

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

BETWEEN:

**BANK OF MONTREAL**

Applicant

- and -

**2TH INC. and DR. MISLAV PAVELIC DENTISTRY PROFESSIONAL CORPORATION**

Respondent

**FACTUM OF THE RECEIVER, KSV RESTRUCTURING INC.  
(SALE TRANSACTION APPROVAL)**

March 15, 2024

**RECONSTRUCT LLP**  
Royal Bank Plaza, South Tower  
200 Bay Street  
Suite 2305, P.O. Box 120  
Toronto, ON M5J 2J3

**Sharon Kour** LSO No. 58328D  
[skour@reconllp.com](mailto:skour@reconllp.com)  
Tel: 416.613.8283

**Jared S. Rosenbaum** LSO No. 74769U  
[jrosenbaum@reconllp.com](mailto:jrosenbaum@reconllp.com)  
Tel: 416.613.8284

Lawyers for KSV Restructuring Inc.

**TO: THE SERVICE LIST**

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## **PART I – OVERVIEW**

1. On October 13, 2023, the debtors' senior secured creditor the Bank of Montreal ("**BMO**"), sought and obtained from the Ontario Superior Court of Justice (Commercial List) (the "**Court**") an Order (the "**Receivership Order**") appointing KSV Restructuring Inc. ("**KSV**") as Receiver of the all of the assets, undertakings and properties (collectively, the "**Property**") of 2th, Inc. ("**2th**") and Dr. Mislav Pavelic Dentistry Professional Corporation ("**Pavelic DPC** and together with 2th, the "**Debtors**").<sup>1</sup>
2. On January 8, 2024, the Court issued a sale process order (the "**Sale Process Order**"), pursuant to which the Receiver was authorized to conduct a sale process (the "**Sale Process**") for all or part of the Debtors' Property and/or business.<sup>2</sup>
3. The Receiver conducted the Sale Process in accordance with the Sale Process Order. The deadline for submission of bids was February 12, 2024.<sup>3</sup> Pursuant to the Sale Process, Namrita Harchandani Dentistry Professional Corporation (the "**Purchaser**") was selected as the successful bidder.
4. On or about February 27, 2024, the Receiver and the Purchaser executed a definitive asset purchase agreement (the "**APA**").<sup>4</sup> The APA is conditional upon the issuance of an approval and vesting order ("**AVO**").<sup>5</sup> Among other things, the APA provides that the AVO must approve the transaction contemplated by the APA and vest the assets of the Debtors in the Purchaser free and clear of all encumbrances.

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<sup>1</sup> Second Report of the Receiver dated March 12, 2024, [s. 1.0 at para 1](#) ["Second Report"].

<sup>2</sup> Sale Process Order of Justice Wilton-Siegel dated January 8, 2024; Second Report, [s. 1.0 at para 3](#).

<sup>3</sup> Second Report, s. [3.1 at para 2\(c\)](#).

<sup>4</sup> Second Report, s. [1.1 at para 1\(c\)](#).

<sup>5</sup> Second Report, s. [3.3 at para 1\(b\)](#).

5. Accordingly, the Receiver brings this motion for:
- (a) the AVO, which among other things:
    - (i) approves the transaction (the “**Transaction**”) between the Receiver and the Purchaser for substantially all of the property, assets and undertakings of the Debtors (the “**Purchased Assets**”); and
    - (ii) vests in the purchaser all of the Debtors’ right, title and interest in the Purchased Assets, upon delivery by the Receiver to the Debtors and the Purchaser of a certificate in the form attached as Schedule “A” to the AVO (the “**Receiver’s Certificate**”); and
  - (b) an ancillary Order (“**Ancillary Order**”), which among other things:
    - (i) approves the Second Report of the Receiver dated March 12, 2024 (the “**Second Report**”) and the activities and conduct of the Receiver described therein;
    - (ii) discharges the Receiver upon the filing of the Receiver’s Certificate certifying the closing of the Transaction;
    - (iii) seals the confidential appendices to the Receiver’s Second Report until the closing of the Transaction; and
    - (iv) approves the fees and disbursements of the Receiver and its counsel, Reconstruct LLP (“**Reconstruct**”), up to and including February 29, 2024, plus an accrual of \$50,000.00 for fees incurred or to be incurred to the completion of these proceedings.
6. The proposed Transaction will maximize the value of the company’s business and assets and preserve approximately 12 jobs. The Receiver is presently unaware of any opposition to the requested relief.

## PART II – FACTS

7. The Debtors operate a dental clinic in Toronto, Ontario. 2th owns substantially all of the clinic's physical assets, whereas Pavelic DPC owns the patient records and physical property.<sup>6</sup> The clinic continues to operate during these receivership proceedings in the ordinary course.<sup>7</sup>

8. The company conducted a sale process prior to the commencement of the receivership proceedings.<sup>8</sup> That process did not result in acceptance of an offer.<sup>9</sup> Ultimately, the Receiver brought a motion to have the Sale Process approved by the Court, which Order was granted by Wilton-Siegel J on January 8, 2024.<sup>10</sup>

9. The Sale Process was designed to widely market the clinic and include potentially interested parties (the "**Potential Bidders**"), including other dentists and consolidators of dental practices that had contacted the Receiver and parties identified by the Receiver.<sup>11</sup>

10. The market was strategically and sufficiently canvassed for potential purchasers. The Receiver distributed an interest solicitation letter to over 60 Potential Bidders, 11 of whom signed a confidentiality agreement in order to obtain access to a virtual data room containing information concerning the Debtors' business.<sup>12</sup> Additionally, the Receiver facilitated site visits for Potential Bidders as requested.<sup>13</sup>

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<sup>6</sup> Second Report, [s. 2.0 at para 3.](#)

<sup>7</sup> Second Report, [s. 2.0 at para 2.](#)

<sup>8</sup> Second Report, [s. 3.1 at para 1.](#)

<sup>9</sup> Second Report, [s. 3.1 at para 1.](#)

<sup>10</sup> Second Report, [s. 3.1 at para 1.](#)

<sup>11</sup> Second Report, [s. 3.1 at para 2.](#)

<sup>12</sup> Second Report, [s. 3.1 at para 2.](#)

<sup>13</sup> Second Report, [s. 3.1 at para 2.](#)

11. Five Potential Bidders submitted offers by the deadline of February 12, 2024.<sup>14</sup>  
The Purchaser was the successful bidder.

12. As stated above at para 4, on February 27, 2024, KSV and the Purchaser executed the APA.

13. The key terms of the APA are as follows:

- (a) Purchaser: A professional corporation owned by Dr. Harchandani, one of the dentists who practices at the clinic.<sup>15</sup>
- (b) Purchase Price: The Receiver recommends that the purchase price be sealed pending closing.<sup>16</sup>
- (c) Purchased Assets: All of the Receiver's and Debtors' right, title and interest in the assets set out in Section 2.1 of the APA.<sup>17</sup>
- (d) Closing Date: Five business days following the date of the issuance of the AVO, or such other date as may be agreed in writing between the Receiver and the Purchaser.<sup>18</sup>
- (e) Conditions: the only material conditions precedent to the Transaction are:
  - (i) on or prior to closing, the landlord for the clinic must provide its written consent to the assignment of the lease to the Purchaser; and
  - (ii) the granting of the proposed AVO.<sup>19</sup>

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<sup>14</sup> Second Report, [s. 3.2 at para 1.](#)

<sup>15</sup> Second Report, [s. 3.3 at para 1.](#)

<sup>16</sup> Second Report, [s. 3.3 at para 1.](#)

<sup>17</sup> Second Report, [s. 3.3 at para 1.](#)

<sup>18</sup> Second Report, [s. 3.3 at para 1.](#)

<sup>19</sup> Second Report, [s. 3.3 at para 1.](#)

- (f) Other: The APA is consistent with standard insolvency transactions, i.e., to be completed on an “as is, where is” basis, without any material representations or warranties.<sup>20</sup>

14. The Receiver has corresponded with the landlord and requested it advise what information it requires to provide its consent.<sup>21</sup> The Receiver is hopeful that such consent will be provided; however, if the landlord does not respond or agree to the lease assignment, the Receiver will seek a Court order to assign the lease and facilitate closing of the Transaction.<sup>22</sup>

### **PART III – ISSUES**

15. The issues to be determined on this motion are whether this Court should:

- (a) authorize and approve the Transaction contemplated in the APA;
- (b) seal the confidential appendices to the Receiver’s Second Report pending closing of the Transaction; and
- (c) approve the activities and fees of the Receiver and its counsel and discharge the Receiver upon filing of its Receiver’s Certificate.

### **PART IV – LAW & ARGUMENT**

#### **A. The APA Should Be Approved**

16. The APA is conditional on the granting of the AVO.

17. When considering whether to approve a sale transaction involving an insolvent debtor, courts have relied on the factors set out by the Ontario Court of Appeal in *Royal*

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<sup>20</sup> Second Report, [s. 3.3 at para 1.](#)

<sup>21</sup> Second Report, [s. 3.3 at para 2.](#)

<sup>22</sup> Second Report, [s. 3.3 at para 2.](#)

*Bank of Canada v Soundair Corp*<sup>23</sup>, which specifically address sales by receivers but apply in the broader insolvency context to any sale of a debtor's assets:

- (a) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;
- (b) whether the interests of all parties have been considered;
- (c) the integrity and efficacy of the process for obtaining offers; and
- (d) whether there has been unfairness in the working out of the process.

18. The *Soundair* principles are satisfied:

- (a) **Sale process was reasonable and not unfair:** Assessing the reasonableness of a sale process does not require the Court to examine in minute detail all of the circumstances leading up to the acceptance of a particular offer.<sup>24</sup> The Court should merely be satisfied that the Receiver has not acted improvidently. Here, the comprehensive marketing process undertaken by the Receiver involved contacting over 60 Potential Bidders and provided sufficient time for Potential Bidders to conduct due diligence and adequately assess the sale opportunity.<sup>25</sup> Further, the APA is the product of negotiations undertaken between the Receiver and the Purchaser;
- (b) **Receiver applied for approval of the Sale Process:** The Receiver applied for court approval of the Sale Process and obtained the Sale Process Order;

<sup>23</sup> [Royal Bank of Canada v. Soundair Corp.](#) (1991), 1991 CarswellOnt 205.

<sup>24</sup> [Royal Bank of Canada v. Soundair Corp.](#) (1991), 1991 CarswellOnt 205 at paras 48-49 (ONCA).

<sup>25</sup> Second Report, [s. 3.1 at para 2.](#)

- (c) **Receiver filed a report:** In support of the relief sought in this motion, the Receiver has filed the Second Report. The Receiver is of the view that the Sale Process was commercially reasonable and appropriate in the circumstances, and the Transaction represents the greatest recovery available in the circumstances<sup>26</sup>, providing for continuity of the clinic and preservation of employment;
- (d) **Creditors were consulted:** The Debtors' key secured creditor, BMO, supports the Transaction<sup>27</sup>;
- (e) **Purchase price is fair and reasonable:** To establish this criterion, the Receiver must demonstrate that sufficient effort has been made to obtain the best price and that the Receiver has not acted improvidently based on the information available at the time the offer is accepted.<sup>28</sup> The decision to accept a particular offer is a matter of business judgment that should not be interfered with lightly in the absence of evidence of imprudence or unfairness.<sup>29</sup> The APA represents the highest bid received within the Sale Process and the Receiver believes that the commercial terms of the APA are reasonable.

19. Based on the foregoing, it is the informed business judgement of the Receiver that the APA is in the best interests of the Debtors and their stakeholders. In the absence of

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<sup>26</sup> Second Report, [s. 3.5 at para 1.](#)

<sup>27</sup> Second Report, [s. 3.5 at para 1.](#)

<sup>28</sup> *Terrace Bay Pulp Inc. (Re)*, 2012 ONSC 4247 at [paras 50-55.](#)

<sup>29</sup> *Royal Bank of Canada v. Soundair Corp.* (1991), 1991 CarswellOnt 205 at paras 21 and 30-31 (ONCA); *Terrace Bay Pulp Inc. (Re)*, 2012 ONSC 4247 [at paras 45](#) and [52-54.](#)

any indication that the Receiver has acted improvidently, its business judgment is entitled to deference by this Court.

## **B. The Ancillary Order Should Be Approved**

### **i. The Sealing Order Should be Granted**

20. The Receiver is seeking a sealing order in respect of certain offer summaries, and the purchase price and deposit set out in the APA until the Transaction closes. In this regard, the Court has been provided with confidential appendices to KSV's Second Report detailing these matters.

21. Courts commonly grant sealing orders in insolvency proceedings relating to information regarding the sales process.<sup>30</sup> The rationale for granting sealing orders in respect of the purchase price contained in an agreement of purchase and sale is that it allows realizations to be maximized for stakeholders in the event the transaction is not completed.<sup>31</sup>

22. The Supreme Court of Canada recently articulated the test for the granting of sealing orders in *Sherman Estate v Donovan*.<sup>32</sup> Writing for the Court, Kasirer J stated that an application seeking to obtain a sealing order must establish that "(1) court openness poses a serious risk to an important public interest; (2) the order sought is necessary to prevent this serious risk to the identified interest because [reasonable] alternative

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<sup>30</sup> Carole J Hunter and Toni Vanderlaan, Signed, Sealed, Delivered: An Analysis of Sealing Orders in Insolvency Proceedings, 2023 21 *Annual Review of Insolvency Law*, 2023 CanLIIDocs 3084, <https://canlii.ca/t/7n8dz> at s. III(2)(i).

<sup>31</sup> Carole J Hunter and Toni Vanderlaan, Signed, Sealed, Delivered: An Analysis of Sealing Orders in Insolvency Proceedings, 2023 21 *Annual Review of Insolvency Law*, 2023 CanLIIDocs 3084, <https://canlii.ca/t/7n8dz> at s. III(2)(i).

<sup>32</sup> [\*Sherman Estate v Donovan\*, 2021 SCC 25.](#)

measures will not prevent this risk; and (3) as a matter of proportionality, the benefits of the order outweigh its negative effects”.<sup>33</sup>

23. Here, the *Sherman Estate* test is met. It is in the public interest for the parties to preserve the ability to maximize value until the Transaction closes, and no alternative measures will prevent this risk. No party will be prejudiced if the purchase price and deposit information contained in the APA is sealed at this time. The Receiver is of the view that the salutary effects of sealing such information from the public record greatly outweigh the deleterious effects of doing so in the circumstances.<sup>34</sup>

**ii. The Fees and Activities of the Receiver and its Counsel Should Be Approved**

24. 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 interests of the company and its stakeholders generally.

25. The jurisdiction of this Court to pass the accounts of the Receiver and its counsel is confirmed in the Receivership Order, which directs that: “the Receiver and its legal counsel shall pass its accounts from time to time, and for this purpose the accounts of the Receiver and its legal counsel are hereby referred to a judge of the Commercial List of the Superior Court of Justice”.<sup>35</sup>

26. In accordance with the Receivership Order, the Receiver seeks the approval of the professional fees incurred by it and its legal counsel, Reconstruct, including their estimate

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<sup>33</sup> *Sherman Estate v Donovan*, 2021 SCC 25 at [para 38](#).

<sup>34</sup> Second Report, [s. 3.4 at para 3](#).

<sup>35</sup> [Receivership Order](#) of Justice Steele dated October 13, 2023.

fees to complete this proceeding. In particular, the following fees and disbursement have been or are anticipated to be incurred in this proceeding:

- (a) As set out in the Fee Affidavit of Mitch Vininsky sworn March 12, 2023, for the period from September 15, 2023 to February 29, 2024, the Receiver's accounts amounts to \$111,527.00 plus disbursements and taxes at an average hourly rate of \$622.53<sup>36</sup>;
- (b) As set out in the Fee Affidavit of Sharon Kour sworn March 12, 2024, for the period from October 17, 2023 to February 29, 2024, Reconstruct's accounts amounts to \$13,533.70, which is comprised of \$11,343.00 in fees, \$633.72 in disbursements, and \$1,556.98 in HST at an average hourly rate of \$584.70 (exclusive of HST)<sup>37</sup>; and
- (c) In addition to the above-noted fees, the Receiver and Reconstruct seek an accrual of \$50,000.00 for fees to be incurred by the Receiver and Reconstruct to the completion of these proceedings.<sup>38</sup> The total amount of WIP being claimed by Reconstruct during the billing period of March 1 to March 12, 2024 is \$8,073.00 (exclusive of HST).<sup>39</sup>

27. On a motion to pass accounts, the Court must consider the "overriding principle of reasonableness", focusing on the overall value contributed by the Receiver and its counsel. The Court does not engage in a docket-by-docket or line-by-line assessment of the accounts as minute details of each element of a professional services may not be instructive when looked at in isolation.<sup>40</sup> In *Bank of Nova Scotia v. Diemer*, the Ontario

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<sup>36</sup> Affidavit of Mitch Vininsky at [paras 4-5](#), Appendix "F" to the Second Report, MR p. 103.

<sup>37</sup> Affidavit of Sharon Kour at [paras 6 and 8](#), Appendix "G" to the Second Report, MR p. 125.

<sup>38</sup> Second Report, [s 1.1 at para 1\(g\)\(ii\)\(4\)](#), MR p. 12.

<sup>39</sup> Affidavit of Sharon Kour at [para 7](#), Appendix "G" to the Second Report, MR p. 125.

<sup>40</sup> *Nortel Networks Inc.*, 2022 ONSC 6680 at [para 10](#).

Court of Appeal stated “the focus of the fair and reasonable assessment should be on what was accomplished, and not how much time it took.”<sup>41</sup>

28. The Receiver and its counsel have charged standard hourly rates that are consistent with market rates for insolvency services of this nature rendered by other firms in the City of Toronto. Such rates have been approved by this Court in numerous other matters and should be approved here.

**iii. The Receiver’s Discharge Should Be Granted Upon Filing of the Receiver’s Certificate**

29. If this Court grants the requested AVO, following the closing of the Transaction, the Receiver will have monetized all of the known property and completed its duties and obligations.<sup>42</sup>

30. The Receiver’s discharge would be effective upon filing a Certificate with the Court confirming closing of the Transaction, as well as full and final distributions to BMO.<sup>43</sup>

31. Accordingly, this receivership proceeding should be terminated and the Receiver should be discharged and released upon filing of its Certificate with the Court.

**PART V – RELIEF REQUESTED**

32. The Receiver requests that this Court grant the proposed form of the AVO and the Ancillary Order.

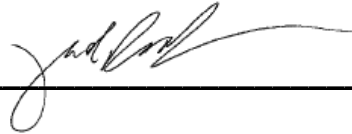
**ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 15<sup>th</sup> DAY OF MARCH, 2024**

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<sup>41</sup> *Bank of Nova Scotia v. Diemer*, 2014 ONCA 851 at [para 45](#).

<sup>42</sup> Second Report, [s. 7.0 at para 1](#).

<sup>43</sup> Second Report, [s. 7.0 at para 1](#).

A handwritten signature in black ink, appearing to read "Judith", is positioned above a solid horizontal line.

**RECONSTRUCT LLP**

**SCHEDULE "A"****List of Authorities**

1. <i>Royal Bank of Canada v. Soundair Corp.</i> (1991), 1991 CarswellOnt 205
2. <i>Terrace Bay Pulp Inc. (Re)</i> , 2012 ONSC 4247
3. <i>Nortel Networks Inc.</i> , 2022 ONSC 6680
4. <i>Bank of Nova Scotia v. Diemer</i> , 2014 ONCA 851
5. Carole J Hunter and Toni Vanderlaan, Signed, Sealed, Delivered: An Analysis of Sealing Orders in Insolvency Proceedings, 2023 21 <i>Annual Review of Insolvency Law</i> , 2023
6. <i>Sherman Estate v Donovan</i> , 2021 SCC 25

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Proceedings commenced at Toronto

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**RECONSTRUCT LLP**  
Royal Bank Plaza, South Tower  
200 Bay Street  
Suite 2305, P.O. Box 120  
Toronto, ON M5J 2J3

**Sharon Kour** LSO No. 58328D  
skour@reconllp.com  
Tel: 416.613.8283

**Jared S. Rosenbaum** LSO No. 74769U  
jrosenbaum@reconllp.com  
Tel: 416.613.8284

**Lawyers for KSV Restructuring Inc.**