

PART I - OVERVIEW

1. KSV Restructuring Inc. (the “**Receiver**”) files this brief Submission in support of its motion for the advice and direction of this Court. In making this Submission, the Receiver relies on its Report of February 15, 2021.¹
2. Despite paragraph 4 of the Order granted by this Court on February 12, 2021 (the “**Receivership Order**”), the Receiver has been unable to access the debtor’s premises in order to remove certain inventory (the “**Inventory**”) that must be delivered by Thursday, February 18, 2021 (the “**Cut-Off Date**”) to a third party buyer -- General Motors Holdings LLC and its affiliates (“**GM**”) – pursuant to a Long Term Supply Accommodation Agreement between GM, the Company, and other parties (the “**LTSA**”). If the Inventory is not delivered prior to the Cut-Off Date, it will essentially be worthless, representing a material loss to the stakeholders of the Company’s estate.
3. To date, the Receiver has been unable to remove the Inventory from the Company’s premises due to the actions of Unifor Local 195 (the “**Union**”) in blocking the loading dock at the debtor’s premises with a trailer. Despite several requests, the Union has not consented to move the trailer for the limited purpose of allowing the Receiver to remove the Inventory and realize on its value for the benefit of the Company’s estate. The Receiver therefore requires the Court’s advice and direction with respect to how best to fulfill its duties to this Court and to the stakeholders as a whole, in light of the risks to the value of the Inventory posed by the Union’s actions.

PART II - SUBMISSIONS

A. The Receiver Owes Duties to All Stakeholders

¹ First Report of KSV Restructuring Inc. as Receiver of JD Norman Canada, ULC, dated February 15, 2021 [First Receiver Report]. Capitalized terms in this Submission have the same meaning as in the First Receiver Report, unless otherwise noted.

4. It is well-established that, even where a receiver is appointed by the court on the application of a secured creditor, the receiver does not represent the security holder or the debtor. The receiver's duties arise in its capacity as principal, not agent, and the receiver has a fiduciary duty to comply with the powers granted in the order, and to act honestly and in the best interests of all interested parties. These duties are owed to the court and to all persons having an interest in the debtor's assets.²

5. The right of a court-appointed receiver to return to the Court for advice and directions is a corollary of the stringent duties imposed upon the receiver.³ This right of the Receiver is codified in the model receivership order accepted in the Ontario Courts (the "**Model Order**") and in this Receivership Order.⁴

6. The purpose of the Company's receivership is to conduct a court-supervised wind-down of the Company's business and assets that maximizes value for the Company's stakeholders, including the Company's principal secured creditors – Bank of America, N.A. and Callidus Capital Corporation.⁵

7. To this end, paragraph 4 of the Receivership Order – which is identical in all respects to the equivalent provision of the Model Order – provides that stakeholders are ordered to provide access and co-operation to the Receiver. Paragraph 4 states, in relevant part:

THIS COURT ORDERS that ... all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order ... shall forthwith advise the Receiver of the existence of any

² *Toronto-Dominion Bank v Usarco Ltd.*, 2001 CanLii 24004 at para. 30, citing *Bennett on Receiverships*; see also *Re Page*, 2002 CarswellOnt 3892 at para. 12.

³ *Royal Bank of Canada v. Vista Homes Ltd.*, 1984 CanLII 526 (BCSC) at para. 4.

⁴ Receivership Order, para. 29.

⁵ First Receiver Report, para. 1.3.

Property in such Person's possession or control, shall grant immediate and continued access to the Property to the Receiver, and shall deliver all such Property to the Receiver upon the Receiver's request. [emphasis added]

8. This provision has been interpreted on a number of occasions as requiring persons who are occupying or otherwise in control of a debtor's property to provide unfettered access to that property to a court-appointed receiver. Failure to do so is a breach of the receivership order.⁶

B. The Terms of the LTSA

9. The circumstances leading to the LTSA are described in the Affidavit of John Ho, filed in support of the application for the Receivership Order.⁷

10. GM – which was the Company's sole customer – terminated the LTSA in November 2020, alleging Company events of default. Even though this termination was disputed, the evidence that is before this Court indicates the belief that GM has now resourced, or is in the process of resourcing, all of GM's business away from the Company.⁸

11. In other words, GM now has other sources to acquire the parts that were to be supplied by the Company. As such, GM has no incentive to acquire the Inventory that remains in the hands of the Company if it is not contractually required to do so.

12. Based on a review of the LTSA and the other evidence before this Court in the receivership application, the Receiver is concerned that GM is only under a contractual obligation to acquire the Inventory from the Company until the Cut-Off Date. In particular, the Receiver believes that

⁶ See, for example, *HSBC Bank Canada v. Turbo Logistics Canada Inc. and 2163960 Ontario Inc.*, 2009 CarswellOnt 5064, aff'd *HSBC Bank Canada v. Turbo Logistics Canada Inc.*, 2011 ONCA 234.

⁷ Affidavit of John Ho, sworn February 10, 2021 [Ho Affidavit].

⁸ Ho Affidavit, para. 14 and 15.

the purchase orders for the remaining Inventory expire on the Cut-Off Date and after that date, if the Inventory has not been delivered, GM is likely to cancel those purchase orders.⁹

13. Until the Cut-Off Date, the Inventory is worth the price that GM is required to pay for it pursuant to the terms of the LTSA – which the Receiver understands to be approximately \$500,000.¹⁰ However, since the Inventory is custom-manufactured component parts for GM, there is no other purchaser to acquire the Inventory if GM does not. After the Cut-Off Date, therefore, if the Receiver has not conveyed the Inventory to GM, the Inventory will be essentially worthless.¹¹

14. Based on this information, it is the Receiver's belief that it is in the best interests of all stakeholders of the Company to remove the Inventory and convey it to GM prior to the Cut-Off Date. If this cannot occur, this value to the estate will be lost.

C. Actions of the Union

15. To date, and despite paragraph 4 of the Receivership Order, the Union has precluded the Receiver from removing the Inventory. Although the Receiver has been permitted limited access to the Company's property to secure it, the Union has blocked access to the shipping docks with a trailer.¹² The only means by which the Receiver can remove the Inventory from the Company's property is by means of the shipping docks.

⁹ First Receiver Report, para. 3.3(c).

¹⁰ First Receiver Report, para. 3.3(b).

¹¹ First Receiver Report, para. 3.3(c).

¹² First Receiver Report, para. 3.2.

16. Although the Receiver has made several requests for the Union to move the trailer for the limited purpose of allowing the Receiver to remove the Inventory, the Union has, to date, declined to do so.¹³ The Union insists that it has the constitutional right to picket and, if the Receiver wishes to prevent the Union from picketing, the Receiver must seek a labour injunction under section 102 of the *Courts of Justice Act* (Ontario).

17. The Receiver does not seek an injunction to preclude the Union from picketing and has no intention of interfering with the Union's ability to picket lawfully in order to communicate its grievances with the Company. The Receiver seeks only to access the Company's property, and in particular, unfettered access to the shipping docks, pursuant to its powers under the Receivership Order, including paragraph 4, and in keeping with its duties to the court and all of the Company's stakeholders.

18. The Receiver does not understand the legal basis for the Union's position that it is entitled, as part of its lawful picketing, to park a trailer on the Company's property, without the authorization of the Company or the Receiver, and contrary to the terms of a Court order. Nor does the Receiver understand the legal basis for the Union's position that it is entitled to entirely block access to a portion of the Company's property – namely, the shipping docks – and preclude the Receiver from removing Inventory from the premises.

19. The Union will not be prejudiced if its blockade is lifted to permit the Inventory to be removed. The Receiver, in removing the Inventory, does not purport to make any determination with respect to the priorities that may apply as against the proceeds of that Inventory. On the other hand, the other stakeholders are materially prejudiced if the Union is allowed to maintain the

¹³ The details of the correspondence between the Receiver and the Union are set out in the First Receiver Report in Section 3.0.

blockade. Without access to the loading docks to permit monetization of the Inventory by the Cut-Off Date, any question of priority over such proceeds will be moot because there will be no significant proceeds against which anyone can assert a claim.

20. The Receiver's duties extend to all actions the Receiver takes regarding the Company's assets, property and undertaking.¹⁴ Once appointed, the duty of the Receiver is to liquidate the assets, pay all costs and distribute the proceeds in accordance with applicable legal priorities.¹⁵ The Receiver cannot compel the Company's secured creditors to make any payments to the Union.

21. The Receiver and the Union are at an impasse. Without the Union's consent to provide access to the Inventory, in accordance with the Receivership Order, the Receiver cannot fulfill its duties to this Court and to the Company's stakeholders in maximizing value of the Company's assets.

22. For this reason, the Receiver requires the advice and direction of this Court with respect to how best to fulfill its duties to the Court and the Company's stakeholders, in view of the above circumstances.

¹⁴ *Ravelston Corporation Limited (Re)*, 2007 CanLII 2663 at para. 63.

¹⁵ *Royal Bank of Canada v Delta Logistics Transportation Inc.*, 2017 ONSC 368 at para. 23.

**CALLIDUS CAPITAL
CORPORATION**

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

SUBMISSIONS OF RECEIVER

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