

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

BETWEEN:

MARSHALLZEHR GROUP INC.

Applicant

- and -

LA PUE INTERNATIONAL INC.

Respondent

FACTUM OF THE RECEIVER

December 13, 2024

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PART I - NATURE OF THE MOTION

1. By order of The Honourable Mr. Justice Cavanagh of the Ontario Superior Court of Justice (Commercial List) (the “**Court**”) dated October 19, 2023 (the “**Receivership Order**”), which Receivership Order was made on application by MarshallZehr Group Inc. (“**MarshallZehr**” or the “**Applicant**”) pursuant to section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985 c. B-3, as amended (the “**BIA**”), and section 101 of the *Courts of Justice Act*, R.S.O 1990, c. C.43, as amended (the “**CJA**”), KSV Restructuring Inc. (“**KSV**”) was appointed as receiver (in such capacity, the “**Receiver**”), without security, of all of the assets, undertakings and properties of La Pue International Inc. (the “**Company**”), including the real property municipally known as 5528 Ferry Street, Niagara Falls (the “**Real Property**”).¹

2. The Receiver seeks, among other things, an order:

- (a) Approving the asset purchase agreement dated April 4, 2024, as amended by the Reinstatement and Amending Agreement dated July 12, 2024, the Reinstatement and Amending Agreement dated October 8, 2024 and the Third Reinstatement and Amending Agreement dated November 18, 2024, between Lakeshore Luxe Design & Build Group (“**Lakeshore**”) and the Receiver (collectively, the “**Lakeshore APS**”) and vesting in 100835091 Ontario Inc. (the “**Purchaser**”), as assignee of Lakeshore, the Company’s rights, title and interest in and to the purchased assets, including the Real Property;
- (b) approving an interim distribution to MarshallZehr from the proceeds of the sale transaction contemplated by the Lakeshore APS (the “**Transaction**”);
- (c) authorizing the Receiver to establish a Holdback Reserve (as defined below) in the amount of \$1.4 million; and
- (d) approving the Fourth Report of the Receiver dated December 11, 2024 (“**Fourth Report**”) and the conduct and activities of the Receiver as described therein; and

¹ Fourth Report of the Receiver dated December 11, 2024 at section 1, Tab 2 of the Motion Record of the Receiver, dated December 11, 2024 (the “**Fourth Report**”).

- (e) sealing the Confidential Appendices to the Fourth Report.

PART II - SUMMARY OF FACTS

A. Background

4. The Company is a single purpose entity that owns the Real Property. Pawel Fugiel (“**Fugiel**”) is the sole office and director of the Company.²
5. The Company intended to develop and sell three mid-rise buildings consisting of one mixed-use, one hotel and one residential building on the Real Property (the “**Project**”). Prior to the receivership proceedings, the Company completed shoring and excavation work on the Project, although no other phases of construction have commenced.³
6. Prior to the receivership proceedings, the Receiver understands the Company pre-sold 359 units (the “**Sale Agreements**”) and collected approximately \$31 million of deposits. The deposits are being held in trust with the surety.⁴
7. The Receiver was appointed on an application by MarshallZehr, the Company’s secured creditor.⁵
8. Sovereign General Insurance Company (“**SGIC**”) holds a second ranking charge in the principal amount of \$2 million as security for deposit insurance. SGIC also registered a financing statement against the Company under the *Personal Property Security Act* (Ontario) (“**PPSA**”).⁶

B. Sales Process

9. On December 20, 2023, the Court granted an order (the “**Sales Process Order**”) approving a process for marketing the Real Property (the “**Sales Process**”).⁷

² Third Report at para 2.1.

³ Third Report at para 2.2.

⁴ Third Report at para 2.3.

⁵ Third Report at para 2.5.

⁶ Third Report at para 2.6.

⁷ Third Report at para 4.

10. The Receiver retained Colliers Macaulay Nicolls Inc. (“**Colliers**”) as the listing agent pursuant to the terms of a Sale Process Order.⁸
11. The Receiver carried out the Sales Process in accordance with the Sales Process Order. A summary of the Sale Process is as follows:
 - (a) A pre-marketing phase which included populating a data room, preparing a confidentiality agreement, form of asset purchase agreement, and a confidential information memorandum (“**CIM**”);⁹
 - (b) On January 17, 2024, Colliers sent an investment summary detailing the acquisition opportunity (the “**Investment Summary**”) to over 4700 parties in its database, including real estate developers in the Niagara region;¹⁰
 - (c) Parties had to sign a confidentiality agreement to gain access to the data room and to obtain a copy of the CIM;¹¹
 - (d) The listing was posted on the Real Estate Board Multiple Listing Services (“**MLS**”);¹² and
 - (e) The Receiver, in conjunction with Colliers, set a “bid not before date” of March 22, 2024 at 5:00 pm (Toronto time).¹³
12. A summary of the results of the Sales Process to April 2024 is as follows:
 - (a) 22 parties executed the CA and were provided a copy of the CIM and access to the VDR; and
 - (b) 2 parties submitted offers.¹⁴

⁸ Third Report at para 3.1.1.

⁹ Third Report at para 3.1.2.

¹⁰ Third Report at para 3.1.2.

¹¹ Third Report at para 3.1.2.

¹² Third Report at para 3.1.2.

¹³ Third Report at para 3.1.2.

¹⁴ Third Report at para 3.2. This number excludes the offers submitted by Mr. Fugiel, the principal of the Company, which are described in greater detail below.

13. Following extensive negotiations, the Receiver entered into an asset purchase agreement with Lakeshore on April 4, 2024 (the “**Original APA**”).¹⁵
14. The Purchaser had paid the first deposit of \$500,000 (the “**First Deposit**”) with respect to the Original APA. Despite the Second Deposit (as defined in the Fourth Report) not being paid, the Receiver proceeded to obtain an approval and vesting order and intended to close the transaction. The Receiver informed the Court that this approach was intended to compel the Purchaser to either complete the transaction or forfeit the first deposit.¹⁶
15. The transaction contemplated by the Original APA was scheduled to close on July 2, 2024, but the Purchaser failed to pay the balance of closing funds. As a result, on July 4, 2024, the Receiver formally terminated the transaction and the first deposit was forfeited to the Receiver.¹⁷
16. Following discussions with the Purchaser, the Receiver was informed that the Purchaser required until September 2024 to secure the necessary funds to close. On July 12, 2024, the Purchaser and the Receiver entered into a Reinstatement and Amending Agreement (the “**First Reinstatement Agreement**”), pursuant to which the Purchaser agreed, among other things, to increase the purchase price by \$50,000 and provide two more deposits (the “**Additional Deposits**”), in addition to the Second Deposit. The Second Deposit was paid by the Purchaser before the First Reinstatement Agreement was executed.¹⁸
17. The Purchaser again failed to pay the additional deposits by the prescribed deadline, so the transaction was terminated. The First Deposit and the Second Deposit (as each are defined in the Fourth Report) were forfeited to the Receiver.¹⁹
18. In September of 2024, MarshallZehr advised the Receiver that the Purchaser had partnered with a real estate developer based in Toronto. Despite the fact the Original APA allowed for its assumption, the Receiver was advised that the Purchaser was not registered with the Home Construction Regulatory Authority (the “**HCRA**”) and, accordingly, could not

¹⁵ Third Report at para 3.2.

¹⁶ Third Report at para 3.0.1-3.0.3.

¹⁷ Third Report at para 3.0.1-3.0.3.

¹⁸ Fourth Report at para 3.01.4.

¹⁹ Fourth Report at para 3.0.6.

assume the Sale Agreements.²⁰ As such, the Purchaser, developer and MarshallZehr entered into the Second Reinstatement and Amending Agreement on October 8, 2024 which included, among other things, an additional deposit and an agreement for the Purchaser to assume the Sale Agreements conditional upon the Purchaser obtaining a vendor and builder license from the HCRA.²¹

19. The Purchaser did not pay the additional deposit and the Receiver, again, terminated the transaction on October 24, 2024.²²
20. The Receiver subsequently re-listed the Purchased Assets for sale.²³
21. In November of 2024, the Purchaser informed the Receiver that it now had access to a further deposit. The amount of this deposit was the same value as the combined sum of the First Deposit and the Second Deposit (the “**Third Deposit**”).²⁴ However, in light of the Purchaser’s prior defaults, before considering a further reinstatement agreement, the Receiver required the Third Deposit to be placed in the Purchaser’s lawyer’s trust account.²⁵ MarshallZehr also advised the Receiver that it was prepared to finance the balance of the purchase price.²⁶
22. On November 18, 2024, the Purchaser’s counsel confirmed that the Third Deposit, in its entirety, was in its trust account. As such, a Third Reinstatement and Amending Agreement was executed on this same day (the “**Amended Transaction**”).²⁷ The Third Reinstatement included the following terms:
 - (a) the Purchaser would pay the Third Deposit to counsel for the Receiver in trust within one (1) business day. If the Purchase Agreement was terminated due to the Purchaser’s default, the Third Deposit, along with any accrued interest, will be forfeited to the Receiver;

²⁰ Fourth Report at para 3.0.7.

²¹ *Ibid.*

²² Fourth Report at para 3.0.9.

²³ Fourth Report at para 4.0.10.

²⁴ Fourth Report at para 4.0.11.

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ *Ibid.*

- (b) if the financing transaction contemplated by a letter of intent between MarshallZehr and the Purchaser failed due to reasons unrelated to the Purchaser's default, the deposit would be returned to the Purchaser without deductions or interest, upon the Purchaser's request; and
 - (c) the terms of the Original APA together with the First Reinstatement Agreement and Second Reinstatement Agreement were reinstated.²⁸
23. The Amended Transaction is substantially similar to the terms approved by the Court in June 2024, subject to the following amendments:
- (a) approximately 18% of the purchase price has now been received by the Receiver by way of deposits;
 - (b) the purchase price was increased by \$50,000; and
 - (c) the Purchaser will only assume the Sale Agreements once it gets HCRA approval, which it has over 90 days after closing to obtain. If the Purchaser does not obtain HCRA approvals, the deposits under the Sale Agreements will be fully refunded.²⁹
24. MarshallZehr has confirmed that other than standard financing conditions requiring Court approval of the Transaction and registration of security, all of its other financing conditions for the loan to the Purchaser have been waived.

C. Fugiel's Offers to Purchase the Real Property

25. Since the outset of these proceeding, Fugiel has indicated, on numerous occasions, his intention to redeem the MarshallZehr mortgage loan or purchase the Real Property. Indeed, on September 20, 2024, Fugiel presented an offer to Colliers to purchase the Real Property.³⁰

²⁸ Fourth Report at para 3.0.11.

²⁹ Fourth Report at para 3.2.

³⁰ Fourth Report at para 3.1.2.

26. By email correspondence on September 30 and October 28, 2024, the Receiver and its counsel advised Fugiel and his counsel that his offer would not be considered unless evidence be provided with respect to his financial ability to close the transaction.³¹
27. A secondary, and higher, offer was presented by Fugiel to the Receiver on November 2, 2024 and the very next day counsel to Fugiel provided the Receiver with a conditional term sheet from Morris Financial Group (the “**Morris Term Sheet**”), a lender based in New York and Tel Aviv.³² The Morris Term Sheet was subject to, among other things, due diligence and credit committee approval.³³
28. In response, on November 3, 2024, the Receiver wrote the Fugiel’s counsel via email, noting prior unfavourable experiences with Morris Financial Group.³⁴ The Receiver requested that Fugiel’s counsel inform the Receiver if the proposed financing became firm but that it would continue to market the property in the meantime.³⁵ Despite an additional commitment letter from another lender, with over 20 conditions with respect to environmental reports, appraisals, among others, the Receiver did not receive any acceptable, firm commitment letters from any potential lenders.³⁶
29. On November 15, 2024, counsel for Fugiel provided the Receiver with another commitment from another lender for financing of Fugiel’s offer to purchase the Real Property. No explanation was provided as to what happened to the commitment from Morris Financial Group. The new commitment letter had over 20 conditions and provided that the maximum proposed loan amount could not exceed 60% of the appraised value.³⁷ For this condition to have been met, the Real Property would have to be valued at over \$36 million, which is substantially greater than the offers received in the Sale Process, including the offer from Fugiel.

³¹ Fourth Report at para 3.1.3.

³² Fourth Report at para 3.1.5.

³³ Fourth Report at para 3.1.5.

³⁴ Fourth Report at para 3.1.6.

³⁵ Fourth Report at para 3.1.6.

³⁶ Fourth Report at para 3.1.9.

³⁷ Fourth Report at para 3.1.8.

30. On November 25, 2024, the Receiver's counsel again advised counsel to Fugiel that it could not accept an offer conditional on financing and that it had entered into another transaction.³⁸
31. On December 8, 2024, Fugiel's counsel advised the Receiver that it intended to oppose the approval of the Amended Transaction.³⁹

D. MarshallZehr Distribution

32. If the Transaction is approved, the Receiver is seeking authorization and direction to distribute the balance of the proceeds therefrom, after reserving for the closing costs (i.e. broker commissions, property taxes) and the costs of these proceedings (i.e. the fees and costs of the Receiver and its counsel) to: (i) repay the amounts owing under the Receiver's Borrowings Charge (which will be \$523,266.95 as at December 18, 2024); (ii) establish a reserve to fund any holdback deficiencies in respect of any valid construction liens on the Real Property, and (iii) repay a portion of the amounts owing to MarshallZehr.⁴⁰
33. MarshallZehr is the principal secured creditor of the Company. A discharge statement provided by MarshallZehr to December 18, 2024 discloses that MarshallZehr is owed \$20.9 million, of which approximately \$20.4 million is in respect of the MarshallZehr's debt and approximately \$523,000 is in respect of the borrowings under the Receiver's Borrowings Charge.⁴¹
34. The Receiver requested that Aird & Berlis LLP ("A&B"), as independent legal counsel, conduct a review of the security granted by the Company in respect of the MarshallZehr Indebtedness. A&B provided the Receiver with an opinion that, subject to standard assumptions and qualifications, pursuant to applicable security documentation, MarshallZehr has valid security interests or charge, as applicable, against the Real Property to be sold pursuant to the Amended Transaction.⁴²

³⁸ Fourth Report at para 3.1.9.

³⁹ Fourth Report at para 3.1.11.

⁴⁰ Fourth Report at para 4.1.

⁴¹ Fourth Report at para 4.2.

⁴² Fourth Report at para 4.3.

35. There are eight construction liens totaling approximately \$13.6 million on the Real Property (collectively the “**Lien Claimants**”). Based on description of services provided in the liens, the claimants all provided services to Buttcon Limited (“**Buttcon**”). Buttcon’s own lien is in the amount of approximately \$8.2 million.⁴³
36. The Receiver understands that the Company did not segregate any funds for holdback. The Receiver intends to carry out a process to establish whether any of the lien claimants could have a Priority Payable Claim that ranks ahead of MarshallZehr in respect of any deficiency in holdback (the “**Holdback Claims**”). A&B further advised that based on its review of the MarshallZehr loan and security documents, and the information relating to the timing and the nature of the loans, the maximum aggregate potential priority for the holdback claims for liens registered against the Real Property would be limited to the statutory 10% holdback of valid construction liens on the Real Property.⁴⁴
37. The Receiver has written to the Lien Claimants for more information regarding their Lien Claims.⁴⁵ The Receiver has not reviewed this information at this time, so the Receiver has not determined if there are any priority holdback claims. Further, the Receiver has not determined if any of the liens are, in fact, valid.
38. To facilitate an interim distribution, while concurrently running this process of reviewing the lien claimants’ claims, the Receiver seeks to establish a holdback reserve of approximately \$1.4 million, which exceeds 10% of the total amount of liens registered on the Real Property (the “**Holdback Reserve**”).⁴⁶

PART III - ISSUES AND LAW

39. The issues on this motion are:
- (a) Whether the Approval and Vesting Order should be granted, approving the Sale Agreement and the Transaction between the Receiver and the Purchaser, should be

⁴³ Fourth Report at para 4.4.

⁴⁴ Fourth Report at para 4.5.

⁴⁵ Fourth Report at para 4.6.

⁴⁶ Fourth Report at para 4.5.

approved, and vesting in the Purchaser, the Purchased Assets free and clear of any encumbrances, other than Permitted Encumbrances;

(b) Whether the Interim Distribution to MarshallZehr should be approved;

(c) Whether the Fourth Report, and the activities described therein should be approved; and

(d) Whether a sealing order should be granted.

A. The Transaction and Sale Agreement should be Approved

(i) The Legal Framework

40. In *Royal Bank v. Soundair*, the Court of Appeal stated that the following factors must be considered when considering the approval of a proposed sale: (i) whether the Receiver has made a sufficient effort to get the best price and has not acted improvidently; (ii) the efficacy and integrity of the process by which offers are obtained; (iii) whether there has been unfairness in the working out of the process; and (iv) the interests of all parties.⁴⁷

41. Courts will generally defer to a court-appointed receiver's business expertise in reviewing a sale and will not second-guess their recommendation absent exceptional circumstances.⁴⁸ Where a receiver has acted reasonably, prudently and not arbitrarily, the court will not conduct a detailed review of each aspect of the procedure by which a receiver's decision was made with respect to a sales process.⁴⁹

(ii) The Soundair Principles have been satisfied

42. Each of foregoing factors are satisfied in respect of the proposed sale of the Company's Purchased Assets:

⁴⁷ *Royal Bank of Canada v. Soundair Corp.*, 1991 CanLII 2727 (ON CA).

⁴⁸ *Marchant Realty Partners Inc. v. 2407553 Ontario Inc.*, 2021 ONCA 375 at para. 15 citing *Regal Constellation Hotel Ltd., Re.*, 2004 CanLII 206 (ONCA) at para. 23. See also *Ontario Securities Commission v. Bridging Finance Inc.*, 2022 ONSC 1857 at paras. 43-45.

⁴⁹ *Bank of Montreal v. Dedicated National Pharmacies Inc. et al.*, 2011 ONSC 4634 at para 43.

- (a) **Fairness, Transparency, and Integrity:** The Receiver carried out a sales process that was approved by the Court by way of a Sales Process Order.⁵⁰ The process undertaken was commercially reasonable.⁵¹ There was sufficient exposure of the assets to the market. Colliers sent the Investment Summary to over 4700 parties, the listing was posted on MLS, and 22 parties executed confidentiality agreements to access the data room.⁵²
- (b) **Commercial Efficacy:** The transaction, as amended, is substantially similar to the terms approved by the Court in June 2024, subject to the amendments as further described above.⁵³ The Real Property has been listed for over a year, and the Transaction offers a path to conclude the receivership and minimize further professional fees and costs including significant maintenance costs.⁵⁴ Further, if HRCA approval is not obtained by the Purchaser, the deposits under the Sale Agreement will be fully refunded.⁵⁵
- (c) **Best Possible Price:** The Purchaser's offer represents the highest and best offer received for the Property from the Sales Process.⁵⁶ The Amended Transaction reflects an increased purchase price by \$50,000.⁵⁷ The Amended Transaction is unconditional, but for Court approval.⁵⁸ MarhsallZehr also supports the Transaction.⁵⁹

43. Mr. Fugiel has had over a year to redeem or submit an offer to purchase the Real Property, and has failed to deliver any concrete offers that are acceptable to the Receiver or that would realistically materialize in a closeable transaction. Any further delays would prejudice the stakeholders and unnecessarily increase the costs of the proceedings.⁶⁰

44. The Receiver thus recommends that the Court approve the Transaction and the Sale Agreement for the reasons set out above.

⁵⁰ Third Report at para 3.1.2.

⁵¹ Third Report at para 3.3.2.

⁵² Third Report at para 3.2.

⁵³ Third Report at para 3.2.2.

⁵⁴ Third Report at para 3.2.2.

⁵⁵ Fourth Report at para 3.2.

⁵⁶ Third Report at para 3.2.

⁵⁷ Fourth Report at para 3.2.

⁵⁸ Third Report at para 3.2.2.

⁵⁹ Third Report at para 3.2.2.

⁶⁰ Third Report at para 3.2.3.

B. The Approval and Vesting Order should be granted

(i) The Legal Framework

45. The Receiver seeks an approval and vesting order to grant the Real Property free and clear of any claims and encumbrances, other than Permitted Encumbrances, as defined in the APS.

46. The Court has the power to grant approval and vesting orders pursuant to section 100 of the *Courts of Justice Act*. This section states that:

A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.”⁶¹

47. Vesting orders are a routine part of insolvency practice.⁶² As set out by the Ontario Court of Appeal in *Third Eye Capital Corporation v. Resources Dianor Inc./Dianor Resources Inc.*, the court will adopt a rigorous cascade analysis. It will consider the nature and strength of the interest that is proposed to be extinguished, which can be determinative. The court can also consider if the parties have consented to the vesting of the interest at the time of sale before the court, or through prior agreement.⁶³ If these factors proved inconclusive, the court can engage in a consideration of equities to determine if a vesting order is appropriate.⁶⁴

48. In particular, the proposed form of vesting order will extinguish:

- (a) the charges registered by MarshallZehr and SGIC on the Real Property;
- (b) the liens and certificates of action registered by the lien claimants on the Real Property;
- (c) The PPSA Registrations made by MarshallZehr, SGIC and Newroads Automotive Group Ltd., but only as against the Purchased Assets; and
- (d) Any court-ordered charges in the receivership order.

⁶¹ *Courts of Justice Act*, RSO 100, c. C.42, s. 100.

⁶² *Third Eye Capital Corporation v. Resources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508 at para 106.

⁶³ *Third Eye Capital Corporation v. Resources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508 at paras 103-106.

⁶⁴ *Third Eye Capital Corporation v. Resources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508 at para 110.

49. It is appropriate for the Court to issue an approval and vesting order, granting the Real Property to the Purchaser free and clear of any claims and encumbrances described above (other than Permitted Encumbrances).

50. The receivership proceedings were brought on the application of MarshallZehr, the first-ranking mortgagee. MarshallZehr is supportive of the transaction being put forward. The sale was conducted in a manner that meets the *Soundair* principles.

51. With respect to the lien claimants, the Receiver has requested information regarding their claims. As further described below, the proposed form strikes a balance between facilitating an interim distribution while permitting the Receiver time to review the validity of any lien claims.

C. Whether the Interim Distribution Should be Approved

52. The interim distribution to MarshallZehr should be approved.

53. Orders granting interim distributions are routinely granted in insolvency proceedings.⁶⁵

54. In *Re Abitibiwater Inc.*, Justice Gascon considered factors as to whether to grant an interim distribution under the *Companies Creditors Arrangement Act*. These include whether: (a) The payee's security is valid and enforceable; (b) The amounts owed to the payee exceed the distribution; and (c) The distribution would result in interest savings.⁶⁶

55. The Receiver submits that MarshallZehr holds valid and enforceable security interest in respect of the collateral covered by its security. The Receiver's counsel has provided the Receiver with an independent security opinion, subject to the usual qualifications assumptions and disclaimers expected with such an opinion, and this opinion confirms the validity of the charge granted in favour of MarshallZehr on the Real Property.⁶⁷

56. The Receiver also seeks to establish a Holdback Reserve of \$1.4 million, which exceeds 10% of the total amount of liens registered on the Real Property. This is a balancing of interests

⁶⁵ See e.g., *Ontario Securities Commission v. Bridging Income Fund L.P.*, 2022 ONSC 4472 at paras 8 and 12.

⁶⁶ *Re Abitibiwater Inc.*, 2009 QCCS 6461 at para 75.

⁶⁷ Fourth Report at para 4.3.

that permits the Receiver to facilitate an interim distribution while permitting the Receiver time to review the validity of the lien claims.

57. The maximum aggregate potential priority of the Lien Claimants over MarshallZehr is limited to an amount equal to the statutory holdback. This view is consistent with the recent decision in *Vandyk*, where the Honourable Mr. Justice Osborne found that the maximum amount that the lien claimants could claim in priority to the mortgagee was their statutory holdback entitlement.⁶⁸

58. The Honourable Mr. Justice Osborne similarly permitted the distribution of sale proceeds to the mortgagee, subject to the reserve for the holdback. Here, the Receiver seeks similar relief in establishing a holdback reserve, which permits the Receiver time to determine: (i) if there are indeed any valid lien claims; and (ii) if so, the quantum of any holdback deficiencies related to any such lien claims and whether such deficiencies would in fact rank ahead of MarshallZehr.

D. The Ancillary Order should be Granted

(i) The Fourth Report and the Activities of the Receiver Should be Approved

59. The Receiver also seeks an ancillary order approving the Fourth Report along with the actions, conduct and activities of the Receiver referred to therein.

60. The Court has inherent jurisdiction to review and approve the activities of a court appointed receiver where the receiver has met the objective test that it has acted reasonably, prudently and not arbitrarily.⁶⁹ The principles espoused by Justice Morawetz in *Re Target Canada Co*, a case involving proceedings under the *Companies Creditors' Arrangement Act*, are applicable here. He noted that requests to approve a court-appointed officer's reports are not unusual, and that there are good policy and practical reasons for such approval to provide a level of protection.⁷⁰ In particular, Justice Morawetz also noted that Court approval:

- (a) allows the Monitor to move forward with the next steps in the CCAA proceedings;

⁶⁸ *Peoples Trust Company, et al. v. Vandyk-Backyard Queensview Limited, et al.*, 2024 ONSC 6648 [*Vandyk*].

⁶⁹ *Leslie & Irene Dube Foundation Inc. v. P218 Enterprises Ltd.*, 2014 BCSC 1855 at para 54.

⁷⁰ *Target Canada Co. (Re)*, 2015 ONSC 7574 at para 2 and para 22.

- (b) brings the Monitor's activities before the Court;
- (c) allows an opportunity for the concerns of the stakeholders to be addressed, and any problems to be rectified,
- (d) enables the Court to satisfy itself that the Monitor's activities have been conducted in a prudent and diligent manner;
- (e) provides protection for the Monitor not otherwise provided by the CCAA; and
- (f) protects the creditors from the delay and distribution that would be caused by:
 - (i) re-litigation of steps taken to date, and
 - (ii) potential indemnity claims by the Monitor.⁷¹

61. Subsequent case law has confirmed that these considerations apply equally to the reports and activities of a receiver,⁷² and such approval is commonly granted as part of orders in receivership proceedings.⁷³

62. The activities of the Receiver have been reported to the court and stakeholders in the Fourth Report. Its activities were all necessary and undertaken in good faith in accordance with the Appointment Order, further to the best interests of the Debtors' stakeholders generally.

(ii) The Sealing Order should be Granted

63. The Receiver also seeks a sealing order with respect to Confidential Appendices of the Fourth Report. The Confidential Appendices contain, information regarding the purchase price and deposits in connection with the Amended Transaction, as well as the purchase price and deposit amounts in the offers submitted by Fuigal.

64. The applicable legal test for granting a sealing order is that the party seeking such relief must establish that:

⁷¹ *Target Canada Co. (Re)*, 2015 ONSC 7574 at para 23.

⁷² *Hanfeng Evergreen Inc., (Re)*, 2017 ONSC 7161 at para 15.

⁷³ See e.g., *Triple-I Capital Partners Limited v. 12411300 Canada Inc.*, 2023 ONSC 3400 at para 65.

- (a) court openness poses a serious risk to an important public interest;
- (b) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and
- (c) as a matter of proportionality, the benefits of the order outweigh its negative effects.⁷⁴

65. This Court has granted sealing orders in respect of commercial information that could negatively impact any sales process in the event that the proposed transaction does not close and the property must undergo another marketing process.⁷⁵ This Court has also observed that disclosure of items such as realization estimates may have a negative impact on future realizations and be detrimental to efforts to maximize value for shareholders.⁷⁶ This Court has further held that, in such circumstances, there is no reasonable alternative to a sealing order; stakeholders will not be materially prejudiced; and any deleterious effects are outweighed by the benefits of granting such relief.⁷⁷

66. Disclosure of the contents of the Confidential Appendices could have a detrimental impact of any future sales process, should one be required if the Transaction is not approved or otherwise does not close. Disclosure of this information could impact any future realizations in a future sales process, should one be required.

67. There is no reasonable alternative to any sealing order here, and stakeholders would not be materially prejudiced by this sealing order.

PART IV - RELIEF SOUGHT

68. For the reasons set out above, the Receiver requests that this Court grant the proposed Order.

⁷⁴ *Sherman Estate v. Donovan*, 2021 SCC 25 at para 38.

⁷⁵ *Romspen Investment Corporation v. Tung Kee Investment Canada Ltd. et al.*, 2023 ONSC 5911 at paras 104-107.

⁷⁶ *Ontario Securities Commission v. Bridging Finance Inc.*, 2022 ONSC 1857 at paras 50-53.

⁷⁷ *Ontario Securities Commission v. Bridging Finance Inc.*, 2022 ONSC 1857 at paras 50-53.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of December 2024



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SCHEDULE “A”: LIST OF AUTHORITIES

1. *Royal Bank of Canada v. Soundair Corp.*, 1991 CanLII 2727 (ON CA)
2. *Marchant Realty Partners Inc. v. 2407553 Ontario Inc.*, 2021 ONCA 375
3. *Regal Constellation Hotel Ltd., Re.*, 2004 CanLII 206 (ONCA)
4. *Ontario Securities Commission v. Bridging Finance Inc.*, 2022 ONSC 1857
5. *Bank of Montreal v. Dedicated National Pharmacies Inc. et al.*, 2011 ONSC 4634
6. *Third Eye Capital Corporation v. Resources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508
7. *Peoples Trust Company, et al. v. Vandyk-Backyard Queensview Limited, et al.*, 2024 ONSC 6648
8. *Leslie & Irene Dube Foundation Inc. v. P218 Enterprises Ltd.*, 2014 BCSC 1855
9. *Target Canada Co. (Re)*, 2015 ONSC 7574
10. *Hanfeng Evergreen Inc., (Re)*, 2017 ONSC 7161
11. *Sherman Estate v. Donovan*, 2021 SCC 25
12. *Romspen Investment Corporation v. Tung Kee Investment Canada Ltd. et al.*, 2023 ONSC 5911

**SCHEDULE “B”
TEXT OF STATUTES, REGULATIONS & BY-LAWS**

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

Vesting orders

100 A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed. R.S.O. 1990, c. C.43, s. 100

Documents public

137 (1) On payment of the prescribed fee, a person is entitled to see any document filed in a civil proceeding in a court, unless an Act or an order of the court provides otherwise.

Sealing documents

(2) 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.

Court lists public

(3) On payment of the prescribed fee, a person is entitled to see any list maintained by a court of civil proceedings commenced or judgments entered.

Copies

(4) On payment of the prescribed fee, a person is entitled to a copy of any document the person is entitled to see. R.S.O. 1990, c. C.43, s. 137.

Bankruptcy and Insolvency Act, RSC 1985, c B-3

PART XI

Secured Creditors and Receivers

Court may appoint receiver

243 (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

- (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
- (b) exercise any control that the court considers advisable over that property and over the insolvent person’s or bankrupt’s business; or

- (c) take any other action that the court considers advisable.

Restriction on appointment of receiver

(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

- (a) the insolvent person consents to an earlier enforcement under subsection 244(2); or
- (b) the court considers it appropriate to appoint a receiver before then.

Definition of receiver

(2) Subject to subsections (3) and (4), in this Part, **receiver** means a person who

- (a) is appointed under subsection (1); or
- (b) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under
 - (i) an agreement under which property becomes subject to a security (in this Part referred to as a “security agreement”), or
 - (ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

Definition of receiver — subsection 248(2)

(3) For the purposes of subsection 248(2), the definition receiver in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

Trustee to be appointed

(4) Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

Place of filing

(5) The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

Orders respecting fees and disbursements

(6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives

the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

Meaning of disbursements

(7) In subsection (6), **disbursements** does not include payments made in the operation of a business of the insolvent person or bankrupt.

Construction Act, RSO 1990, c C.30

Priority over mortgages, etc.

78 (1) Except as provided in this section, the liens arising from an improvement have priority over all conveyances, mortgages or other agreements affecting the owner's interest in the premises. R.S.O. 1990, c. C.30, s. 78 (1); 2017, c. 24, s. 70.

Building mortgage

(2) Where a mortgagee takes a mortgage with the intention to secure the financing of an improvement, the liens arising from the improvement have priority over that mortgage, and any mortgage taken out to repay that mortgage, to the extent of any deficiency in the holdbacks required to be retained by the owner under Part IV, irrespective of when that mortgage, or the mortgage taken out to repay it, is registered. R.S.O. 1990, c. C.30, s. 78 (2).

Prior mortgages, prior advances

(3) Subject to subsection (2), and without limiting the effect of subsection (4), all conveyances, mortgages or other agreements affecting the owner's interest in the premises that were registered prior to the time when the first lien arose in respect of an improvement have priority over the liens arising from the improvement to the extent of the lesser of,

- (a) the actual value of the premises at the time when the first lien arose; and
- (b) the total of all amounts that prior to that time were,
 - (i) advanced in the case of a mortgage, and
 - (ii) advanced or secured in the case of a conveyance or other agreement. R.S.O. 1990, c. C.30, s. 78 (3); 2017, c. 24, s. 70, 71.

Prior mortgages, subsequent advances

(4) Subject to subsection (2), a conveyance, mortgage or other agreement affecting the owner's interest in the premises that was registered prior to the time when the first lien arose in respect of an improvement, has priority, in addition to the priority to which it is entitled under subsection (3), over the liens arising from the improvement, to the extent of any advance made in respect of that conveyance, mortgage or other agreement after the time when the first lien arose, unless,

- (a) at the time when the advance was made, there was a preserved or perfected lien against the premises; or
- (b) prior to the time when the advance was made, the person making the advance had received written notice of a lien. R.S.O. 1990, c. C.30, s. 78 (4); 2017, c. 24, s. 53 (1), 70.

Special priority against subsequent mortgages

(5) Where a mortgage affecting the owner's interest in the premises is registered after the time when the first lien arose in respect of an improvement, the liens arising from the improvement have priority over the mortgage to the extent of any deficiency in the holdbacks required to be retained by the owner under Part IV. R.S.O. 1990, c. C.30, s. 78 (5); 2017, c. 24, s. 70.

General priority against subsequent mortgages

(6) Subject to subsections (2) and (5), a conveyance, mortgage or other agreement affecting the owner's interest in the premises that is registered after the time when the first lien arose in respect to the improvement, has priority over the liens arising from the improvement to the extent of any advance made in respect of that conveyance, mortgage or other agreement, unless,

- (a) at the time when the advance was made, there was a preserved or perfected lien against the premises; or
- (b) prior to the time when the advance was made, the person making the advance had received written notice of a lien. R.S.O. 1990, c. C.30, s. 78 (6); 2017, c. 24, s. 53 (1), 70.

Advances to trustee under Part IX

(7) Despite anything in this Act, where an amount is advanced to a trustee appointed under Part IX as a result of the exercise of any powers conferred upon the trustee under that Part,

- (a) the interest in the premises acquired by the person making the advance takes priority, to the extent of the advance, over every lien existing at the date of the trustee's appointment; and
- (b) the amount received is not subject to any lien existing at the date of the trustee's appointment. R.S.O. 1990, c. C.30, s. 78 (7); 2017, c. 24, s. 70.

Where postponement

(8) Despite subsections (4) and (6), where a preserved or perfected lien is postponed in favour of the interest of some other person in the premises, that person shall enjoy priority in accordance with the postponement over,

- (a) the postponed lien; and
- (b) where an advance is made, any unpreserved lien in respect of which no written notice has been received by the person in whose favour the postponement is made at the time of the advance,

but nothing in this subsection affects the priority of the liens under subsections (2) and (5). R.S.O. 1990, c. C.30, s. 78 (8); 2017, c. 24, s. 70.

Saving

(9) Subsections (2) and (5) do not apply in respect of a mortgage that was registered prior to the 2nd day of April, 1983. R.S.O. 1990, c. C.30, s. 78 (9).

Financial guarantee bond

(10) A purchaser who takes title from a mortgagee takes title to the premises free of the priority of the liens created by subsections (2) and (5) where,

- (a) a bond of an insurer licensed under the Insurance Act to write surety and fidelity insurance; or

(b) a letter of credit or a guarantee from a bank listed in Schedule I or II to the *Bank Act* (Canada),

in the prescribed form is registered on the title to the premises, and, upon registration, the security of the bond, letter of credit or the guarantee takes the place of the priority created by those subsections, and persons who have proved liens have a right of action against the surety on the bond or guarantee or the issuer of the letter of credit. R.S.O. 1990, c. C.30, s. 78 (10); 1997, c. 19, s. 30; 2017, c. 24, s. 53 (2), 70.

Home buyer's mortgage

(11) Subsections (2) and (5) do not apply to a mortgage given or assumed by a home buyer. R.S.O. 1990, c. C.30, s. 78 (11).

MARSHALLZEHR GROUP INC.
Applicant

- and -

LA PUE INTERNATIONAL INC.
Respondent

Court File No. CV-23-00700695-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced at Toronto

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