

**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

(Interim Distribution Order)

November 11, 2021

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PART I -OVERVIEW

1. On February 12, 2021, this Court granted an order (the “**Receivership Order**”) appointing KSV Restructuring Inc. as the receiver and manager (the “**Receiver**”) of JD Norman Canada, ULC. (the “**Debtor**”).
2. The Applicant, Callidus Capital Corporation (the “**Applicant**”), is a senior secured creditor of the Debtor.
3. The Receiver has undertaken to liquidate various assets of the Debtor over which the Applicant has priority, including the Debtor’s machinery and equipment (the “**M&E Assets**”), and the Debtor’s owned manufacturing facility in Windsor, Ontario (the “**Windsor Property**”).
4. The liquidation of the M&E Assets was completed in August 2021. The Receiver currently remains in possession of the proceeds.
5. The Receiver has commenced marketing the Windsor Property, which has not yet been sold.
6. Accordingly, the Receiver seeks an order (the “**Interim Distribution Order**”):
 - (a) authorizing the Receiver to make the proposed interim distribution of \$300,000 to the Applicant (the “**Proposed Interim Distribution**”), being a portion of the net proceeds generated from the liquidation of the Debtor’s M&E Assets, in accordance with the approach described in the Third Report (as defined below);

- (b) following the Proposed Interim Distribution, authorizing the Receiver to make further distributions to the Applicant, up to the amount of the Debtor's secured indebtedness owing to the Applicant; and
- (c) approving the Third Report of the Receiver dated November 9, 2021 (the "**Third Report**") and the activities of the Receiver described therein.

PART II -FACTS

A. Background

7. 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. ¹ As a result of GM resourcing its supply to an alternative vendor, the Debtor discontinued its operations in early February 2021.²

8. On February 12, 2021, the Receiver was appointed pursuant to an order of this Court to conduct a Court-supervised wind-down of the Debtor's business and assets, including all proceeds thereof, that maximizes value for stakeholders. As part of this process, the Receiver undertook to liquidate various assets of the Debtor, including the M&E Assets and the Windsor Property.

9. The Applicant, along with Bank of America, N.A ("**BofA**"), are JDN's principal secured creditors, and the Debtor is an obligor on both the Applicant and BofA loan facilities.³ On July

¹ Third Report of the Receiver to the Court dated November 9, 2021 (the "**Third Report**"), at paras. 2.1-2.2, Motion Record of the Receiver dated November 9, 2021 ("**Motion Record**") at Tab 2.

² Third Report at para. 2.3, Motion Record at Tab 2.

³ Third Report at para. 2.3, Motion Record at Tab 2.

10, 2018, the Applicant, BofA, and JDN concluded an Intercreditor Agreement, which fixed their respective rights and priorities (the “**Intercreditor Agreement**”). Under the terms of the Intercreditor Agreement, the Applicant’s security ranks in priority to BofA’s security in regard to equipment and fixtures, while BofA’s security ranks in priority to the Applicant’s security in regard to inventory and accounts receivable.⁴

10. At the commencement of these proceedings, the Applicant was owed approximately \$146.4 million USD, which was secured against the Debtor and JDN’s property, including the M&E Assets and the Windsor Property, in addition to interest and costs which continue to accrue.⁵

B. Liquidation of the M&E Assets

11. On February 23, 2021, the Receiver commenced a comprehensive process to solicit liquidation bids for the M&E Assets.

12. Six liquidation proposals for the M&E Assets were submitted to the Receiver. The offer submitted by Corporate Assets Inc. (the “**Liquidator**”) was the highest of the six bids submitted. It resulted in the execution of the Liquidation Services Agreement dated April 20, 2021, between the Liquidator and the Receiver (the “**Liquidation Services Agreement**”) and contemplated a sale of the M&E Assets by auction or private sale.⁶

⁴ Third Report at para. 4.2(b), Motion Record at Tab 2.

⁵ Third Report at para. 2.4, Motion Record at Tab 2.

⁶ Third Report at para. 3.1, Motion Record at Tab 2.

13. Pursuant to an Approval and Vesting Order made on May 4, 2021 (the “**Approval and Vesting Order**”), the Liquidation Services Agreement and transaction contemplated therein were approved.⁷

14. The Approval and Vesting Order empowered the Liquidator to market and sell the M&E Assets in accordance with the Liquidation Services Agreement and, upon completion of the sale of any of the M&E Assets, deliver a bill of sale or similar conveyance document to each purchaser of assets (each, a “**Purchaser**”), vesting in the Purchaser all of the Debtor’s right, title and interest in such assets.⁸

15. The Liquidator conducted an auction of the M&E Assets on June 9, 2021. By the end of August 2021, the Liquidator removed all of the M&E Assets from the Windsor Property, relieving the Receiver and the Liquidator of their obligations pursuant to the Liquidation Services Agreement.⁹

16. As of November 9, 2021, the cash on deposit in the receivership account is approximately \$390,000.¹⁰

C. Liquidation of the Windsor Property

17. The Receiver also undertook to liquidate the Windsor Property. Accordingly, the Receiver entered into a listing agreement for the Windsor Property on April 19, 2021 (the “**Listing Agreement**”) with Colliers International London Ontario, Brokerage.¹¹

⁷ Third Report at para. 3.1, Motion Record at Tab 2.

⁸ Third Report at para. 3.1, Motion Record at Tab 2.

⁹ Third Report at para. 3.3, Motion Record at Tab 2.

¹⁰ Third Report at para. 2.3, Motion Record at Tab 2.

¹¹ Third Report at para. 5.1, Motion Record at Tab 2.

18. The Listing Agreement expired on October 31, 2021 without a sale being completed. After consulting with the Applicant, the Receiver engaged CBRE Limited – 273 (“**CBRE**”) to list the Windsor Property for sale on November 1, 2021.¹²

19. As of November 9, 2021, CBRE’s marketing process is in its preliminary stages, and the sale of the Windsor Property has not yet been completed.

PART III -ISSUES

20. The issues on this motion are as follows:

- (a) Should this Court authorize the Proposed Interim Distribution?
- (b) Should this Court authorize the Receiver to make further distributions to the Applicant, up to the amount of the Debtor’s secured indebtedness owing to the Applicant?
- (c) Should this Court approve the Third Report and the Receiver’s activities described therein?

PART IV -LAW & ARGUMENT

A. The Proposed Interim Distribution Should be Authorized

21. The Receiver seeks authorization to make a distribution of \$300,000 to the Applicant, drawn from the net proceeds generated by the liquidation of the M&E Assets.

¹² Third Report at para. 5.2, Motion Record at Tab 2.

22. Orders authorizing interim distributions are routinely granted by courts in insolvency proceedings, including receiverships.¹³ For example, in *GE Canada Real Estate*, Brown J. approved an interim distribution by a receiver, subject to the receiver maintaining sufficient reserves to complete the administration of the receivership, in order to maximize efficiency and avoid the need for further motions.¹⁴

23. Similarly, in *AbitibiBowater*, Justice Gascon considered a number of factors in determining whether an interim distribution should be permitted, including: (1) whether counsel had stated that the security interest was valid and enforceable; (2) whether the interim distribution would enable interest savings; and (3) whether there will be sufficient liquidity after the distribution is made.¹⁵ While *AbitibiBowater* dealt with a CCAA proceeding, its reasoning applies equally to a receivership proceeding.

24. Each of these factors supports granting the Proposed Interim Distribution.

(a) The Applicant's security interest is valid and perfected

25. The funds which are to be distributed to the Applicant represent a portion of the proceeds generated from the liquidation of the M&E Assets. The Receiver's counsel has confirmed, subject to usual and customary qualifications and assumptions, that the security held by the Applicant under the Ontario *Personal Property Security Act* and the British Columbia *Personal Property Security Act* is a valid and perfected security interest over the M&E Assets.¹⁶

¹³ See, for example, *GE Canada Real Estate*, 2014 ONSC 1173, at para. 53 [*"GE Canada Real Estate"*]; *AbitibiBowater inc. (Arrangement relatif à)*, 2009 QCCS 6461 at paras. 70 – 75 [*"AbitibiBowater"*].

¹⁴ *GE Canada Real Estate* at para. 53.

¹⁵ *AbitibiBowater*, at para. 75.

¹⁶ Third Report at para. 4.2(a), Motion Record at Tab 2.

26. Further, the Receiver is not aware of any other secured creditor or other claim that ranks or may rank in priority to the Applicant's claim to the proceeds generated from the liquidation of the M&E Assets, other than any amounts secured by the Court-ordered charges contained within the Receivership Order.

(b) The Proposed Interim Distribution would permit interest savings

27. The proceeds of the sale of the M&E Assets secures debt owed by the Debtor to the Applicant, upon which interest continues to accumulate.¹⁷ Permitting the Proposed Interim Distribution will reduce the principal owing by the Debtor to the Applicant, which will in turn minimize the continued accumulation of interest costs, to the benefit of creditors generally.

(c) The Proposed Interim Distribution would leave the Receiver with sufficient financing

28. The Receiver expects to have sufficient financing following the Proposed Interim Distribution to fund the remainder of the receivership proceedings.¹⁸ To the Receiver's knowledge, all post-filing obligations, including professional fees, are current. Following payment of the Proposed Interim Distribution, approximately \$90,000 will remain in the receivership account to fund carrying and other costs until the Windsor Property is sold.¹⁹ Under the terms of the Interim Distribution Order, the Proposed Interim Distribution is subject to the retention of any necessary reserves, as determined by the Receiver.

¹⁷ Third Report at para. 1.4, Motion Record at Tab 2.

¹⁸ Third Report at para. 4.2(d), Motion Record at Tab 2.

¹⁹ Third Report at para. 4.2(e), Motion Record at Tab 2.

29. Further, to the extent additional funding is required, the Applicant has committed to make advances to the Receiver in accordance with the Receivership Order.²⁰

B. Further Distributions Should be Authorized

30. In addition to the Proposed Interim Distribution, the Receiver seeks authorization to make further distributions to the Applicant, up to the amount of the Debtor's secured indebtedness owing to the Applicant. These distributions will be funded from the proceeds of the eventual sale of the Windsor Property.

31. The factors discussed above apply equally to the issue of future distributions. In addition, authorizing further distributions at this time would allow the Court to avoid wasteful and duplicative future proceedings.

(a) The Applicant's charge on the property is valid

32. The Receiver's counsel has confirmed, subject to usual and customary qualifications and assumptions, that the Applicant holds a charge on the Windsor Property, that this charge was validly registered on title to the Windsor Property, and that this charge is the only encumbrance registered against the Windsor Property.²¹

(b) The Proposed Interim Distribution would permit interest savings

33. As above, the Windsor Property secures debt owed by the Debtor to the Applicant, upon which interest continues to accumulate. Permitting further distributions to the Applicant as funds

²⁰ Third Report at para. 4.2(e), Motion Record at Tab 2.

²¹ Third Report at para. 5.5, Motion Record at Tab 2.

become available to reduce the principal of the outstanding indebtedness to the Applicant will further minimize unnecessary interest costs, to the benefit of creditors generally.²²

(c) The Proposed Interim Distribution would leave the Receiver with sufficient financing

34. For the reasons given above, the Receiver expects to have sufficient financing following the Proposed Interim Distribution to fund the remainder of the receivership proceedings. Under the terms of the Interim Distribution Order, any further distributions to the Applicants are subject to the retention of any necessary reserves, as determined by the Receiver.

35. To the extent additional funding is required, the Applicant has committed to make advances to the Receiver under the Receiver's Borrowing Charge in accordance with the Receivership Order.

(d) Authorizing further distributions would maximize efficiency and avoid the need for further motions

36. Authorizing the Receiver to make further distributions to the Applicant without returning to Court will allow the parties and the Court to avoid additional duplicative motions, along with the associated costs. The funds from which any such distribution would be drawn are subject to a valid security interest, and there are no considerations which would apply to future distributions which do not apply to the Proposed Interim Distribution. By approving the future distributions

²² Third Report at para. 1.4, Motion Record at Tab 2.

now, the Court avoids the need to hear future motions which would be substantively identical to the motion currently before it.

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

37. It has become common practice in CCAA proceedings for Monitors to bring motions seeking approval for their reports and the activities set out therein.²³ In *Target Canada Co.*, Morawetz RSJ 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.²⁴

38. 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.

39. The activities of the Receiver as set out in the Third 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 Third Report and the Receiver's activities described in the report should be approved.

²³ *Re Target Canada Co.*, 2015 ONSC 7574 at para. 2.

²⁴ *Ibid.* at paras. 22 – 23.

PART V - RELIEF REQUESTED

40. The Receiver respectfully requests that this Honourable Court grant the Interim Distribution Order substantially in the form included in the Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of November 2021.

Osler, Hoskin & Harcourt LLP

SCHEDULE “A” – LIST OF AUTHORITIES

1. *AbitibiBowater (Re)*, 2009 QCCS 6461
2. *GE Canada Real Estate Financing Business Property Company v 1262354 Ontario Inc*, 2014 ONSC 1173
3. *Re Target Canada Co*, 2015 ONSC 7574

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JD NORMAN CANADA, ULC

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

and

Applicant

Respondent

ONTARIO
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COMMERCIAL LIST

PROCEEDING COMMENCED AT: TORONTO

FACTUM
(Interim Distribution Order)

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