

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

B E T W E E N :

ONTARIO SECURITIES COMMISSION

Applicant

- and -

GO-TO DEVELOPMENTS HOLDINGS INC., OSCAR FURTADO, FURTADO HOLDINGS INC., GO-TO DEVELOPMENTS ACQUISITIONS INC., GO-TO GLENDALE AVENUE INC., GO-TO GLENDALE AVENUE LP, GO-TO MAJOR MACKENZIE SOUTH BLOCK INC., GO-TO MAJOR MACKENZIE SOUTH BLOCK LP, GO-TO MAJOR MACKENZIE SOUTH BLOCK II INC., GO-TO MAJOR MACKENZIE SOUTH BLOCK II LP, GO-TO NIAGARA FALLS CHIPPAWA INC., GO-TO NIAGARA FALLS CHIPPAWA LP, GO-TO NIAGARA FALLS EAGLE VALLEY INC., GO-TO NIAGARA FALLS EAGLE VALLEY LP, GO-TO SPADINA ADELAIDE SQUARE INC., GO-TO SPADINA ADELAIDE SQUARE LP, GO-TO STONEY CREEK ELFRIDA INC., GO-TO STONEY CREEK ELFRIDA LP, GO-TO ST. CATHARINES BEARD INC., GO-TO ST. CATHARINES BEARD LP, GO-TO VAUGHAN ISLINGTON AVENUE INC., GO-TO VAUGHAN ISLINGTON AVENUE LP, AURORA ROAD LIMITED PARTNERSHIP and 2506039 ONTARIO LIMITED

Respondents

APPLICATION UNDER SECTIONS 126 AND 129 OF THE *SECURITIES ACT*, R.S.O. 1990, c. S.5, AS AMENDED

FACTUM OF THE RECEIVER – RETURNABLE JUNE 14, 2022

June 10, 2022

AIRD & BERLIS LLP

Barristers and Solicitors
181 Bay St., Suite 1800
Toronto, ON M5J 2T9

Steven L. Graff (LSO# 31871V)

416.865.7726 / sgraff@airdberlis.com

Ian Aversa (LSO# 55449N)

416.865.3082 / iaversa@airdberlis.com

Jeremy Nemers (LSO# 66410Q)

416.865.7724 / jnemers@airdberlis.com

Tamie Dolny (LSO#: 77958U)

647.426.2306 / tdolny@airdberlis.com

PART I – INTRODUCTION

1. This factum is filed by KSV Restructuring Inc. (“**KSV**”), in its capacity as the Court-appointed receiver and manager (in such capacity, the “**Receiver**”) of the 23 parties listed on Schedule “B” of the Receivership Order (as defined below) (the “**Receivership Respondents**”), in support of the Receiver’s motion for five Orders.
2. Four of the five Orders contain, in substance, the following requested relief (such Orders being the “**Approval and Vesting Orders**”):
 - (a) approving the agreements of purchase and sale between the Receiver and four respective purchasers for the purchase and sale of four different groups of real property and related assets (collectively, the “**Recommended APSs**”), and authorizing the Receiver to complete the transactions contemplated thereby (such transactions being the Adelaide Transaction, the Eagle Valley Transaction, the Chippawa Transaction and the Beard Transaction, each as defined below, and, collectively, the “**Recommended Transactions**”);
 - (b) upon execution and delivery of certificates by the Receiver containing confirmation of the closing of the Recommended Transactions, vesting in the corresponding purchaser all rights, title and interest in the Purchased Assets (as defined in the respective Recommended APSs) subject to certain permitted encumbrances; and
 - (c) with the exception at this time of the Eagle Valley Transaction, authorizing the Receiver to make distributions from the proceeds of sale from the Recommended Transactions to specific (but not all) mortgagees on title.

3. The fifth Order contains, in substance, the following requested relief (the “**Ancillary Order**”):
 - (a) approving the Fourth Report of the Receiver to the Court dated June 3, 2022 (the “**Fourth Report**”) and the actions and activities of the Receiver and its counsel described therein; and
 - (b) sealing the confidential appendices to the Fourth Report (the “**Confidential Appendices**”).

PART II – THE FACTS

A. Background

4. Pursuant to an application by the Ontario Securities Commission (the “**OSC**”) under ss. 126 and 129 of the *Securities Act*, RSO 1990, c. S.5, as amended (the “**Securities Act**”), the Court made an Order on December 10, 2021 (the “**Receivership Order**”) appointing KSV as the Receiver of the 17 pieces of real property listed on Schedule “A” of the Receivership Order (the “**Real Property**”) and all the other assets, undertakings and properties of each of the Receivership Respondents, including all the assets held in trust or required to be held in trust by or for any of the Receivership Respondents, or by their lawyers, agents and/or any other person, and all proceeds thereof (together with the Real Property, the “**Property**”).¹

¹ Receivership Order, at recitals and para. 3.

5. The Receivership Respondents are developers of nine residential real estate projects in Ontario (the “**Projects**”).² The Receivership Respondents’ principal is Oscar Furtado (“**Mr. Furtado**”). Between 2016 and 2020, Mr. Furtado and the Receivership Respondents raised almost \$80 million from Ontario investors for the Projects. All the Projects are in the early development stages, and the vast majority of investors’ funds remain outstanding.³
6. Having regard to all the circumstances described in the OSC’s application, the Court determined that it was in the best interests of the Projects’ investors to appoint the Receiver.⁴
7. Mr. Furtado and the Receivership Respondents took steps to appeal the Receivership Order. They also brought a motion to stay the Receivership Order pending the appeal.⁵
8. The Court of Appeal for Ontario dismissed the motion to stay the Receivership Order on December 29, 2021, and dismissed the appeal itself on April 28, 2022.⁶

B. The Sale Process

9. The Receivership Order grants the Receiver the authority to, *inter alia*, market the Property, sell the Property (with Court approval) and apply for vesting Orders.⁷

²Fourth Report, section 2.0.

³ Endorsement of The Honourable Mr. Justice Pattillo dated December 10, 2021 [**Receivership Endorsement**], at para. 8.

⁴ Receivership Endorsement, at para. 22.

⁵ Fourth Report, section 1.0.

⁶ Fourth Report, section 1.0.

10. In addition, the Receiver obtained a further Order from the Court on February 9, 2022 (the “**Sale Process Order**”), which, in substance, approved a sale process for the Property (the “**Sale Process**”).⁸
11. On April 7, 2022, the Court granted an Order approving the sale and vesting of one of the nine groups of Property (the “**St. Catharines Transaction**”), authorizing and directing the Receiver to distribute monies to the two mortgagees who were then registered on title to the underlying Real Property and approving the Third Report of the Receiver dated March 29, 2022 and the actions and activities of the Receiver and its counsel (collectively, the “**St. Catharines AVO**”).⁹
12. The St. Catharines Transaction closed on May 9, 2022 for total proceeds of \$7.2 million.¹⁰
13. The Recommended Transactions that comprise the substance of the present motion are in respect of four of the remaining eight groups of Property.
14. As previously reported and approved, the Receiver retained:
 - (a) Colliers Macaulay Nicolls Inc. (“**Colliers**”) to market the Property of Go-To Spadina Adelaide Square Inc. and Go-To Spadina Adelaide Square LP (collectively, “**Go-To Adelaide**”); and

⁷ Receivership Order, at paras. 4(j), 4(k) and 4(l).

⁸ Fourth Report, section 1.0.

⁹ Fourth Report, section 1.0.

¹⁰ Fourth Report, section 4.0.

- (b) CBRE Limited (“**CBRE**” and, together with Colliers, the “**Realtors**”) to market the balance of the Property.¹¹ CBRE also engaged Internet Commercial Realty Inc. (“**Internet Realty**”), a broker based near Niagara Falls, to assist with its marketing efforts for the Property located in Southwestern Ontario.¹²
15. Pursuant to the Sale Process Order, the Receiver and the Realtors prepared offering summaries (the “**Offering Summaries**”), virtual data rooms (“**VDRs**”) and confidentiality agreements (the “**CAs**”) for the various groups of Property.¹³
16. With respect to the Recommended Transactions, the Realtors distributed the underlying Offering Summaries on February 28, 2022 to an extensive list of prospective purchasers, including local, national and international builders, developers and investors. The acquisition opportunities were also published in trade journals and on social media platforms. The Realtors also targeted and reached out to bidders that they believed would be the best candidates for each group of Property.¹⁴
17. In order to assist potential purchasers to submit unconditional bids, the Receiver engaged Pinchin Ltd. to prepare a Phase I environmental site assessment (“**ESA**”) for each site. The completed ESAs were included in the VDRs, along with historical ESAs, where applicable.¹⁵

¹¹ Fourth Report, section 5.0.

¹² Fourth Report, section 5.0.

¹³ Fourth Report, section 5.0.

¹⁴ Fourth Report, section 5.0.

¹⁵ Fourth Report, section 5.0.

18. The Realtors attended site tours, responded to diligence requests from prospective purchasers and scheduled calls, when requested, with the Receivership Respondents' advisors (planners and architects) to discuss the development plans and their status.¹⁶
19. The Receiver also retained Altus Group ("**Altus**"), a real estate advisory services firm, to provide updated appraisals for certain Property. With respect to the Recommended Transactions, appraisals were provided for the Real Property that is subject to the Adelaide Transaction and the Eagle Valley Transaction. For the other Real Property, the Receiver had the benefit of the indications of value that were provided earlier in these proceedings by realtors as part of the Receiver's realtor solicitation process.¹⁷

(i) *The Adelaide Transaction*¹⁸

20. Located in downtown Toronto, the Real Property owned by Go-To Adelaide (the "**Adelaide Real Property**") is the Receivership Respondents' most significant asset. The Adelaide Real Property consists of two municipal parcels: (a) 355 Adelaide Street West and 16 Oxley Street (currently a 6-storey office building and surface-level parking lot); and (b) 46 Charlotte Street (currently a surface level parking lot).
21. The Receiver understands that a Zoning By-law Amendment application was submitted for the Adelaide Real Property and is currently under review with the City of Toronto, and that a Site Plan Application is also being reviewed in conjunction with a Zoning Amendment Application. The current proposal contemplates a 48-storey,

¹⁶ Fourth Report, section 5.0.

¹⁷ Fourth Report, section 5.0.

¹⁸ Unless otherwise noted, all references in this section are to the Fourth Report, section 6.0.

158.6m mixed use building incorporating residential office and commercial uses, including the retention and incorporation of the existing heritage building into the proposal and an 11-storey component facing Oxley Street. Go-To Adelaide's proposed 48-storey mixed use building is contemplated to be located next to and over top of the heritage building fronting Adelaide Street West, while the 11-storey residential building is contemplated to have frontage along Oxley Street.

22. Five offers for the Adelaide Real Property and ancillary assets (the "**Adelaide Property**") were received by the initial bid deadline. The Receiver and Colliers discussed the offers, the due diligence periods requested (and due diligence already performed) by each of the prospective purchasers and the financial wherewithal of each party to close a transaction. Colliers then communicated with each of the prospective purchasers regarding their offers and requested three parties to participate in a second round of bidding. Additionally, one of the unselected parties also submitted a second round bid.

23. After receipt of the second-round offers, Colliers engaged with the highest bidders to evaluate the level of risk associated with entering into a conditional agreement of purchase and sale where the Receiver would provide the selected party with a period of exclusivity to complete its due diligence. Based on those discussions, Colliers recommended that the Receiver enter into a transaction with Fengate Capital Management Ltd. (the "**Adelaide Purchaser**") if it agreed to increase the value of its offer. The discussions with the Adelaide Purchaser resulted in several amendments to its proposed agreement of purchase and sale, including an increase in the purchase price and the Receiver agreeing to provide it with exclusivity for 21 business days.

24. Prior to entering into the Adelaide APS (as defined below), the Receiver discussed the offers received, prior valuations for the Adelaide Property and other market data with the first two mortgagees on a confidential basis, after confirming that neither intended to participate directly or indirectly in the Sale Process, and that neither directly or indirectly had an interest in any offer.
25. The Receiver also engaged in discussions with counsel for certain parties that were creditors, investors or both, summarizing at a high level the results of the Sale Process for the Adelaide Property. Certain of these stakeholders requested that the Receiver agree that “*the acceptance of any offer is without prejudice to the ability of the second [mortgagee] to take an assignment of the first [mortgage]*” for a period of 40 days from April 14, 2022. The Receiver agreed to this request. More than 40 days have since passed, and these parties have not advised the Receiver of any assignment or redemption of the first mortgage on the Adelaide Real Property.
26. The Receiver understands that the first mortgagee, Cameron Stephens Mortgage Capital Ltd. (“**Cameron Stephens**”), supports the Adelaide Transaction.
27. On June 2, 2022 the Receiver discussed the Adelaide Transaction with the second mortgagee, Northridge Maroak Developments Inc. (“**Northridge**”), and its legal counsel. The Receiver is not aware of any opposition to the Adelaide Transaction by Northridge.
28. A summary of the Receiver’s proposed transaction with the Adelaide Purchaser (the “**Adelaide Transaction**”) is as follows:¹⁹

¹⁹ Capitalized terms not otherwise defined in this paragraph are defined in the Adelaide APS.

- (a) Purchaser: Fengate Capital Management Ltd., which is arm's length to the Receivership Respondents.
- (b) Purchased Assets: All of the Receiver's and Go-To Adelaide's right, title and interest in the Adelaide Real Property and the other ancillary Adelaide Property specified in the Recommended APS with the Adelaide Purchaser (the "**Adelaide APS**").
- (c) Purchase Price: The Receiver recommends that the Purchase Price be sealed pending closing. The Purchase Price is to be adjusted on closing for adjustments standard for a real estate transaction, including property taxes. The Purchase Price may be increased pursuant to the Density Bonus (discussed below).
- (d) Deposit: The Adelaide Purchaser has paid a deposit of \$10 million.
- (e) Closing Date: The later of (i) the tenth (10th) Business Day following the date on which the Adelaide AVO is issued by the Court, if not subject to an appeal; and (ii) the first Business Day that is thirty days after May 27, 2022; provided that, in the event notification with respect to the Adelaide Transaction is required pursuant to Part IX of the Competition Act and the Competition Act Approval is not obtained on or before the Closing Date, then either Party may by Notice to the other extend the Closing Date through the exercise of up to four successive periods of up to fifteen (15) days each, such that the Closing Date may in the aggregate be extended by up to sixty (60) days.
- (f) Estoppel Certificates: The Adelaide APS includes a covenant by the Receiver to use reasonable commercial efforts to obtain and deliver to the Adelaide Purchaser by Closing an estoppel certificate from all Tenants. The failure to obtain an executed Estoppel Certificate (or one which discloses any information different from the draft forms of Estoppel Certificates approved by the Adelaide Purchaser) from a Tenant shall not constitute a default on the part of the Receiver.
- (g) Density Bonus: The Adelaide APS provides that, in addition to the Purchase Price, the Adelaide Purchaser shall pay to the Receiver, as additional consideration for the Purchased Assets, the amount of \$283 per square foot of residential Gross Floor Area of any full floor which is permitted to be constructed on the Adelaide Real Property above the height of 152 metres above grade (the "**Additional Height Density**"), all as permitted by way of the issuance to the Adelaide Purchaser of a Final and Binding building permit that permits the construction of the Additional Height Density, subject to a cap, as specified in the Adelaide APS. The maximum amount of the density bonus is \$3 million.
- (h) Material Conditions:

- (i) there shall be no Claim, litigation or proceedings pending or threatened or order issued by a Governmental Authority against either of the Parties, or involving any of the Purchased Assets, for the purpose of enjoining, preventing or restraining the completion of the Adelaide Transaction or otherwise claiming that such completion is improper;
 - (ii) the Adelaide Purchaser shall have received written confirmation from each Tenant that: (i) each such Lease constitutes the entire agreement between such Tenant and the landlord respecting the Adelaide Real Property and there are no other agreements with respect to such tenancy (which is a condition precedent to closing); and (ii) there are no material disputes with the landlord(s) the costs of which to remedy exceed \$25,000 individually or \$200,000 in the aggregate (which is not a condition precedent to closing, but which, if not satisfied, will result in an equal reduction to the purchase price);
 - (iii) the Court shall have issued the Adelaide AVO; and
 - (iv) unless the Receiver and the Adelaide Purchaser agree, each acting reasonably, that such approval is not required, the Competition Act Approval shall have been obtained and remains in force.
- (i) Termination: The Adelaide APS can be terminated if, among other things:
- (i) the Adelaide Transaction is not approved by the Court or the Court does not issue the Adelaide AVO on or before August 30, 2022, provided that either the Receiver or the Adelaide Purchaser may exercise the one-time right to extend such date for a period of up to ninety (90) days; or
 - (ii) closing has not occurred prior to the discharge of KSV as the Receiver, unless the Receiver's interest in the Adelaide APS has been assigned in accordance with Section 14.10 of the Adelaide APS prior to (or as part of) the Receiver's discharge.

(ii) ***The Eagle Valley Transaction***²⁰

29. The Eagle Valley Real Property is comprised of 3.4 acres of development land located at 2334 St. Paul Avenue, Niagara Falls. The Receiver understands that the site has been rezoned as a 13-storey, 219,378 square foot condominium apartment building

²⁰ Unless otherwise noted, all references in this section are to the Fourth Report, section 7.0.

with 123 dwelling units that overlooks the Eagle Valley Golf Club. The development plan provides for 175 parking spaces in the form of 160 underground spaces and 15 surface spaces.

30. The City of Niagara Falls approved the Site Plan on September 21, 2021. The Receiver understands that a Draft Site Plan Agreement was issued prior to the date of the Receivership Order to the registered owners of the Eagle Valley Real Property (being Go-To Niagara Falls Eagle Valley Inc. and Go-To Niagara Falls Eagle Valley LP (collectively, “**Go-To Eagle Valley**”)), for review and signature. Approval of plans and drawings is conditional on Go-To Eagle Valley, or a subsequent owner, entering into a Site Plan Agreement and providing certain facilities outlined in the agreement.
31. Early-stage construction on the Project had commenced before the date of the Receivership Order. Construction on the site was halted at the commencement of the receivership as Go-To Eagle Valley did not have the liquidity to advance the Project.
32. As detailed in its marketing report appended to the Fourth Report, CBRE, with the assistance of Internet Realty, widely canvassed the market and received 26 signed CAs in respect of the Eagle Valley Real Property and ancillary assets (the “**Eagle Valley Property**”). The Receiver and CBRE reviewed the offers received by the initial bid deadline, and requested that bidders submit their final and best offers by April 21, 2022. The highest offer was submitted by Iskender Tokuc, in trust (“**Tokuc**”).
33. On April 22, 2022, CBRE had a call with Tokuc to discuss his offer. CBRE advised Tokuc that the Receiver would accept his offer if it were increased. CBRE advised the Receiver that Tokuc agreed to amend the offer to the amount requested.

34. On April 27, 2022 (five days later), Tokuc advised CBRE that he decided not to increase and that he would instead be reducing his offer. He stated that the reduction was due to additional costs he would need to fund in respect of the development notwithstanding that he had ample opportunity to perform due diligence in advance of submitting his initial offer. Tokuc submitted an agreement of purchase and sale at his reduced price.
35. The value of Tokuc's offer was sufficient to repay the first mortgagee registered on title to the Eagle Valley Real Property, Queen Properties Inc. ("**Queen Properties**"), but was not sufficient to fully repay the second mortgagee, being Gabriele Fischer and Imperio SA Holdings Inc. (collectively, "**Imperio**"). Before accepting the offer from Tokuc, and consistent with the terms of the Sale Process, the Receiver consulted with the second mortgagee concerning the offer from Tokuc to determine if Imperio would consent to a sale to Tokuc on the terms proposed by Tokuc. Imperio advised that it was not prepared to do so.
36. Imperio subsequently advised the Receiver that it, or someone on its behalf, was prepared to acquire the Eagle Valley Real Property, subject to a brief diligence period.
37. Imperio executed a CA on May 6, 2022 and then performed due diligence on an expedited basis. On May 12, 2022, Imperio caused the Eagle Valley Purchaser (as defined below) to submit an unconditional agreement of sale for a purchase price in excess of all other offers. Subject to Court approval, the Receiver accepted the Eagle Valley Purchaser's offer, with minor amendments, on May 13, 2022 (with an effective date of May 10, 2022).

38. A summary of the Receiver's proposed transaction with the Eagle Valley Purchaser (the "**Eagle Valley Transaction**") is as follows:²¹

- (a) Purchaser: Bryce Coates, in trust for a company to be incorporated (the "**Eagle Valley Purchaser**"). The Receiver understands that Mr. Coates is the CEO of TriLend Inc., a licensed mortgage administrator, which was involved in structuring Imperio's second mortgage with Go-To Eagle Valley and is arm's length to the Receivership Respondents.
- (b) Purchased Assets: All of the Receiver's and Go-To Eagle Valley's right, title and interest in the Eagle Valley Real Property and certain contracts and permits specified in the Recommended APS with the Eagle Valley Purchaser (the "**Eagle Valley APS**").
- (c) Purchase Price: The Receiver recommends that the Purchase Price be sealed pending closing. The Purchase Price is to be adjusted on closing for adjustments standard for a real estate transaction, including property taxes.
- (d) Deposit: The Eagle Valley Purchaser paid a deposit in the amount of \$500,000.
- (e) Pre-Sales: The Eagle Valley Purchaser is not assuming any of the 94 preconstruction condominium purchase agreements sold on this Project. Accordingly, the Receiver intends to terminate the contracts subsequent to Closing and to implement a protocol with Trisura and Tarion for the purchasers to receive a return of their deposits.
- (f) Closing Date: The later of: (i) June 30, 2022; (ii) the first Business Day following the date that is ten days following the issuance of the Eagle Valley AVO; and (iii) the first Business Day following the date on which any appeals or motions to set aside or vary the Eagle Valley AVO have been finally determined, or, if the Receiver and the Eagle Valley Purchaser agree, such other date as they may agree in writing.
- (g) Material Conditions:
 - (i) there shall be no Claim, litigation or proceedings pending or threatened or order issued by a Governmental Authority against either of the Parties, or involving any of the Purchased Assets, for the purpose of enjoining, preventing or restraining the completion of the Transaction or otherwise claiming that such completion is improper; and
 - (i) the Court shall have issued the Eagle Valley AVO. The Eagle Valley APS may be terminated by either of the Parties, in writing to the other,

²¹ Capitalized terms not otherwise defined in this paragraph are defined in the Eagle Valley APS.

if the Eagle Valley AVO is not issued by the Court on or before July 15, 2022.

*(iii) The Chippawa Transaction*²²

39. The Chippawa Real Property is comprised of 2.6 acres of development land located at 4210 and 4248 Lyon's Creek Road, Niagara Falls. The Receiver understands that the site has been rezoned for a 3-4 storey, 58,684 sq. ft. building with 63 residential dwellings and 6 three-storey townhouse units.
40. On October 13, 2021, Go-To Niagara Falls Chippawa Inc. and Go-To Niagara Falls Chippawa LP (collectively, "**Go-To Chippawa**") received approval of a Zoning By-law Amendment (ZBLA) allowing for the proposed height and density of the development. The Receiver understands that a pre-consultation meeting for the future Site Plan Application (SPA) submission was held on September 6, 2021 and a submission package has been prepared and is ready to be formally submitted.
41. As detailed in its marketing report appended to the Fourth Report, CBRE, with the assistance of Internet Realty, widely canvassed the market and received 28 signed CAs in respect of the Chippawa Real Property and ancillary assets (the "**Chippawa Property**"). The Receiver and CBRE reviewed the offers received by the initial bid deadline and clarified the terms with certain of the bidders. On April 14, 2022, CBRE requested that the bidders with the four highest offers submit final and best offers by April 21, 2022.

²² Unless otherwise noted, all references in this section are to the Fourth Report, section 8.0.

42. The bidder with the highest offer (Mr. Singh on behalf of 2809881 Ontario Inc.) submitted a conditional letter of intent including a list of due diligence information that he required and no specificity as to the amount of time required to perform due diligence, whereas the other three bidders submitted proposed agreements of purchase and sale.
43. On April 22, 2022, CBRE advised Mr. Singh that the Receiver was prepared to accept his offer if submitted on an unconditional basis substantially in the form of the Receiver's template agreement of purchase and sale. Mr. Singh advised CBRE that he was prepared to do so, but, despite the multiple follow-up attempts discussed in the Fourth Report, no such agreement has been submitted.
44. Neither the Receiver nor CBRE has heard from Mr. Singh since May 2, 2022, whether in response to this request or otherwise. Additionally, to assess the possibility of completing a transaction with Mr. Singh, the Receiver asked CBRE to perform due diligence on Mr. Singh's real estate development experience relative to the other bidders. Based on this due diligence, CBRE advised the Receiver that, in its view, there was a better chance of closing and maximizing value by transacting with the proposed Chippawa Purchaser (as defined below), which is owned by a significant developer in the area.
45. The proposed Chippawa Transaction is supported by the only registered mortgagee on title to the Chippawa Real Property, Green Leaf Financial Limited ("**Green Leaf**").

46. A summary of the Receiver's proposed transaction with the Chippawa Purchaser (the "**Chippawa Transaction**") is as follows:²³

- (a) Purchaser: 1977678 Ontario Limited in trust (the "**Chippawa Purchaser**"), which corporate entity is arm's length to the Receivership Respondents.
- (b) Purchased Assets: All of the Receiver's and Go-To Chippawa's right, title and interest in the Chippawa Real Property and certain contracts and permits specified in the Recommended APS with the Chippawa Purchaser (the "**Chippawa APS**").
- (c) Purchase Price: The Receiver recommends that the Purchase Price be sealed pending closing. The Purchase Price is to be adjusted on closing for adjustments standard for a real estate transaction, including property taxes.
- (d) Deposit: The Chippawa Purchaser paid a deposit in the amount of \$425,000.
- (e) Closing Date: The later of: (i) the first Business Day following the date that is ten days following the granting of the Chippawa AVO; and (ii) the first Business Day following the date on which any appeals or motions to set aside or vary the Chippawa AVO have been finally determined, or, such other date as the Receiver and the Chippawa Purchaser agree in writing.
- (f) Material Conditions: As follows:
 - (i) there shall be no Claim, litigation or proceedings pending or threatened or order issued by a Governmental Authority against either of the Parties, or involving any of the Purchased Assets, for the purpose of enjoining, preventing or restraining the completion of the Chippawa Transaction or otherwise claiming that such completion is improper; and
 - (ii) the Court shall have issued the Chippawa AVO.
- (iv) ***The Beard Transaction***²⁴

47. The Beard Real Property is comprised of 3.4 acres of development land located at 19 Beard Place, St. Catharines. The Receiver understands that the development plan

²³ Capitalized terms not otherwise defined in this paragraph are defined in the Chippawa APS.

²⁴ Unless otherwise noted, all references in this section are to the Fourth Report, section 9.0.

provides for a 6-storey, 38,696 square foot residential apartment building with 44 residential dwellings and a total of 55 parking spaces are proposed.

48. The Receiver understands that a Minor Variance Application was approved by the City of St. Catharines on December 9, 2020 to permit the proposed increased height and density on the site. Go-To St. Catharines Beard Inc. and Go-To St. Catharines Beard LP (collectively, “**Go-To Beard**”) originally submitted a Site Plan Approval application in April 2020 and a revised submission was made in September 2020. The third and final submission was made in February 2021, and the Receiver understands that the City of St. Catharines has provided conditional approval.
49. As detailed in its marketing report appended to the Fourth Report, CBRE, with the assistance of Internet Realty, widely canvassed the market and received 23 signed CAs in respect of the Beard Real Property and ancillary assets (the “**Beard Property**”). The Receiver and CBRE reviewed the offers received by the initial bid deadline and requested that the bidders submit final and best offers by April 25, 2022.
50. The highest offer was submitted by a company represented by Mr. Singh, the same party who submitted the highest offer for the Chippawa Real Property. As in that case, Mr. Singh submitted his offer in the form of a conditional letter of intent and not the Receiver’s template agreement of purchase and sale.
51. As with the case with the Chippawa Property, the letter of intent submitted by Mr. Singh contained a list of additional due diligence information and no specificity as to the amount of time required to perform due diligence. As a result, and given Mr. Singh’s unresponsiveness related to his offer for the Chippawa Property, the Receiver

engaged directly with the Beard Purchaser (as defined below), being the next highest bidder in respect of the Beard Property.

52. Subject to review of the materials submitted in the Claims Process (as defined below), the Receiver understands that Investcap Inc. (“**Investcap**”) is the sole investor in the Beard Project. The value of the Beard Purchaser’s offer exceeds the four indications of value provided by the realtors before commencement of the Sale Process.
53. Given the above, any increase in value from another bidder would (subject to an unanticipated result from the Claims Procedure) accrue to Investcap, as investor. Accordingly, on May 13, 2022, the Receiver accepted the Beard APS (as defined below), subject to Court approval.
54. A summary of the Receiver’s proposed transaction with the Beard Purchaser (the “**Beard Transaction**”) is as follows:²⁵
- (a) Purchaser: Investcap Inc., in trust for a corporation or other entity, whether or not presently in existence or to be formed (the “**Beard Purchaser**”). The Receiver understands that Investcap is the sole limited partner of Go-To Beard and arm’s length to the Receivership Respondents.
 - (b) Purchased Assets: All of the Receiver’s and Go-To Beard’s right, title and interest in the Beard Real Property and certain permits specified in the Recommended APS with the Beard Purchaser (the “**Beard APS**”).
 - (c) Purchase Price: The Receiver recommends that the Purchase Price be sealed pending closing. The Purchase Price is to be adjusted on closing for adjustments standard for a real estate transaction, including property taxes.
 - (d) Deposit: The Beard Purchaser paid a deposit in the amount of \$245,000.
 - (e) Closing Date: The later of: (i) June 30, 2022; (ii) the first Business Day following the date that is ten days following the granting of the Beard AVO;

²⁵ Capitalized terms not otherwise defined in this paragraph are defined in the Beard APS.

and (iii) the first Business Day following the date on which any appeals or motions to set aside or vary the Beard AVO have been finally determined, or, if the Parties agree, such other date as agreed in writing by the Parties.

(f) Material Conditions:

- (i) there shall be no Claim, litigation or proceedings pending or threatened or order issued by a Governmental Authority against either of the Parties, or involving any of the Purchased Assets, for the purpose of enjoining, preventing or restraining the completion of the Beard Transaction or otherwise claiming that such completion is improper; and
- (ii) the Court shall have issued the Beard AVO. The Beard APS may be terminated by either of the Parties, in writing to the other, if the Beard AVO is not issued by the Court on or before August 12, 2022.

55. The Receiver recommends the approval of the four Recommended Transactions for the reasons described in the Fourth Report and summarized in the legal analysis section of this factum.

C. Proposed Distributions

56. On April 7, 2022, the Court approved a claims procedure (the “**Claims Procedure**”), pursuant to which the Receiver is authorized, directed and empowered to administer the Claims Procedure for the substantive purpose of calling for, assessing and determining claims against the Receivership Respondents.²⁶

57. The Claims Bar Date (as defined in the Claims Procedure) was June 2, 2022 at 5 p.m. (ET). The Receiver is in the process of reviewing the claims as submitted, and intends to summarize the results of the Claims Procedure in a future report. In the interim, the Receiver is seeking authorization and direction to distribute funds to: (1) the first- and

²⁶ Fourth Report, sections 1.0 and 3.0.

second-ranking mortgagees registered on title to the Adelaide Real Property; and (2) the first-ranking mortgagees registered on title to the Chippawa Real Property and the Beard Real Property.²⁷

58. The Receiver's independent legal counsel, Aird & Berlis LLP, has provided opinions to the Receiver, which, subject to the standard assumptions and qualifications contained therein, conclude that the applicable security granted by Go-To Adelaide to the first two mortgagees on the Adelaide Real Property (being Cameron Stephens and Northridge), Go-To Chippawa to the first mortgagee on the Chippawa Real Property (being Green Leaf) and Go-To Beard to the first mortgagee on the Beard Real Property (being Prudential Property Management Inc.) is valid and enforceable (or, in the case of personal property security, as applicable, perfected).²⁸
59. The Receiver is not aware of any other secured creditors or any other claims that rank or that may rank in priority to these stakeholders, other than:
- (a) the Receiver's Charge (as defined in the Receivership Order), for which an appropriate reserve will be taken on closing of each of the corresponding Recommended Transactions;
 - (b) the commission payable to the Realtors, as applicable, which will be satisfied on closing of each of the corresponding Recommended Transactions;
 - (c) property taxes, which will also be satisfied on closing of each of the corresponding Recommended Transactions; and

²⁷ Fourth Report, sections 1.0 and 3.0.

²⁸ Fourth Report, sections 6.0, 7.0, 8.0 and 9.0.

(d) in the case of the proposed distribution to the first mortgagee on the Chippawa Real Property (being Green Leaf), there is also a construction lien registered on title for approximately \$301,000 in favour of Capital Build Construction Management Corp. Should this lien be valid, there will be sufficient proceeds from the Chippawa Transaction to repay it.²⁹

60. At this time, the Receiver is not proposing to make any distributions from the proceeds of the Eagle Valley Transaction. In addition to the Receiver's Charge, the Eagle Valley Real Property is presently encumbered with four mortgages/charges and five construction liens. Moreover, the Receiver understands that:

(a) the first mortgage constitutes a vendor takeback mortgage originally granted by 2557815 Ontario Inc., which purchased the Eagle Valley Real Property on June 22, 2017 for \$3.7 million on June 22, 2017 and then transferred the Eagle Valley Real Property later that same day to Go-To Eagle Valley for \$5.1 million. The Receiver's review of this matter is ongoing; and

(b) the second mortgage is also registered on title to the Beard Real Property, such that potential entitlement to proceeds from the Eagle Valley Transaction would depend, in part, on recoveries from the proceeds of the Beard Transaction.³⁰

61. In short, the Receiver believes it needs to determine (and, where necessary, investigate) the entitlements of the various stakeholders registered on title to the Eagle Valley Real Property before recommending any distributions from the Eagle Valley Transaction.³¹

²⁹ Fourth Report, sections 6.0, 7.0, 8.0 (including, without limitation, 8.1, subparagraph 2) and 9.0.

³⁰ Fourth Report, sections 7.0 and 9.0.

PART III – ISSUES AND THE LAW

62. The substantive issues on the Receiver’s motion are the granting of the four Approval and Vesting Orders and the sealing of the Confidential Appendices.

PART IV – LAW AND ARGUMENT

63. In determining whether to approve a proposed sale of assets by a Court-appointed receiver, Ontario courts have consistently and uniformly applied the principles set out by the Court of Appeal for Ontario in *Royal Bank v. Soundair*.³²

64. *Soundair* establishes that, in reviewing a proposed sale of assets by a Court-appointed receiver, the Court must consider the following:

- (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 efficacy and integrity of the process by which offers are obtained; and*
- (d) *whether there has been unfairness in the working out of the process.*

65. The Receiver submits that the *Soundair* principles have been satisfied in respect of all four of the Recommended Transactions. The “facts” section of this factum, together with the more detailed analysis in the Fourth Report and the appendices thereto, reflect the significant effort undertaken by the Receiver and its agents to obtain the best price

³¹ Fourth Report, section 7.0.

³² (1991), 4 O.R. (3d) 1 (C.A.) (CanLII: <http://canlii.ca/t/1p78p>) [*Soundair*].

possible for each group of Property in question, and to act fairly, efficiently and with integrity in considering the interests of all applicable stakeholders.

66. Without limiting the generality of the foregoing, the Receiver notes that:

- (a) the sale processes undertaken by the Receiver that led to the four Recommended Transactions were commercially reasonable and conducted in accordance with the Sale Process previously approved by the Court;
- (b) the Realtors, who have extensive experience selling development properties in and around the applicable geographic regions, widely canvassed the market for purchasers and are of the view that the Recommended Transactions are the best available in the circumstances (which, in the case of the Adelaide Transaction, consists of a purchase price at or near market highs for a property in the downtown GTA per square foot of residential gross floor area);
- (c) the Receiver is of the view that the purchase prices are fair, reasonable and maximize value for the respective Property, based on (amongst other things):
 - (i) the offers received;
 - (ii) the subsequent negotiations that took place (including, without limitation, with offerors who reduced or abandoned their offers, notwithstanding their previous communications to the contrary);
 - (iii) rapidly changing dynamics in the real estate sector as the Sale Process evolved, including rapidly rising interest rates, further increases in construction costs, foreign buyer restrictions announced by the federal government and ongoing trade strikes in the construction sector;

- (iv) where Altus appraisals were provided (i.e., the Adelaide Real Property and the Eagle Valley Real Property), the value of the applicable Real Property in these appraisals; and
- (v) where Altus appraisals were not available, estimates of value that were provided to the Receiver by four realtors that participated in its broker solicitation process previously approved by the Court;
- (d) the Receiver sought the input, and, where applicable, participation, of the respective fulcrum creditors (to the extent known);
- (e) the support (or non-opposition, as the case may be) of the first two registered mortgagees on the Adelaide Real Property,³³ the first two-registered mortgagees on the Eagle Valley Real Property (neither of which is to receive a distribution on this motion) and the only two registered mortgagees on the Beard Real Property, and sufficient funds being available to satisfy all valid encumbrances registered on the Chippawa Real Property;
- (f) the significant deposits made by the respective purchasers, their ability to close and the imminent closings of all four Recommended Transactions; and
- (g) the Receiver's view that further time spent marketing the applicable Property will not result in a superior transaction (and, in fact, may result in materially inferior transactions).³⁴

³³ The Receiver notes that the third registered mortgagee on title to the Adelaide Real Property is Adelaide Square Developments Inc. (“**ASD**”). The transactions which gave rise to Go-To Adelaide’s indebtedness to ASD are discussed at length in the OSC’s application materials, and, accordingly, the Receiver intends to review those transactions as part of determining the validity and enforceability of ASD’s security.

³⁴ Fourth Report, sections 6.5, 7.4, 8.4 and 9.4.

67. The Receiver's rationale for its acceptance of the Recommended Transactions in light of all the foregoing reflects sound business judgment. The Receiver has also obtained independent opinions in respect of the security for which distributions are being sought. As such, the request for the Approval and Vesting Orders falls within "*the general principle that the court will 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.*"³⁵
68. The Confidential Appendices are limited to commercially-sensitive information (essentially pricing of the various offers received), which the Receiver recommends be sealed until further Order of the Court. If disclosed, they would likely have a detrimental impact on the sale efforts for the Property, particularly if any of the Recommended Transactions does not close. The requested sealing Order is therefore the least restrictive means available, and, as such, complies with *Sierra Club*, *Sherman Estate* and the CJA.³⁶

PART V – RELIEF SOUGHT

69. The Receiver respectfully requests the granting of the Orders substantially in the form contained in its motion record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED as of the date first written above.

Aird & Berlis LLP

AIRD & BERLIS LLP, lawyers for the Receiver

³⁵ *Soundair*, at para. 16; *Morganite Canada Corp. v. Wolfhollow Properties Inc.* (2003), 47 CBR (4th) 89 (ONSC) (CanLII: <http://canlii.ca/t/4qkp>) at para. 7; *B&M Handelman Investments Limited v. Drotos*, 2018 ONCA 581 (CanLII: <http://canlii.ca/t/hsp9r>) at para. 43.

³⁶ *Sierra Club of Canada v. Canada (Minister of Finance)* [2002] 2 S.C.R. 522 (CanLII: <http://canlii.ca/t/51s4>) [*Sierra Club*] at para. 53; *Sherman Estate v. Donovan*, 2021 SCC 25 (CanLII: <https://canlii.ca/t/jgc4w>) [*Sherman Estate*] at para 38; *Courts of Justice Act* (Ontario) [CJA], s. 137(2).

**SCHEDULE “A”
LIST OF AUTHORITIES**

1. *Royal Bank of Canada v. Soundair Corp.*, (1991) 4 O.R. (3d) 1 (C.A.).
2. *Morganite Canada Corp. v. Wolfhollow Properties Inc.*, (2003) 47 CBR (4th) 89 (ONSC).
3. *B&M Handelman Investments Limited v. Drotos*, 2018 ONCA 581.
4. *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522.
5. *Sherman Estate v. Donovan*, 2021 SCC 25.

SCHEDULE “B” RELEVANT STATUTES

Securities Act, R.S.O. 1990, c. S.5

Freeze direction

126 (1) If the Commission considers it expedient for the due administration of Ontario securities law or the regulation of the capital markets in Ontario or expedient to assist in the due administration of the securities laws or the regulation of the capital markets in another jurisdiction, the Commission may,

- (a) direct a person or company having on deposit or under its control or for safekeeping any funds, securities or property of any person or company to retain those funds, securities or property;
- (b) direct a person or company to refrain from withdrawing any funds, securities or property from another person or company who has them on deposit, under control or for safekeeping; or
- (c) direct a person or company to maintain funds, securities or property, and to refrain from disposing of, transferring, dissipating or otherwise dealing with or diminishing the value of those funds, securities or property.

Duration

(1.1) A direction under subsection (1) applies until the Commission in writing revokes the direction or consents to release funds, securities or property from the direction, or until the Superior Court of Justice orders otherwise.

Application

(2) A direction under subsection (1) that names a bank or other financial institution shall apply only to the branches of the bank or other financial institution identified in the direction.

Exclusions

(3) A direction under subsection (1) shall not apply to funds, securities or property in a recognized clearing agency or to securities in process of transfer by a transfer agent unless the direction so states.

Certificate of pending litigation

(4) The Commission may order that a direction under subsection (1) be certified to a land registrar or mining recorder and that it be registered or recorded against the lands or claims identified in the direction, and on registration or recording of the certificate it shall have the same effect as a certificate of pending litigation.

Review by court

(5) As soon as practicable, but not later than 10 days after a direction is issued under subsection (1), the Commission shall serve and file a notice of application in the Superior Court of Justice to continue the direction or for such other order as the court considers appropriate.

Grounds for continuance or other order

(5.1) An order may be made under subsection (5) if the court is satisfied that the order would

be reasonable and expedient in the circumstances, having due regard to the public interest and,

- (a) the due administration of Ontario securities law or the securities laws of another jurisdiction; or
- (b) the regulation of capital markets in Ontario or another jurisdiction.

Notice

(6) A direction under subsection (1) may be made without notice but, in that event, copies of the direction shall be sent forthwith by such means as the Commission may determine to all persons and companies named in the direction.

Clarification or revocation

(7) A person or company directly affected by a direction may apply to the Commission for clarification or to have the direction varied or revoked.

Appointment of receiver, etc.

129 (1) The Commission may apply to the Superior Court of Justice for an order appointing a receiver, receiver and manager, trustee or liquidator of all or any part of the property of any person or company.

Grounds

- (2) No order shall be made under subsection (1) unless the court is satisfied that,
 - (a) the appointment of a receiver, receiver and manager, trustee or liquidator of all or any part of the property of the person or company is in the best interests of the creditors of the person or company or of persons or companies any of whose property is in the possession or under the control of the person or company or the security holders of or subscribers to the person or company; or
 - (b) it is appropriate for the due administration of Ontario securities law.

Application without notice

(3) The court may make an order under subsection (1) on an application without notice, but the period of appointment shall not exceed fifteen days.

Motion to continue order

(4) If an order is made without notice under subsection (3), the Commission may make a motion to the court within fifteen days after the date of the order to continue the order or for the issuance of such other order as the court considers appropriate.

Powers of receiver, etc.

(5) A receiver, receiver and manager, trustee or liquidator of the property of a person or company appointed under this section shall be the receiver, receiver and manager, trustee or liquidator of all or any part of the property belonging to the person or company or held by the person or company on behalf of or in trust for any other person or company, and, if so directed by the court, the receiver, receiver and manager, trustee or liquidator has the authority to wind up or manage the business and affairs of the person or company and has all powers necessary or incidental to that authority.

Directors' powers cease

(6) If an order is made appointing a receiver, receiver and manager, trustee or liquidator of the property of a person or company under this section, the powers of the directors of the company that the receiver, receiver and manager, trustee or liquidator is authorized to exercise may not be exercised by the directors until the receiver, receiver and manager, trustee or liquidator is discharged by the court. .

Fees and expenses

(7) The fees charged and expenses incurred by a receiver, receiver and manager, trustee or liquidator appointed under this section in relation to the exercise of powers pursuant to the appointment shall be in the discretion of the court. 194, c. 11, s. 375.

Variation or discharge of order

(8) An order made under this section may be varied or discharged by the court on motion.

Limitation period

129.1 Except where otherwise provided in this Act, no proceeding under this Act shall be commenced later than six years from the date of the occurrence of the last event on which the proceeding is based.

Directors and officers

129.2 For the purposes of this Act, if a company or a person other than an individual has not complied with Ontario securities law, a director or officer of the company or person who authorized, permitted or acquiesced in the non-compliance shall be deemed to also have not complied with Ontario securities law, whether or not any proceeding has been commenced against the company or person under Ontario securities law or any order has been made against the company or person under section 127.

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

137(2) Sealing documents

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.

ONTARIO SECURITIES COMMISSION

Applicant

and

GO-TO DEVELOPMENTS

HOLDINGS INC. et al

Respondents

Court File No: CV-21-00673521-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at TORONTO

FACTUM OF THE RECEIVER
(RETURNABLE JUNE 14, 2022)

AIRD & BERLIS LLP
BARRISTERS AND SOLICITORS
181 Bay St., Suite 1800
Toronto, ON M5J 2T9

Steven Graff, LSO#: 31871V
Email: sgraff@airdberlis.com

Ian Aversa, LSO#: 55449N
Email: iaversa@airdberlis.com

Jeremy Nemers, LSO#: 66410Q
Email: jnemers@airdberlis.com

Tamie Dolny, LSO#: 77958U
Email: tdolny@airdberlis.com

Lawyers for the Receiver