

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

**IN THE MATTER OF SECTION 243 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**

BETWEEN:

CALLIDUS CAPITAL CORPORATION

Applicant

- and -

JD NORMAN CANADA, ULC

Respondent

FACTUM OF THE RECEIVER

(Approval, Vesting and Discharge Order)

January 17, 2022

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TO: THE SERVICE LIST

PART I -OVERVIEW

1. This factum is filed by KSV Restructuring Inc. (“**KSV**”) in its capacity as receiver (the “**Receiver**”) of the property, assets, and undertakings of JD Norman Canada, ULC (the “**Debtor**”). KSV was appointed as Receiver pursuant to an order of this Court made on February 12, 2021 (the “**Receivership Order**”).

2. Pursuant to the terms of the Receivership Order, the Receiver undertook to supervise an orderly wind-down of the Debtor’s business. This task included liquidating the assets of the Debtor in a manner designed to maximize value for stakeholders. The only significant asset remaining in the Debtor’s possession is real property located in Windsor, Ontario, which the Receiver has arranged to sell to an interested purchaser following an extensive marketing process.

3. Following this sale, no remaining significant assets will remain in the Debtor’s possession, and the purpose of the receivership will have been fulfilled. The Receiver is therefore entitled to be discharged.

4. In this motion, the Receiver now seeks an order (the “**Approval, Vesting, and Discharge Order**”):

- (a) approving the sale transaction (the “**Transaction**”) contemplated by an agreement of purchase and sale between the Receiver and Nexe Innovations Inc (the “**Purchaser**”), dated December 22, 2021 (as amended on December 23, 2021, the “**Sale Agreement**”) for the sale of the real property known as 6845 Hawthorne Drive, Windsor, Ontario (the “**Windsor Property**”) to the Purchaser;

- (b) vesting in the Purchaser the Debtor's right, title, and interest in and to the Windsor Property upon the delivery of the Receiver's Certificate (as defined in the Receiver's Notice of Motion) to the Purchaser;
 - (c) approving the Fourth Report of the Receiver dated January 14, 2022 (the "**Fourth Report**") and the activities of the Receiver described therein, and the Receiver's and its counsel's fees and disbursements (as set out in the Fee Affidavits appended to the Fourth Report) and the Fee Accrual;
 - (d) sealing the confidential appendices to the Fourth Report (the "**Confidential Appendices**"), pending completion of the Transaction; and
 - (e) discharging KSV as Receiver in accordance with the Fourth Report, subject to the Receiver filing a certificate (the "**Discharge Certificate**") with the Court certifying it has completed all outstanding receivership matters as set out in the Fourth Report, and upon filing the Discharge Certificate, releasing and discharging KSV from any and all liability that KSV now has or may thereafter have by reason of, or in any way arising out of, the acts or omissions of KSV while acting in its capacity as Receiver, save and except for any gross negligence or wilful misconduct on the Receiver's part.
5. This factum is filed in support of the proposed Approval, Vesting, and Discharge Order.

PART II -FACTS

A. Background

6. The Debtor is a subsidiary of JD Norman Industries, Inc. (“**JDN**”), a US based automotive parts manufacturer. Until early February 2021, the Debtor carried on the business of manufacturing highly engineered metal components and supplying the components exclusively to General Motors Holdings LLC and its affiliates (“**GM**”) from its facility in Windsor, Ontario. As a result of GM resourcing its supply to an alternative vendor, the Debtor discontinued its operations in early February 2021.¹

7. Callidus Capital Corporation (“**Callidus**”), along with Bank of America, N.A (“**BofA**”), are JDN’s principal secured creditors, and the Debtor is an obligor on both Callidus and BofA loan facilities. At the commencement of these proceedings, Callidus was owed approximately USD \$146.4 million, which was secured against the Debtor and JDN’s property, including the Debtors’ manufacturing and equipment (the “**M&E Assets**”) and the Windsor Property. BofA was owed approximately \$16.3 million USD, which was secured against the Debtor and JDN’s accounts receivable and inventory.²

B. Appointment and Activities of the Receiver

8. On February 12, 2021, the Receiver was appointed pursuant to the Receivership Order to conduct a Court-supervised wind-down of the Debtor’s business and assets, including all proceeds thereof, with the objective of maximizing value for stakeholders. As part of this process, the

¹ Fourth Report of the Receiver to the Court dated January 14, 2022 (the “**Fourth Report**”), at paras. 2.1-2.3, Motion Record of the Receiver dated January 14, 2022 (“**Motion Record**”) at Tab 2.

² Fourth Report at para. 2.4, Motion Record at Tab 2.

Receiver undertook to liquidate various assets of the Debtor, including both the Windsor Property and the M&E Assets.³

9. Additionally, the Receiver's activities included securing and arranging for the maintenance of the Debtor's premises and coordinating with counsel and JDN.⁴

C. Liquidation of the M&E Assets and the Distribution Order

10. As part of the Receiver's undertaking to liquidate the M&E Assets, the Receiver entered into a Liquidation Services Agreement with Corporate Assets Inc. ("the **Liquidator**"). The Liquidation Services Agreement was approved by this Court pursuant to an Approval and Vesting Order dated May 4, 2021.⁵

11. In accordance with the Liquidation Services Agreement, the Liquidator conducted an auction of the M&E Assets on June 9, 2021. Following the successful completion of this process, the Liquidator removed all of the M&E Assets from the Windsor Property by the end of August 2021, relieving the Receiver and the Liquidator of their obligations pursuant to the Liquidation Services Agreement.⁶

12. On November 16, 2021, the Receiver sought and obtained from this Court an order approving the proposed distribution by the Receiver of the proceeds of the sale of the M&E assets (the "**Interim Distribution Order**").⁷

³ Fourth Report at para. 1.3, Motion Record at Tab 2. A copy of the Receivership Order is attached as Appendix "A" to the Fourth Report.

⁴ Fourth Report at para. 9.1, Motion Record at Tab 2. A summary of the Receiver's activities is found at Section 9 of the Fourth Report.

⁵ Fourth Report at para. 2.2.1, Motion Record at Tab 2.

⁶ Fourth Report at para. 2.2.3, Motion Record at Tab 2.

⁷ A copy of the Interim Distribution Order is attached as Appendix "H" of the Fourth Report.

13. Pursuant to the Interim Distribution Order, the Receiver was authorized and directed to make an interim distribution to Callidus of \$300,000, representing a portion of the net proceeds generated from the liquidation of the M&E Assets.⁸

14. The Interim Distribution Order authorized the Receiver to make further distributions to Callidus up to the amount of the Debtor's indebtedness to Callidus without requiring any further order of the Court.⁹

D. Liquidation of the Windsor Property

(a) The Colliers Listing Period

15. In order to liquidate the Windsor Property, the Receiver undertook a rigorous and extensive sale process (the "**Sale Process**"). The Receiver entered into a listing agreement for the Windsor Property on April 19, 2021 (the "**Colliers Listing Agreement**") with Colliers International London Ontario, Brokerage ("**Colliers**"), for the purposes of marketing the Windsor Property.¹⁰

16. Based on Colliers' recommendation, the Windsor Property was listed for sale on the Multiple Listing Service ("**MLS**") for \$6 million. This amount was subsequently reduced to \$5.8 million in August 2021.¹¹

17. The Colliers Listing Agreement expired on October 31, 2021 without a sale being completed.¹²

⁸ Fourth Report, Appendix "H": Interim Distribution Order at para. 2, Motion Record at Tab 2.

⁹ Fourth Report, Appendix "H": Interim Distribution Order at para. 3, Motion Record at Tab 2.

¹⁰ Fourth Report at para. 3.1.1, Motion Record at Tab 2.

¹¹ Fourth Report at para. 3.1.2, Motion Record at Tab 2.

¹² Fourth Report at para. 3.1.3, Motion Record at Tab 2.

(b) The CBRE Listing Period

18. After consulting with Callidus, the Receiver engaged CBRE Limited – 273 (“**CBRE**”) to list the Windsor Property for sale on November 1, 2021 (the “**CBRE Listing Agreement**”).¹³

19. During the period of the CBRE Listing Agreement, the Receiver and CBRE engaged in extensive marketing of the Windsor Property. During the pre-marketing period, the Receiver and CBRE assembled diligence information relating to the Windsor Property, which was made available to interested parties. This diligence information included a marketing brochure (the “**Marketing Brochure**”), a confidentiality agreement (the “**CA**”), and additional documents including environmental reports and detailed information on the Windsor Property and the Sale Process (the “**Property Information Summary**”).¹⁴

20. The Receiver and CBRE then undertook the following process to market the Windsor Property:

- (a) In early November 2021, CBRE listed the Windsor Property for sale on MLS for \$4.5 million.
- (b) On November 10, 2021, MLS, CBRE sent the Marketing Brochure to over 400 prospective purchasers and real estate professionals, primarily in the Ontario region.
- (c) CBRE discussed the transaction opportunity with over 50 prospective purchasers.

¹³ Fourth Report at para. 3.1.3, Motion Record at Tab 2.

¹⁴ Fourth Report at para. 3.1.4, Motion Record at Tab 2.

- (d) CBRE placed “For Sale Signage” on the Windsor Property.
- (e) Interested parties were requested to submit their offers using a standard form asset purchase agreement, and to blackline any changes in their offer against that form of agreement.¹⁵

(c) Results of the Sale Process

21. Over the course of both listing agreements, more than 21 parties executed a CA and performed diligence, including touring the premises and reviewing the compiled diligence information.¹⁶

22. During the entirety of the Sale Process three offers were submitted. The Purchaser’s offer was the high value offer made.¹⁷

23. On December 22, 2021, after consulting with Callidus, the Receiver entered into the Sale Agreement with the Purchaser, which was subsequently amended to provide the Purchaser until January 7, 2022 to satisfy or waive its due diligence conditions. On January 7, 2022, the Purchaser waived all conditions.¹⁸

¹⁵ Fourth Report at para. 3.1.4, Motion Record at Tab 2.

¹⁶ Fourth Report at paras. 3.2.1(a)-(b), Motion Record at Tab 2.

¹⁷ Fourth Report at para. 3.2.1(c), Motion Record at Tab 2. A summary of the offers received is attached as Confidential Appendix “1” of the Fourth Report.

¹⁸ Fourth Report at paras. 3.2.1(d)-(e), Motion Record at Tab 2.

(d) The Transaction

24. Under the terms of the Transaction,¹⁹ the Purchaser, Nexx Innovations Inc., will purchase the Windsor Property in trust for a company to be incorporated in the future. The Purchaser's bid was submitted during the period of the CBRE Listing Agreement in accordance with the requirements outlined above. The Purchaser is an arms-length party to both the Receiver and to CBRE.²⁰

25. The Transaction includes as a condition precedent the Court's issuance of the proposed Order. This is the only condition precedent which has not yet been satisfied or waived. Should Court approval be granted, the Transaction is to close within 10 days of the granting of the proposed Order.²¹

(e) Activities of the Receiver in Relation to the Sale Process

26. The Receiver's activities in relation to the Sale Process included, but were not limited to, the following:

- (a) negotiating both the Colliers Listing Agreement and the CBRE Listing Agreement, corresponding extensively with both Colliers and CBRE; and reviewing and commenting on Collier's and CBRE's marketing materials;

¹⁹ The material terms of the Transaction are contained in Section 4.0 of the Fourth Report. A copy of a redacted version of the Sale Agreement is attached as Appendix "D" of the Fourth Report, while an unredacted copy of the Sale Agreement is attached as Confidential Appendix "2" of the Fourth Report.

²⁰ Fourth Report at para. 4.1(a), Motion Record at Tab 2.

²¹ Fourth Report at paras. 4.1(h)-(i), Motion Record at Tab 2.

- (b) arranging for Phase I and II ESA Reports, corresponding extensively with the consultant retained to provide them, and reviewing the reports once provided;
- (c) corresponding with AON Parizeau, the Receiver's insurance broker, to place insurance coverage over the Windsor Property; and
- (d) negotiating the APS with the Purchaser's legal counsel.²²

E. Fees and Disbursements of the Receiver and its Counsel

27. Under the terms of the Receivership Order, the Receiver was authorized to retain counsel for the purpose of assisting with the exercise of the Receiver's power and duties.²³ Pursuant to this authority, Osler, Hoskin & Harcourt LLP ("**Osler**") was retained as counsel to the Receiver.

28. The Receiver seeks approval of the following fees and disbursements on behalf of itself and Osler which were or will be incurred in the exercise of the Receiver's power and duties:

- (a) For the Receiver, for the period from February 1, 2021 to December 31, 2021, fees and disbursements of approximately \$145,000;²⁴
- (b) For Osler, for the period from February 9, 2021 to November 16, 2021, fees and disbursements of approximately \$153,000;²⁵ and

²² Fourth Report at para. 9.1, Motion Record at Tab 2. A summary of the activities of the Receiver in relation to the Sale Process may be found at Section 9 of the Fourth Report.

²³ Fourth Report, Appendix "A": Receivership Order at para. 3(d), Motion Record at Tab 2.

²⁴ Fourth Report at para. 10.1, Motion Record at Tab 2.

²⁵ Fourth Report at para. 10.2, Motion Record at Tab 2.

- (c) A Fee Accrual of \$50,000 to cover further fees and disbursements by both the Receiver and Osler pending the filing of the Discharge Certificate.²⁶

F. Remaining Assets and Distribution

29. Other than the Windsor Property, the only known remaining asset subject to the Receivership is the cash on deposit in the receivership account. Currently, this account contains approximately \$33,000 (excluding the deposit made by the Purchaser pursuant to the Sale Agreement).²⁷

30. Pursuant to the Distribution Order, and subject to Court approval of the Transaction, the Receiver intends to distribute the proceeds of the Transaction to Callidus as the senior secured creditor.²⁸

G. Remaining Activities and Discharge

31. The remaining activities of the Receiver include the completion of the Transaction, the distribution of the proceeds of the Transaction to Callidus in accordance with the Distribution Order, and the preparation of the Receiver's final report (the "**Remaining Activities**").²⁹

32. Following the completion of the Remaining Activities, the Receiver will have completed its statutory duties, as well as those duties set out by the Court in the Receivership Order.

²⁶ Fourth Report at para. 10.4, Motion Record at Tab 2.

²⁷ Fourth Report at para. 6.1, Motion Record at Tab 2.

²⁸ Fourth Report at para. 6.3, Motion Record at Tab 2.

²⁹ Fourth Report at paras. 7.3 and 8.1, Motion Record at Tab 2. The remaining activities of the Receiver are outlined in more detail in Section 8 of the Fourth Report.

PART III -ISSUES

33. The issues on this motion are whether:
- (a) This Court should approve the Transaction;
 - (b) This Court should order that the Confidential Appendices be temporarily sealed;
 - (c) This Court should approve the Fourth Report and the Receiver's activities described therein;
 - (d) This Court should approve the fees and disbursements of the Receiver and its counsel; and
 - (e) This Court should discharge the Receiver following the completion of the Remaining Activities and the receipt of the Discharge Certificate.

PART IV -LAW & ARGUMENT

A. The Transaction Should be Approved

(a) The Receiver has the authority to enter into the Transaction

34. The Receivership Order empowers and authorizes the Receiver to act in any and all of the following ways:

- (a) to market any or all of the Debtor's property, including the Windsor Property, and to negotiate such terms of sale as the Receiver in its discretion may deem appropriate;³⁰

³⁰ Fourth Report, Appendix "A": Receivership Order at para. 3(j), Motion Record at Tab 2.

- (b) with the approval of the Court, to sell any part of the Debtor's property, including the Windsor Property;³¹ and
- (c) to apply to this Court for any vesting or other orders necessary to convey any part of the Debtor's property, including the Windsor Property, free and clear of any liens or encumbrances.³²

35. The Receiver's power under the Receivership Order was granted by this Court pursuant to section 243(1) of the *Bankruptcy and Insolvency Act*, which authorizes the court to grant a receiver the power to exercise any control that the court considers advisable over an insolvent person's property, and to take any other action that the court considers advisable.³³

36. Accordingly, the Sale Process and the Sale Agreement were conducted and entered into pursuant to the authority granted to the Receiver under the terms of the Receivership Order.

(b) The Transaction satisfies the *Soundair* Principles

37. The test for approving a sale of assets under a receivership is well established. Under the principles set out in *Royal Bank v. Soundair Corp*, the Court is to consider:

- (a) whether the Receiver has made sufficient effort to obtain the best price, and has not acted improvidently;
- (b) the interests of all parties;

³¹ Fourth Report, Appendix "A": Receivership Order at para. 3(k), Motion Record at Tab 2.

³² Fourth Report, Appendix "A": Receivership Order at para. 3(m), Motion Record at Tab 2.

³³ *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, ss. 243(1)(b)-(c).

- (c) the efficacy and integrity of the process by which offers were obtained; and
- (d) whether there has been unfairness in the working out of the process.³⁴

38. Where a sale has been conducted in accordance with the *Soundair* principles, the court should uphold the business judgement of the receiver and the parties supporting it, both regarding the sale process itself, and the ultimate result of the sale process.³⁵

39. The proposed Transaction satisfies each of the *Soundair* principles.

(c) The Receiver made sufficient efforts to obtain the best price

40. The Receiver hired two separate listing agents, Colliers and CBRE, who together canvassed the market for over nine months. The listing agents used established strategies designed to sell real property, such as direct solicitation of purchasers, the MLS system, and signage placed on the Windsor Property.³⁶

41. It is the Receiver's opinion that CBRE undertook a thorough and commercially reasonable marketing of the Windsor Property, ultimately leading to the bid made by the Purchaser.³⁷ Further, it is CBRE's professional opinion that the terms and price of the Sale Agreement are at or above the market rate for comparable industrial facilities in the Windsor market.³⁸

³⁴ 1991 CanLII 2727 (ON CA) at para. 36 [*"Soundair"*].

³⁵ *Eddie Bauer of Canada, Inc. (Re)*, 2009 CanLII 48527 (ON SC), at para. 22.

³⁶ Fourth Report at para. 3.1.4, Motion Record at Tab 2.

³⁷ Fourth Report at para. 4.2.1(c), Motion Record at Tab 2.

³⁸ Fourth Report at para. 4.2.1(d), Motion Record at Tab 2; Fourth Report, Appendix "E": letter from CBRE dated January 12, 2022, Motion Record at Tab 2.

(d) Approving the sale is in the interests of all parties

42. When engaging in the sale of assets, a receiver's primary concern is to protect the interests of the debtor's creditors.³⁹ Where the proceeds of the sale are intended to be distributed to secured creditors, the receiver owes a particular duty to maximize the return for the secured creditors. This is especially so where the secured creditors are paying the costs of the receiver, and where they stand to incur an ultimate shortfall on their security.⁴⁰

43. In this proceeding, Callidus, the principle secured creditor of the debtor, has consented to the proposed Transaction. Callidus is projected to incur a substantial shortfall on its advances, and absent additional funding from Callidus, there is no funding available to continue maintaining and marketing the Windsor Property.⁴¹

44. Without funding, there is no certainty that any future transaction involving the Windsor Property could be completed. Further, despite the positive environmental reports, additional time spent marketing the Windsor Property enhances the risk of new environmental issues emerging, or of further costs being incurred procuring alternate or updated environmental reports.⁴²

(e) The Sale Process was effective and fair

45. In assessing the integrity of a sale process, the Court is not required to examine in minute detail all the circumstances leading up to the acceptance of any particular offer; rather, the court must simply be satisfied that the process adopted was a reasonable and prudent one.⁴³

³⁹ *Skyepharma PLC. v. Hyal Pharmaceutical Corp.*, 1999 CanLII 15007 (ON SC), at para. 6.

⁴⁰ *2403177 Ontario Inc. v Bending Lake iron Group Limited*, 2016 ONSC 199, at paras. 68, 72.

⁴¹ Fourth Report at para. 4.2.1(e), Motion Record at Tab 2.

⁴² Fourth Report at para. 4.2.1(f), Motion Record at Tab 2.

⁴³ *Soundair* at para. 32.

46. As discussed above, the Receiver ensured that the Sale Process was effectively conducted, employing two listing agents and keeping the Windsor Property on the market for nine months until the Receiver received a bid at or above the market rate for comparable properties.

47. The Receiver has also ensured that the Sale Process was conducted fairly and with integrity. The Purchaser is an arm's length party who submitted the highest bid following an extended and competitive sale process. Callidus, who will receive the proceeds of the Transaction as senior secured creditor, has approved the Transaction.

48. For the foregoing reasons, the Transaction is consistent with the *Soundair* principles and should be approved by this Court.

B. The Confidential Appendices Should be Sealed

49. The Receiver seeks to temporarily seal the Confidential Appendices pending completion of the Transaction. Confidential Appendix "1" of the Fourth Report contain a summary of the offers received during the Sale Process, while Confidential Appendix "2" of the Fourth Report contains an unredacted copy of the Sale Agreement.

50. The Confidential Appendices contain commercially sensitive details, including the purchase price of the Transaction, the value of other bids received for the Windsor Property, and the identity of the other bidders. Temporarily sealing these documents is necessary to preserve the integrity of the Sale Process in the event that the Transaction does not close and the Receiver is required to further market the Windsor Property.⁴⁴

⁴⁴ Fourth Report at para. 4.1.1, Motion Record at Tab 2.

51. The test for a Sealing Order is set out in *Sherman Estate v. Donovan*, and has been recently applied by insolvency courts in determining whether to seal confidential appendices. In *Ontario (Securities Commission) v. Bridging Finance Inc.*, Morawetz C.J. set out and applied the *Sherman Estate* test:

In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption 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 reasonably alternative measures will not prevent this risk; and
- (3) as a matter of proportionality, the benefits of the order outweigh its negative effects.

[...]

Having reviewed the Confidential Appendices, I am satisfied that the three prerequisites have been satisfied. There is a public interest in ensuring the integrity of the Sales Process and any arbitration. There is no reasonable alternative measure to preserve the integrity of the Sales Process and any arbitration. Finally, as a matter of proportionality, I am satisfied that the benefits of the order outweigh its negative effects.⁴⁵

52. Insolvency courts have routinely granted temporary sealing orders in similar circumstances, where a failure to do so would threaten the integrity of any future sale process. Recently, the Court in *The Bank of Nova Scotia v. Lackey and Lackey* granted a sealing order in relation to sale transaction documents in order to ensure that the markets were not tainted, and that the receiver's ability to sell the property in the future was not prejudiced.⁴⁶

53. The three *Sherman Estate* prerequisites are established in the present case. First, there is a public interest in maintaining the integrity of sale processes conducted by court officers, and in ensuring that by seeking approval of a proposed transaction, a receiver does not risk prejudicing

⁴⁵ 2021 ONSC 4347 at paras. 23-24, citing *Sherman Estate v Donovan*, 2021 SCC 25.

⁴⁶ 2021 ONSC 2628, at paras. 41-42.

any future sale process. Second, no reasonable alternative exists which will not risk the integrity of any future sale process. Third, the benefits of the sealing order outweigh any negative effects: the order is appropriately time-limited, and the Receiver does not believe any stakeholder would be prejudiced by the temporary sealing of these documents; on the contrary, keeping these details sealed pending completion of the Transaction would benefit stakeholders by maximizing the value obtained through any future sale process.⁴⁷

54. Accordingly, the Confidential Appendices should be temporarily sealed pending the close of the Transaction.

C. The Fourth Report and the Receiver's Activities Should be Approved

55. It has become common practice in CCAA proceedings for Monitors to bring motions seeking approval for their reports and the activities set out therein.⁴⁸ In *Target Canada Co*, the court noted that there are good policy and practical reasons for the court to grant such approval, including (a) allowing the Monitor to bring its activities before the Court; (b) allowing an opportunity for stakeholders' concerns to be addressed; (c) enabling the Court to satisfy itself that the Monitor's activities have been conducted in a prudent and diligent manner; (d) providing protection for the Monitor not otherwise provided by the CCAA; and (e) protecting creditors from delay that may be caused by re-litigation of steps or potential indemnity claims by the Monitor.⁴⁹

56. The same comments and the policy considerations apply with equal force to receivership proceedings and motions seeking approval for a receiver's report and activities.

⁴⁷ Fourth Report at para. 4.1.2, Motion Record at Tab 2.

⁴⁸ *Re Target Canada Co.*, 2015 ONSC 7574 at para. 2.

⁴⁹ *Ibid.* at paras. 22 – 23.

57. The activities of the Receiver as set out in the Fourth 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 Debtor's stakeholders generally. The Receiver therefore respectfully submits that the Fourth Report and the Receiver's activities described in the report should be approved.

D. The Fees and Disbursements of the Receiver and its Counsel Should be Approved

58. Pursuant to paragraph 18 of the Receivership Order, the Receiver and counsel to the Receiver are entitled to be paid their reasonable fees and disbursements at their standard rates and charges, unless otherwise ordered by the Court on the passing of accounts.⁵⁰

59. In order to approve the fees and disbursements of a receiver and its counsel, the court must be satisfied that they are fair and reasonable.⁵¹ The Ontario Court of Appeal has approved the following non-exhaustive list of factors which may assist the court in reaching this determination:

- (a) the nature, extent and value of the assets;
- (b) the complications and difficulties encountered;
- (c) the degree of assistance provided by the debtor;
- (d) the time spent;
- (e) the receiver's knowledge, experience and skill;

⁵⁰ Fourth Report, Appendix "A": Receivership Order at para. 18, Motion Record at Tab 2.

⁵¹ *Bank of Nova Scotia v. Diemer*, 2014 ONCA 851, at para. 33 [*"Diemer"*].

- (f) the diligence and thoroughness displayed;
- (g) the responsibilities assumed;
- (h) the results of the receiver's efforts; and
- (i) the cost of comparable services when performed in a prudent and economical manner.⁵²

60. Of these factors, the results and value provided by the receiver and its counsel pre-dominate over any mathematical calculations.⁵³

61. In the present case, as outlined above, the Receiver and its counsel liquidated the Debtor's assets in a prudent and economical manner in order to maximize the interests of stakeholders. The Receiver successfully negotiated an initial dispute with the union representing the Debtor's former employees,⁵⁴ successfully liquidated the M&E Assets and distributed the proceeds, and successfully liquidated the Windsor Property after a rigorous and extensive Sale Process, having properly managed the Windsor Property in the interim.

62. Further, the fees charged by the Receiver and counsel are within the appropriate range for the services provided. The accounts of the Receiver are fair and reasonable in the circumstances of the administration.⁵⁵ The rates charged by Osler are consistent with the rates charged by

⁵² Ibid.

⁵³ Ibid., at para. 45.

⁵⁴ Fourth Report, at para. 2.1, Motion Record at Tab 2.

⁵⁵ Fourth Report, Appendix "I": Affidavit of David Sieradzki sworn January 14, 2022 at para. 7, Motion Record at Tab 2.

corporate law firms practicing insolvency law in the Toronto market, and Osler's total hours, fees, and disbursements are reasonable and appropriate in the circumstances.⁵⁶

63. The Receiver is also of the view that the Fee Accrual is reasonable and appropriate in the circumstances, and that it properly provides for the estimated fees to be incurred by the Receiver and Osler prior to the filing of the Discharge Certificate.⁵⁷

E. The Receiver Should be Discharged

64. Upon completion of the Remaining Activities, the Receiver will have fulfilled both its statutory duties and its duties under the Receivership Order. Accordingly, the Receiver respectfully submits that it should be discharged, and the Receivership terminated, following the completion of the Remaining Activities and the filing of the Discharge Certificate.

PART V - RELIEF REQUESTED

65. The Receiver respectfully requests that this Honourable Court grant the Approval, Vesting and Discharge Order substantially in the form included in the Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of January 2022.

Osler, Hoskin & Harcourt LLP

⁵⁶ Fourth Report at para. 10.5, Motion Record at Tab 2.; Fourth Report, Appendix "J": Affidavit of Marc Wasserman sworn January 14, 2022 at para. 6, Motion Record at Tab 2.

⁵⁷ Fourth Report at para. 10.6, Motion Record at Tab 2.

SCHEDULE “A” – LIST OF AUTHORITIES

1. *2403177 Ontario Inc. v Bending Lake iron Group Limited*, 2016 ONSC 199
2. *Bank of Nova Scotia v. Diemer*, 2014 ONCA 851
3. *Eddie Bauer of Canada, Inc. (Re)*, 2009 CanLII 48527 (ON SC)
4. *Ontario Securities Commission v. Bridging Finance Inc.*, 2021 ONSC 4347
5. *Re Target Canada Co.*, 2015 ONSC 7574
6. *Royal Bank of Canada v. Soundair Corp.*, 1991 CanLII 2727 (ON CA)
7. *Skyepharma PLC. v. Hyal Pharmaceutical Corp.*, 1999 CanLII 15007 (ON SC)
8. *The Bank of Nova Scotia v. Lackey and Lackey*, 2021 ONSC 2628

**CALLIDUS CAPITAL
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JD NORMAN CANADA, ULC

Court File No: CV-21-00656820-00CL

and

Applicant

Respondent

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT: TORONTO

FACTUM
(Approval, Vesting and Discharge Order)

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