part of the Bidding Procedures and Stalking Horse APS Approval Order, the Court approved a 30-day process for the exposure of the Real Property. Accordingly, the bid deadline would have been February 8, 2024 had there been no Appeal. As a result of the intervening Appeal and the immediate cessation of all Sale Process efforts following the Appeal Motion Decision, the bid deadline contemplated under the Sale Process was extended, following the dismissal of the Appeal, to May 7, 2024 (the “**Bid Deadline**”) to remain consistent with the timeline set out in the Bidding Procedures and Stalking Horse APS Approval Order.<sup>16</sup>

20. More than 5,000 parties were sent the Teaser and the NDA and 37 parties executed the NDA and were provided access to the VDR to perform additional due diligence. Unfortunately, despite JLL’s efforts, no Qualified Bids were received prior to the Bid Deadline and, as a result, on May 8, 2024, the Purchaser was deemed to be the Successful Bidder in the Sale Process.<sup>17</sup>

**(ii) The Transaction**

21. A summary of the Transaction is as follows:

- (a) Purchaser: 2557904 Ontario Inc.;
- (b) Purchased Assets: all of the Debtor’s right, title and interest in and to the property described in the Sale Agreement;
- (c) Purchase Price: \$24,255,000, plus all applicable Taxes payable in respect of the Transaction;

---

<sup>16</sup> *Ibid* at section 4.2 at paras 2 and 3.

<sup>17</sup> *Ibid* at section 4.3 at paras 1 and 2.



- (d) Deposit: \$2,400,000.00;
- (e) Representation and Warranties: consistent with the standard terms of an insolvency transaction, i.e. on an “as is, where is” basis, with limited representations and warranties;
- (f) Closing: the first Business Day which is five (5) Business Days after the receipt of the Approval and Vesting Order, or such other date as agreed in writing by the Parties;
- (g) Vacant Possession: on Closing, vacant possession of the Real Property will be provided to the Purchaser, subject to the Permitted Encumbrances; and
- (h) Material Conditions: the only material condition is Court approval.<sup>18</sup>

#### **D. The Distribution and Discharge Order**

##### **(i) The Proposed Distributions**

22. The Distribution and Discharge Order contemplates, among other things, authorizing the Receiver to make one or more distributions to: (i) pay the Work Fee owing to JLL in accordance with the terms of the listing agreement (ii) repay the amounts owing to Peakhill in respect of the Debtor’s obligations to it; and (iii) partially repay the amounts owing to Zaherali Visram in respect of the Debtor’s obligations to him (collectively, the “**Proposed Distributions**”).<sup>19</sup>

---

<sup>18</sup> *Ibid* at section 5.1 at para 2.

<sup>19</sup> *Ibid* at section 1.1 at para 1(e)(ii).

23. As set out above, per the Bidding Procedures and Stalking Horse APS Approval Order, the Court approved the retention of JLL as the listing agent for the Real Property. Pursuant to the Listing Agreement between JLL and the Receiver, JLL is entitled to a Work Fee of \$140,000.<sup>20</sup>

24. As previously noted, the senior secured creditor of the Debtor is Peakhill.<sup>21</sup> In addition to Peakhill, Zaherali Visram has a \$4 million charge (as amended by Instrument No. YR2598469 registered on title to the Real Property) registered against the Real Property.<sup>22</sup> The Receiver's counsel has provided opinions to the Receiver that each of Peakhill's and Zaherali Visram's security is valid, subject to the usual qualifications and assumptions.<sup>23</sup>

**(ii) *The Discharge of the Receiver***

25. The Receiver is requesting that it be discharged upon the filing of the Discharge Certificate as, subject to completion of the Transaction and distributing the proceeds therefrom, its duties and responsibilities under the Receivership Order will have been materially completed.<sup>24</sup>

**(iii) *Approval of Activities, the Second Report and Fees and Disbursements***

26. In addition to seeking approval of the Second Report<sup>25</sup> and the activities of the Receiver referred to therein, the Receiver is also seeking approval of the fees and disbursements incurred by it and its counsel as set out in the Fee Affidavits.<sup>26</sup> Additionally, the Receiver and its counsel

---

<sup>20</sup> *Ibid* at section 1.0 at para 4(b).

<sup>21</sup> *Ibid* at section 3.1 at para 1.

<sup>22</sup> *Ibid* at section 3.1 at para 2.

<sup>23</sup> *Ibid* at section 3.1 at paras 3 and 4.

<sup>24</sup> *Ibid* at section 8.0 at para 1.

<sup>25</sup> *Ibid* at section 1.1 at para 1(e)(ii).

<sup>26</sup> *Ibid* at section 7.0 at para 2.

are seeking approval of the Fee Accrual which approval will avoid the need for a separate fee approval motion in the future and thereby minimize further professional fees.<sup>27</sup>

### **PART III: ISSUES**

27. The sole issues on this motion are whether the Approval and Vesting Order and the Distribution and Discharge Order should be granted.

### **PART IV: LAW AND ARGUMENT**

#### **A. The Approval and Vesting Order**

##### **1. The Transaction Should be Approved**

28. Section 100 of the CJA, as amended, authorizes this Court to grant an order vesting “in any person an interest in real or personal property that the Court has authority to order be conveyed”.<sup>28</sup> Similarly, subsection 243(1) of the BIA vests this Court with jurisdiction to “grant a vesting order vesting property in a purchaser”.<sup>29</sup> Additionally, paragraph 3(m) of the Receivership Order empowers and authorizes the Receiver to “[...] apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property.”<sup>30</sup>

---

<sup>27</sup> *Ibid* at section 7.0 at para 5.

<sup>28</sup> *Courts of Justice Act*, RSO 1990, c. C.43 s 100; *Elleway Acquisitions Limited v 4358376 Canada Inc*, 2013 ONSC 7009 at para 30 [Elleway].

<sup>29</sup> *Third Eye Capital Corporation v Ressources Dianor Inc./Dianor Resources Inc*, 2019 ONCA 508 at para 87 [Third Eye]; *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3 s 243(1).

<sup>30</sup> *In the Matter of the Receivership Proceedings of 1000093910 Ontario Inc.* (September 13, 2023), Newmarket, CV-23-00004031-0000 (Receivership Order) at para 3(m) [Receivership Order].

29. The principles to be applied when determining whether to approve a sale transaction were articulated by the Ontario Court of Appeal in *Royal Bank of Canada v Soundair Corp.*

(“*Soundair*”):

- (a) whether the party made a sufficient effort to obtain the best price and to not act improvidently;
- (b) the interests of all parties;
- (c) the efficacy and integrity of the process by which the party obtained offers; and
- (d) whether the working out of the process was unfair.<sup>31</sup>

30. Deference is to be afforded to a receiver respecting its proposed sale process. Absent a violation of the *Soundair* principles or other exceptional circumstances, the court should uphold the business judgment of the receiver, as its court officer.<sup>32</sup>

31. The proposed Transaction satisfies the *Soundair* principles given that:

- (a) the Court-approved Sale Process was conducted by the Receiver in accordance with the Bidding Procedures and Stalking Horse APS Approval Order and provided for a fair, transparent and thorough canvassing of the market for the Real Property;
- (b) the market was widely canvassed using several traditional marketing techniques to sell real estate, including direct solicitation of prospective purchasers by JLL;

---

<sup>31</sup> [\*Royal Bank of Canada v Soundair Corp.\*, \[1991\] 46 OAC 321](#) at para 16; [\*Elleway\*](#) at para 31; [\*Home Trust Co v 2122775 Ontario Inc.\*, 2014 ONSC 1039](#) at para 11; [\*Romspen Investment Corp v 6176666 Canada Ltée\*, 2012 ONSC 1727](#) at para 18 [*Romspen*].

<sup>32</sup> [\*Crown Trust Co. et al. v. Rosenberg et al.\*, 1986 CanLII 2760 \(ON SC\)](#) at para 83 [*Crown Trust*].

- (c) the Sale Agreement is the highest and best offer obtained for the Real Property through the Sale Process;
- (d) JLL, an experienced and reputable real estate broker, is familiar with the local real estate market and is of the view that the Transaction is the best one available in these circumstances;
- (e) the Receiver believes that the approval of the Sale Agreement and the Transaction contemplated thereunder is in the best interests of the Debtor and all of its stakeholders including, among others, its principal secured creditor Peakhill; and
- (f) Peakhill is supportive of the Transaction.<sup>33</sup>

## **2. The Court has Jurisdiction to Grant the Approval and Vesting Order**

32. In *Third Eye Capital Corporation v Ressources Dianor Inc./Dianor Resources Inc.*, the Ontario Court of Appeal clarified that a court's jurisdiction under section 243(1) of the BIA to authorize a receiver to "take any other action that the court considers advisable" includes the authority to grant a vesting order vesting property in a purchaser free and clear of encumbrances and extinguishing liabilities.<sup>34</sup>

33. In granting approval and vesting orders, courts have made clear that the recommendation of the Court-appointed receiver in respect of the proposed sale transaction should only be ignored in exceptional circumstances.<sup>35</sup> As previously noted, the Receiver believes that the approval of the

---

<sup>33</sup> Second Report, *supra* note 1 at section 5.2 para 1.

<sup>34</sup> *Third Eye*, *supra* note 29 at para 63.

<sup>35</sup> *Romspen*, *supra* note 31 at para 18, citing to *Crown Trust*, *supra* note 32 at paras 80 and 81.

Sale Agreement and the Transaction contemplated thereunder is in the best interests of the Debtor and its stakeholders.<sup>36</sup>

## **B. The Distribution and Discharge Order**

### **1. The Receiver Should be Authorized to Make the Proposed Distributions**

34. The Receiver is seeking authorization to make the Proposed Distributions from the Sale Proceeds as is set out in the Second Report. Orders granting distributions are routinely granted by Canadian Courts in insolvency proceedings and receiverships.<sup>37</sup>

35. While the Court in *Abitibi* dealt with an interim distribution pursuant to a proceeding under the *Companies Creditors' Arrangement Act*, R.S.C. 1985, c. C-36, Justice Gascon (as he then was) considered several factors in assessing whether to approve an interim distribution that are equally applicable to a distribution in a receivership proceeding. Those factors include, among others: (i) whether the payee's security is valid and enforceable; (ii) the amounts owed to the payee exceed the distribution; and (iii) the distribution would result in significant interest savings.<sup>38</sup>

36. JLL, whose retention was approved by the Court in connection with Bidding Procedures and Stalking Horse APS Approval Order, is entitled to its Work Fee in accordance with the terms of the Listing Agreement.<sup>39</sup>

37. Each of Peakhill and Zaherali Visram hold security over the Real Property which is subject to the Transaciton. The Receiver's counsel has provided an opinion that each of Peakhill's and Zaherali Visram's security is valid, subject to the usual qualifications and assumptions.<sup>40</sup> To the

---

<sup>36</sup> Second Report, *supra* note 1 at section 5.2 para 1.

<sup>37</sup> *AbitibiBowater inc. (Arrangement relatif à)*, 2009 QCCS 6461 (CanLII) at paras. 70-75 [*Abitibibowater*].

<sup>38</sup> *Abitibibowater* at para 75

<sup>39</sup> Second Report, *supra* note 1 at section 1.0 at para 4(b).

<sup>40</sup> *Ibid* at section 3.1 at paras 3 and 4.

Receiver's knowledge, the only unsecured creditor of the Debtor as of October 11, 2023 was the City of Vaughan in respect of property taxes owing, which property taxes will be paid in connection with the closing of the Transaction.<sup>41</sup>

38. The Receiver respectfully submits that the Proposed Distribution are appropriate in the circumstances and should be authorized in accordance with the proposed Distribution and Discharge Order.<sup>42</sup>

39. The Receiver notes that distributions are expressly contemplated by the Commercial List Model Discharge Order.

## **2. The Court Should Approve the Second Report and the Receiver's Activities Described Therein**

40. The Court has the inherent jurisdiction to review and approve the activities of a court appointed receiver as set out in the receiver's reports.<sup>43</sup>

41. It has become common practice for court officers to bring motions to seek approval of their reports and the activities set out therein.<sup>44</sup> Court approval, among other things, allows the court officer to bring its activities before the court and presents an opportunity to address concerns of stakeholders, while enabling the court to satisfy itself that the court officer's activities have been conducted in a prudent and diligent matter.<sup>45</sup>

---

<sup>41</sup> *Ibid* at section 3.2 at para 1.

<sup>42</sup> *Ibid* at section 6.0 at para 2.

<sup>43</sup> *Bank of America Canada v. Willam Investments Ltd.*, 1996 CanLII 2782 (ON CA).

<sup>44</sup> *Target Canada Co. (Re)*, 2015 ONSC 7574 at para 2 [*Target Canada*]; *Triple-I Capital Partners Limited v 12411300 Canada Inc.*, 2023 ONSC 3400 at paras 65 and 66 [*Triple-I Capital*].

<sup>45</sup> *Target Canada* at para 23; *Triple-I Capital* at paras 65-66.

42. The activities of the Receiver described in the Second Report were all necessary and undertaken in good faith pursuant to the Receiver's duties and powers set out in the Receivership Order and were in each case in the best interest of the stakeholders of the Debtor.

43. The Receiver therefore respectfully submits that the Second Report and the activities described therein should be approved.

44. The Receiver notes that approval of the reports of the receiver, along with its activities referred to therein, is expressly contemplated by the Commercial List Model Discharge Order.

### **3. The Court Should Approve the Fees and Disbursements of the Receiver and its Counsel**

45. The Receiver is seeking approval of the professional fees and disbursements incurred by it and its legal counsel as well as the Fee Accrual, each as described in greater detail in the Fee Affidavits attached to the Second Report.<sup>46</sup>

46. The Receivership Order provides that the Receiver and its counsel shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges unless otherwise ordered by the Court on the passing of accounts.<sup>47</sup>

47. In determining whether to approve the accounts of a Court-appointed receiver and its counsel, the Court will consider the overall value contributed, taking into account (a) the nature, extent and value of the assets, (b) the complications encountered, (c) the degree of assistance provided by the debtor, (d) the time spent, (e) the receiver's knowledge, experience and skill, (f) the diligence and thoroughness displayed, (g) the responsibilities assumed, (h) the results of the

---

<sup>46</sup> Second Report, *supra* note 1 at section 7.0 at para 2-4.

<sup>47</sup> [Receivership Order](#), *supra* note 30 at para 18.



receiver's efforts and (i) the cost of comparable services when performed in a prudent and economical manner.<sup>48</sup>

48. On a motion to pass accounts, "[...] it is evident that the fairness and reasonableness of the fees of a receiver and its counsel are the stated lynchpins."<sup>49</sup>

49. The fees and disbursements are fair and reasonable and have been properly incurred, specifically when bearing in mind the considerations set forth in paragraph 47, and the approval of the Fee Accrual will avoid the need for a separate fee approval motion in the future and minimize further professional fees. The hourly rates charged by the Receiver and its counsel are consistent with comparable firms practicing in the area of insolvency in the applicable market.<sup>50</sup>

#### **4. The Discharge of the Receiver and the Release of the Receiver Should Be Approved**

50. Subject to completion of the Transaction and distributing the proceeds therefrom, the Receiver's duties and responsibilities under the Receivership Order will have been materially completed.<sup>51</sup> The Receiver respectfully submits that it is appropriate to discharge the Receiver upon the filing of the Discharge Certificate.

51. The Receiver respectfully submits that it is also appropriate to grant a limited release in favour of it. In *Pinnacle v Kraus*, this Court granted an Order discharging and releasing a court-appointed receiver. In doing so, the Court noted that such a release is expressly contemplated by

---

<sup>48</sup> *Bank of Nova Scotia v Diemer*, 2014 ONCA 851 at paras 33 [*Diemer*].

<sup>49</sup> *Diemer* at para 35.

<sup>50</sup> Second Report, *supra* note 1 at section 7.0 at para 7.

<sup>51</sup> *Ibid* at section 8.0 at para 1.

the Commercial List Model Discharge Order and that in the absence of improper or negligent conduct on the part of the Receiver, such releases should be granted.<sup>52</sup>

52. Throughout the Receivership Proceedings, the Receiver has acted prudently and contributed substantially to the administration of these proceedings, with the activities of the Receiver having been thoroughly disclosed throughout. Accordingly, the Receiver respectfully submits that the requested release is reasonable in the circumstances, will provide the Receiver with finality, and should be granted.

**PART V: RELIEF REQUESTED**

53. The Receiver requests that this Court grant the proposed form of Approval and Vesting Order and Distribution and Discharge Order.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

*Bennett Jones LLP*

June 6, 2024

---

<sup>52</sup> [\*Pinnacle v Kraus\*, 2012 ONSC 6376](#) at para. 47.

## SCHEDULE A – LIST OF AUTHORITIES

### *Cases Cited*

1. [Elleway Acquisitions Limited v 4358376 Canada Inc., 2013 ONSC 7009](#)
2. [Third Eye Capital Corporation v Ressources Dianor Inc./Dianor Resources Inc., 2019 ONCA 508](#)
3. [Royal Bank of Canada v Soundair Corp., \[1991\] 46 OAC 321](#)
4. [Home Trust Co v 2122775 Ontario Inc., 2014 ONSC 1039](#)
5. [Romspen Investment Corp v 6176666 Canada Ltée, 2012 ONSC 1727](#)
6. [Crown Trust Co. et al. v. Rosenberg et al., 1986 CanLII 2760 \(ON SC\)](#)
7. [AbitibiBowater inc. \(Arrangement relatif à\), 2009 QCCS 6461 \(CanLII\)](#)
8. [Bank of America Canada v. Willann Investments Ltd., 1996 CanLII 2782 \(ON CA\)](#)
9. [Target Canada Co. \(Re\), 2015 ONSC 7574](#)
10. [Triple-I Capital Partners Limited v 12411300 Canada Inc., 2023 ONSC 3400](#)
11. [Bank of Nova Scotia v Diemer, 2014 ONCA 851](#)
12. [Pinnacle v Kraus, 2012 ONSC 6376](#)

### *Materials and Court Orders*

1. [In the Matter of the Receivership Proceedings of 1000093910 Ontario Inc. \(September 13, 2023\), Newmarket, CV-23-00004031-0000 \(Receivership Order\)](#)

## **SCHEDULE B – STATUTES RELIED ON**

### **Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3**

#### **Section 243**

##### **Court may appoint receiver**

(1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

- (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
- (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
- (c) take any other action that the court considers advisable.

##### **Restriction on appointment of receiver**

(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

- (a) the insolvent person consents to an earlier enforcement under subsection 244(2); or
- (b) the court considers it appropriate to appoint a receiver before then.

##### **Definition of receiver**

(2) Subject to subsections (3) and (4), in this Part, receiver means a person who

- (a) is appointed under subsection (1); or
- (b) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under
  - (i) an agreement under which property becomes subject to a security (in this Part referred to as a “security agreement”), or
  - (ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

**Definition of receiver — subsection 248(2)**

(3) For the purposes of subsection 248(2), the definition receiver in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

**Trustee to be appointed**

(4) Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

**Place of filing**

(5) The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

**Orders respecting fees and disbursements**

(6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

**Meaning of disbursements**

(7) In subsection (6), disbursements does not include payments made in the operation of a business of the insolvent person or bankrupt.

**Courts of Justice Act, R.S.O. 1990, c. C.43****Section 100****Vesting Orders**

A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.

**Section 101****Injunctions and receivers**

101 (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

**Terms**

(2) An order under subsection (1) may include such terms as are considered just.

**PEAKHILL CAPITAL INC.**

-and-

**1000093910 ONTARIO INC.**

Applicant

Respondent

Court File No.: CV-23-00004031-0000

***ONTARIO***  
**SUPERIOR COURT OF JUSTICE**

Proceedings commenced at Newmarket

**FACTUM OF THE RECEIVER**

**BENNETT JONES LLP**

One First Canadian Place  
Suite 3400, P.O. Box 130  
Toronto, Ontario  
M5X 1A4

**Sean Zweig** (LSO# 57307I)

Tel: (416) 777-6254

Email: [zweigs@bennettjones.com](mailto:zweigs@bennettjones.com)

**Aiden Nelms** (LSO#: 74170S)

Tel: (416) 777-4642

Email: [nelmsa@bennettjones.com](mailto:nelmsa@bennettjones.com)

Lawyers for KSV Restructuring Inc., solely in its capacity as Court-appointed Receiver and not in its personal capacity