

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

B E T W E E N:

MCAP FINANCIAL CORPORATION

Applicant

- and -

VANDYK-BACKYARD KINGS MILL LIMITED

APPLICATION UNDER SECTION 243(1) 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; AND SECTION 68 OF THE *CONSTRUCTION ACT*, R.S.O. 1990, C. C.30

**FACTUM OF THE RECEIVER
(Approval and Vesting Order and Distribution Order)**

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TO: **SERVICE LIST**

PART I - NATURE OF THE MOTION

1. On December 11, 2023, the Ontario Superior Court of Justice (the “**Court**”) issued an order (the “**Receivership Order**”), effective on January 8, 2024, appointing KSV Restructuring Inc. (“**KSV**”) as the receiver and manager and construction lien trustee (in such capacities, the “**Receiver**”) over all property assets and undertakings of Vandyk-Backyard Kings Mill (“**Vandyk-Kings Mill**”) acquired for or used in relation to Vandyk-Kings Mill’s business and the Project (as defined below), including the proceeds therefrom (collectively, the “**Property**”).

2. Vandyk-Kings Mill is part of a broader group of real estate development companies known as the “**Vandyk Group**,” a number of which have become subject to receivership proceedings. On March 8, 2024, the Court issued an order (the “**Sale Process Order**”) approving a sale process (the “**Sale Process**”) for the Property and for property of other entities within the Vandyk Group.

3. The Sale Process was a success and resulted in a proposed sale transaction (the “**Transaction**”) between the Receiver and PAD Investments Ltd. (the “**Purchaser**”), whereby the Purchaser will purchase substantially all of the Property, including the beneficial interest in certain of the Property (the “**Beneficial Interest**”) held by Vandyk-Backyard Humberside Limited, an affiliated company of Vandyk-Kings Mill (“**Vandyk Humberside**”, and together with Vandyk-Kings Mill, the “**Debtors**”). A distribution (the “**Distribution**”) from the proceeds of the Transaction (the “**Proceeds**”) is proposed to be made to MCAP Financial Corporation (“**MCAP**”), Vandyk-Kings Mill’s senior secured creditor.

4. The Receiver therefore seeks the following orders:

- (a) an Approval and Vesting Order (the “**AVO**”), which will, among other things: (i) approve the Transaction; (ii) appoint KSV as receiver over the Beneficial Interest;

and (iii) seal certain commercially sensitive documents until the closing of the Transaction; and

- (b) an Ancillary Matters and Distribution Order (the “**Distribution Order**”) which will, among other things: (i) authorize and direct the Receiver to make the Distribution to MCAP; (ii) approve the fees and disbursements of the Receiver and its counsel (“**Osler**”); and (iii) approve the reports and activities of the Receiver.

5. The Transaction is the culmination of a successful sale process, represents the most certain, highest recovery available to stakeholders, and should be approved by the Court.

PART II - SUMMARY OF FACTS

6. The facts are more fully set out in the First Report of the Receiver.¹

A. Background to the Transaction

7. The Vandyk Group is a real estate developer that mainly develops low, mid and high-rise residential projects in the Greater Toronto Area. As part of the Vandyk Group, Vandyk-Kings Mill is a single-purpose real estate development company that owns real property located in Etobicoke, Ontario, on which it is developing a residential condominium consisting of approximately 234 units (the “**Project**”). As of the date of the Receivership Order, 213 of the 234 units were subject to pre-sale homebuyer agreements (the “**Purchase Agreements**”). Construction of the Project has been at a standstill since the commencement of these receivership proceedings.²

¹ First Report of the Receiver dated June 27, 2024 [First Report]. Capitalized terms not otherwise defined have the same meaning as in the First Report. Dollar amounts are given in Canadian dollars unless otherwise specified.

² First Report at paras. 2.1.1-2.1.4.

8. MCAP is Vandyk-Kings Mill’s senior secured creditor and holds a mortgage and certain other security on the Property. As of June 27, 2024, MCAP was owed approximately \$40.2 million, in respect of which interest and costs continue to accrue (the “**MCAP Indebtedness**”).³

9. Vandyk Humberside is a related entity which is the beneficial owner of the real property (as defined above, the “**Beneficial Interest**”) being sold pursuant to the Transaction (the “**Real Property**”). In addition, Vandyk Humberside is a guarantor of the MCAP Indebtedness and has provided MCAP with a security interest in the Beneficial Interest as security for the payment of the MCAP Indebtedness.⁴

10. Westmount Guarantee Services Inc. (“**Westmount**”) has made available to Vandyk-Kings Mill a surety facility in the amount of \$30 million in respect of the deposit monies received from the pre-sale purchasers of the condominiums (the “**Deposit Monies**”). Westmount’s security charge is subordinate to MCAP, except as against the Deposit Monies held in trust at Schneider Ruggiero Spencer Milburn LLP, on which it has a first-ranking charge. As provided in the Receivership Order, the Deposit Monies are excluded from the definition of “Property” over which the Receiver has been appointed. Westmount’s exposure is approximately \$17.1 million (the “**Westmount Indebtedness**”), which represents the Deposit Monies that were previously released to Vandyk-Kings Mill.⁵

11. Aviva Insurance Company of Canada (“**Aviva**” and together with Westmount, the “**Sureties**”) is the primary insurer on risk under the Westmount surety policy.⁶

³ First Report at para. 3.1.2(a).

⁴ First Report at paras. 2.2.1-2.2.3. Note that while Vandyk Humberside is subject to other ongoing receivership proceedings, the scope of those receivership proceedings does not extend to the Real Property: First Report at para. 2.2.4.

⁵ First Report at para. 3.1.2(b).

⁶ First Report at para. 4.2.5.

B. The Sale Process

12. On March 8, 2024, the Court granted the Sale Process Order, approving the proposed Sale Process to be undertaken in respect of the Property. In accordance with the terms of the Sale Process Order, the Receiver retained Jones Lang LaSalle Real Estate Services, Inc. (“**JLL**”) to list the Property for sale.⁷

13. JLL launched the Sale Process on March 19, 2024. JLL distributed an investment summary (the “**Teaser**”) and a form of non-disclosure (“**NDA**”) to its database of prospective buyers, and further marketed the Property through email campaigns and other advertisements. Interested parties that signed the NDA were given access to a virtual data room (the “**VDR**”) which contained information regarding the Property, along with a form of asset purchase agreement (the “**Template APA**”).⁸

14. The bid deadline for submission of letters of intent (“**LOIs**”) was May 7, 2024, seven weeks after the commencement of the Sale Process. 51 parties executed the NDA and were provided with access to the VDR, and 10 parties ultimately submitted an LOI for the Property. Following a review of the bids, the Receiver and/or JLL engaged in direct discussions with the leading bidders in order to understand the bids, including in relation to any remaining due diligence.⁹

15. Three rounds of bidding were ultimately conducted. The two leading bids in Round One and Round Two both contained diligence conditions, notwithstanding the seven-week period during which access to diligence materials was provided. The leading bidder in Round One and

⁷ First Report at para. 4.1.1(a).

⁸ First Report at paras. 4.1.1(b)-(d).

⁹ First Report at paras. 4.1.2-4.2.2.

Round Two, who the Receiver understands was working with the Sureties, further advised the Receiver that it would require ten additional days to consider waiving its diligence conditions.¹⁰

16. Accordingly, the Receiver provided the three leading bidders, which included the Purchaser, ten days to submit binding agreements of purchase and sale blacklined to the Template APA. The Receiver further advised the parties that it would assist in expediting any further required diligence during the ten-day period, and that any diligence conditions included as part of an offer would possibly result in that bid not being selected as the successful bid.¹¹

17. In Round Three, the previous leading bidder significantly reduced its offer, while the previous second leading bidder did not submit a conforming bid, as it failed to submit an offer on the Template APA, but rather indicated that its previous conditional bid (which included a 30-day diligence period) was still open. In contrast, the Purchaser submitted an unconditional offer on the Template APA.¹²

18. The Receiver initially did not consult with the Sureties, which the Receiver understood were working with the lead bidder. However, following the Round Three bids, the Receiver was advised by the Sureties that they were no longer participating in the Sale Process, and the Receiver provided the Sureties with a summary of all offers received following the negotiation of a non-disclosure agreement.¹³

19. After consulting with certain key stakeholders, the Receiver selected the Purchaser as the successful bidder for the Property, resulting in the execution of the APA on June 11, 2024.¹⁴

¹⁰ First Report at para. 4.2.3.

¹¹ First Report at para. 4.2.3.

¹² First Report at para. 4.2.4.

¹³ First Report at para. 4.2.5.

¹⁴ First Report at para. 4.2.7.

C. The Transaction

20. Under the terms of the APA, the Purchaser will purchase all of the Receiver's and the Debtors' right, title, and interest in: (i) the Real Property; (ii) the Buildings; (iii) the Additional Assets; and (iv) the Intellectual Property, Project Rights and Documents, but each only to the extent transferable to the Purchaser (each term as defined in the APA, and together the "**Purchased Assets**"). All undertaking, property, and assets of the Debtors, other than the Purchased Assets, are excluded from the scope of the Transaction, including all accounts receivable of Vandyk-Kings Mill, any insurance refunds, and all HST refunds and other tax receivables.¹⁵

21. As is discussed in greater detail below, the Receiver is requesting that the purchase price contemplated by the APA (the "**Purchase Price**") be sealed until the closing of the Transaction. The Transaction is scheduled to Close three business days following the date on which any conditions under the APA (including the issuance of the AVO) are satisfied. The Outside Date under the APA is July 31, 2024.¹⁶

22. The APA contemplates that the Purchase Agreements will be terminated, repudiated, and/or not assumed at the time of the closing of the Transaction. The proposed AVO therefore contains a term authorizing and directing the Receiver to terminate and disclaim the Purchase Agreements prior to closing. The issuance of the AVO in a form containing this term is a condition precedent to the Closing of the Transaction.¹⁷

¹⁵ See First Report at para. 5.1.2 for a full summary description of the APA.

¹⁶ First Report at para. 5.1.2.

¹⁷ First Report at paras. 5.1.2, 5.2.1-5.2.2.

D. Activities of the Receiver

23. Since its appointment, the Receiver, in addition to the activities outlined above, has, with the assistance of counsel, engaged in the following activities in furtherance of its mandate:¹⁸

- (a) corresponding with the Vandyk Group's management and their counsel regarding the Company's affairs and these proceedings;
- (b) corresponding with MCAP regarding all aspects of this mandate, including providing periodic status updates;
- (c) reviewing information provided by the Vandyk Group and MCAP relating to the Project, including its development status;
- (d) developing and carrying out the Court-approved Sale Process for the Property;
- (e) reviewing and commenting on drafts of the Sale Process materials, including the Teaser and NDA;
- (f) preparing the Consolidated Report of the Receiver dated March 1, 2024 in connection with the Sale Process motion;
- (g) reviewing information uploaded to the VDRs;
- (h) dealing with JLL regarding due diligence requests from prospective purchasers;
- (i) attending update calls with JLL and MCAP, as applicable, regarding the status of the Sale Process;

¹⁸ First Report at para. 7.0.1.

- (j) corresponding with Aviva and its counsel regarding the Property and the status of the Sale Process;
- (k) corresponding with the Purchaser and its counsel regarding the APA and the Transaction;
- (l) corresponding with Masters Insurance, Vandyk-Kings Mill's insurance broker;
- (m) corresponding with Vandyk-Kings Mill's creditors;
- (n) corresponding with representatives of Tarion regarding the status of the Project and the Sale Process;
- (o) corresponding with representatives of the City of Toronto regarding the status of the Project and the Sale Process;
- (p) arranging for the maintenance, security and general upkeep of the Real Property;
- (q) assessing various claims that may have priority over the security held by the Company's mortgagees;
- (r) corresponding with the pre-sale homebuyers of the Project;
- (s) corresponding with the Canada Revenue Agency regarding the Company's HST accounts; and
- (t) drafting the First Report and reviewing the motion materials in respect of same.

PART III - THE ISSUES AND THE LAW

24. The issues on this motion are whether this Court should:
- (a) grant the AVO; including:
 - (i) authorizing the Receiver to enter into the Transaction;
 - (ii) appointing KSV as Receiver over the Beneficial Interest;
 - (iii) authorizing and directing the Receiver to terminate and disclaim the Purchase Agreements;
 - (iv) sealing the Offer Summary (as defined below) and the unredacted APA until the Closing of the Transaction; and
 - (b) grant the Distribution Order, including
 - (i) approving the Distribution;
 - (ii) approving the fees and disbursements of the Receiver and Osler; and
 - (iii) approving the reports and activities of the Receiver.

A. The AVO Should be Granted

(a) The Transaction Should be Approved

25. The purpose of a receivership under section 243 of the *Bankruptcy and Insolvency Act* (the “BIA”) is to “enhance and facilitate the preservation and realization of the assets for the benefit of creditors,” a purpose which is generally achieved through the liquidation of the debtors’ assets.¹⁹

¹⁹ *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, [2019 ONCA 508](#) at para. 73.

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:²⁰

- (a) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;
- (b) the efficacy and integrity of the process by which offers are obtained;
- (c) whether there has been unfairness in the working out of the process; and,
- (d) the interests of all parties.

26. Each of these factors are satisfied in respect of the proposed Sale Process:

- (a) **Fairness, Transparency, and Integrity:** The Sale Process was commercially reasonable and conducted in accordance with the terms of the Sale Process Order. All potential purchasers were treated fairly and equally, and all potential purchasers that executed the NDA were given access to the VDR. Further, each of the bidders in the third round was required to submit their bids in the form of the Template APA, further ensuring the transparency of the bidding process.²¹
- (b) **Commercial Efficacy:** The Sale Process was conducted by JLL, which has extensive experience selling development properties in and around the Greater Toronto Area, and occurred over the course of over two months, during which times prospective purchasers were able to perform any required due diligence.

²⁰ *Royal Bank of Canada v. Soundair Corp.*, [1991 CanLII 2727 \(ON CA\)](#) at para. 16 [*Soundair*].

²¹ First Report at paras. 4.2.1(b), 4.2.3.

- (c) **Process Designed to Obtain Best Possible Price:** The market was widely canvassed for potential purchasers, with 2019 potential purchasers being sent the Teaser and the NDA, and further marketing occurring by way of email campaigns, print and digital ads, and visible signage at the sites.²² Ultimately, 10 interested parties submitted bids on the Property, and the Receiver is of the view that the Transaction, the result of three rounds of bidding, represents the most certain highest recovery available in the circumstances, given the conditional nature of the other offers received during the final round of bidding.²³

27. The Receiver and MCAP both support the Transaction, and as of the date of this factum no parties have objected to any of the relief being sought pursuant to the proposed AVO.²⁴ The commercial decisions of a receiver regarding a sale process are afforded broad deference by the courts – the business judgment of a receiver is accepted by the court absent exceptional circumstances,²⁵ and courts have stated that where a receiver has acted reasonably, prudently and not arbitrarily, that the court should not sit in appeal from the receiver’s decision or conduct a detailed review of every element of the procedure by which a receiver’s decision was made.²⁶

28. The Receiver submits that the Transaction should be approved for the reasons outlined above. The Receiver carried out the sale process in accordance with the Sale Process Order, which was a fair, open, transparent, and commercially reasonable process which obtained the most certain highest recovery available in the circumstances.

²² First Report at paras. 4.1.1(b), 4.2.1(a).

²³ First Report at paras. 4.2.1(c), 5.3.1(d). Courts have noted that receivers are entitled to select an offer in an acceptable form and reject offers which could not be accepted in their present form: see, i.e., *Soundair*, at para. 59.

²⁴ First Report at para. 5.3.1(c).

²⁵ *Soundair*, at paras. 21, 58.

²⁶ *Bank of Montreal v. Dedicated National Pharmacies Inc. et al*, [2011 ONSC 4634](#) at para. 43.

(b) The Receiver Should be Authorized and Directed to Terminate and Disclaim the Purchase Agreements

29. It is well-established that the court may direct a receiver to disclaim pre-sale homebuyer agreements in the context of real property receiverships.²⁷ This authority derives from the receiver's duty to maximize the recovery of assets under its jurisdiction, in service of which the receiver may affirm or disclaim contracts.²⁸

30. The criteria to be considered by a court in determining whether to authorize such disclaimers were set out in *Forjay Management*: (i) the respective legal priorities of the competing interests; (ii) whether the disclaimer would enhance the value of the assets, and if so would failure to disclaim amount to a preference in favour of a particular party; and (iii) whether, if a preference would arise, the party which is seeking to avoid the disclaimer has established that the equities support such a preference.²⁹

31. The proposed disclaimers satisfy the criteria identified in *Forjay Management* and should be approved. The Construction Receiver's Borrowings Charge (as defined and authorized under the terms of the Receivership Order) and the MCAP Indebtedness constitute senior charges on the Property, along with applicable priority claim amounts, and rank in priority over the Purchase

²⁷ See, i.e., *KingSett Mortgage Corp. v. Stateview Homes et al.*, (November 16, 2023), Ont. S.C.J. [Commercial List], Court File No. CV-23-00698576-00CL ([Endorsement of Justice Osborne](#)) at para. 16 [*Stateview Homes*]; *KingSett Mortgage Corp. and Dorr Capital Corp. v. Stateview Homes (Minu Towns) Inc.*, (September 14, 2023), Ont. S.C.J. [Commercial List], Court File No. CV-23-00698576-00CL ([Endorsement of Justice Cavanaugh](#)); *Firm Capital Mortgage Fund Inc. v. Stateview Homes (Hampton Heights) et al.*, (August 18, 2023), Ont. S.C.J. [Commercial List], Court File No. CV-23-00700356-00CL ([Endorsement of Justice Conway](#)) at para. 6 [*Hampton Heights*]; *Forjay Management Ltd. v. 0981478 B.C. Ltd.*, [2018 BCSC 527](#) at paras. 131-132 [*Forjay Management*].

²⁸ *Peoples Trust Company v. Censorio Group (Hastings & Carleton) Holdings Ltd.*, [2020 BCSC 1013](#) at para. 25 [*Peoples Trust Company*].

²⁹ *Forjay Management*, at para. 44. See also *Stateview Homes*, at para. 17, in which the Ontario court approved the *Forjay Management* criteria.

Agreements.³⁰ Furthermore, the deposit paid by the homebuyers under the Purchase Agreements are guaranteed by the Westmount surety policy.³¹ As a result, the termination of the Purchase Agreements should not result in the homebuyers losing their deposits.³²

32. In addition, the termination and disclaimer of the Purchase Agreements is a condition precedent for the closing of the APA, which represents the best offer received for the Property. None of the offers received by the Receiver in respect of the Property contemplated an assumption of the Purchase Agreements.³³ As a result, the termination and disclaimer of the Purchase agreements is necessary to maximize recovery for stakeholders.³⁴

(c) KSV Should be Appointed as Receiver Over the Beneficial Interest

33. The Receiver seeks an order appointing itself as receiver over the Beneficial Interest in the Real Property held by Vandyk HumberSide, so that it may convey the Beneficial Interest to the Purchaser in order to successfully close the Transaction.

34. This Court has the authority to appoint a Receiver pursuant to s. 101 of the *Courts of Justice Act*, R.S.O. c. C.43 (the “CJA”) and s. 243(1) of the BIA. Section 101 of the CJA provides that the court may appoint a receiver where it is “just or convenient” to do so:

³⁰ First Report at paras. 3.1.1-3.2.3. See *Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Ltd.*, [2012 ONSC 4816](#), in which the court found that registered charges have priority over any unregistered interests potentially deriving from agreements of purchase and sale in respect of individual condominium units (at paras. 22-23). No interests related to the Purchase Agreements have been registered against title: see Parcel Register dated November 24, 2023, Affidavit of Michael Miesner sworn November 24, 2023, Exhibit “A,” [Application Record of the Applicants](#) dated November 24, 2023, at pp. 30-37.

³¹ First Report at para. 5.2.5.

³² See *Hampton Heights*, at para. 7, in which the court noted, in permitting the receiver to disclaim presale purchase agreement, that the purchasers would potentially be able to recover their deposits.

³³ First Report at paras. 5.2.3(a)-(b).

³⁴ See i.e., *Stateview Homes*, at para. 19, and *Hampton Heights*, at para. 6, in which the same considerations were held to support authorizing the receiver to disclaim pre-sale purchase agreements.

Injunctions and receivers

101 (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

Terms

(2) An order under subsection (1) may include such terms as are considered just.

35. The opening language of s. 243(1) of the BIA is similar in referring to the appointment of a receiver where it is “just or convenient.”

36. The Receiver submits that it is both just and convenient to appoint it as Receiver over the Beneficial Interest, for the following reasons:

- (a) **Maximizing Recovery:** The extension of the receivership to cover the Beneficial Interest is necessary in order to facilitate the closing of the Transaction. Under the terms of the APA, the Beneficial Interest in the Real Property is to be conveyed to the Purchaser along with the Real Property itself; as a result, in order for the Transaction to close, the Receiver must therefore have the authority to convey the Beneficial Interest. As the Transaction represents the most certain, highest recovery available to stakeholders,³⁵ the extension of the receivership is necessary in order to maximize stakeholder recovery.

- (b) **MCAP’s Security Interest:** As discussed above, Vandyk Humberside has granted a security interest over the Beneficial Interest in the Real Property to MCAP, in respect of Vandyk Humberside’s guarantee of the MCAP indebtedness.³⁶

³⁵ First Report at para. 5.3.1(c).

³⁶ First Report at para. 2.2.3.

(c) **Vandyk Humberside is an Affiliated Company:** It is well established that the court may extend a receivership to cover over a company which is intricately involved with companies already subject to an existing receivership proceeding, even where the new party is not itself subject to the same receivership.³⁷ Such orders have been granted where the affiliated companies are “intricately involved” with the companies already subject to the receivership.³⁸ Vandyk Humberside is an affiliated company of Vandyk-Kings Mill, and, as the owners of the legal and beneficial style, respectively, in relation to the same real property, are clearly intricately and inseparably involved, such that it is both just and convenient to extend the receivership on this basis.

(d) The Sealing Order Should be Granted

37. Pursuant to s. 137(2) of the CJA, the Receiver requests that the offer summary in respect of the final bids received for the Property (the “**Offer Summary**”) and the unredacted APA be temporarily treated as confidential and sealed, and not form part of the public record, pending the closing of the Transaction.

38. The test for a sealing order was established by the Supreme Court in *Sierra Club*, and subsequently recast in *Sherman Estate*. The test requires the court to consider whether:³⁹

(a) court openness poses a serious risk to an important public interest;

³⁷ Frank Bennett, Bennett on Receiverships, 4th ed. (Toronto: Thomson Reuters Canada, 2021) at p. 203; *WestLB AG, Toronto Branch v. Rosseau Resort Developments Inc.*, [2009 CanLII 55120 \(ON SC\)](#) at para. 37 [*Rosseau Resort*].

³⁸ *Rosseau Resort*, at para. 37. See also *Murphy v. Cahill*, [2012 ABQB 220](#), at paras. 12-13, in which the court extended a receivership to cover affiliated corporations where the affairs of all of the corporations were “intrinsically involved,” and they shared shareholders and directors.

³⁹ *Sherman Estate v. Donovan*, [2021 SCC 25](#) at para. 38 [*Sherman Estate*].

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

39. Each of these considerations supports the proposed sealing order:

- (a) **Public Interest:** The maximization of recovery in insolvency has been found to constitute an important public interest for the purpose of obtaining a sealing order. The granting of a sealing order in respect of commercially sensitive information is therefore “standard practice” in insolvency proceedings,⁴⁰ and courts have approved sealing orders where they are required to protect commercially sensitive information disclosed in the course of negotiation, including the quantum of the bids received and the ultimate purchase price.⁴¹ The Offer Summary contains precisely this type of sensitive information, including the identity of other bidders and the value of other bids received for the Property, along with the Purchase Price. As the publication of this information could adversely impact the future marketability of the Property should the Transaction not close, the sealing of this information is necessary to ensure that recoveries in these receivership proceedings are maximized.⁴²
- (b) **Lack of a Reasonable Alternative:** Courts in insolvency proceedings have found that no reasonable alternative to a sealing order exists where declining to grant the

⁴⁰ *Yukon (Government of) v. Yukon Zinc Corporation*, [2022 YKSC 2](#) at para. 39.

⁴¹ *Danier Leather Inc., Re*, [2016 ONSC 1044](#) at para. 84; *Elleway Acquisitions Limited v. 4358376 Canada Inc.*, [2013 ONSC 7009](#) [*Elleway Acquisitions*].

⁴² First Report at para. 5.4.2. For a sealing order granted in respect of the same documents, see *Stateview Homes*, at para. 22, in which a sealing order was granted in respect of an offer summary and unredacted agreements.

proposed order would materially impair the maximization of asset value for the benefit of stakeholders.⁴³ In the present case, there are no reasonable alternatives to a sealing order which would prevent the risks to the Debtors' stakeholders outlined above.

- (c) **Proportionality:** The benefits of the proposed sealing order greatly exceed any negatives, as no party will be prejudiced by the temporary sealing of the commercially sensitive information, and no public interest will be served if they are made public prior to closing, prejudicing stakeholder recoveries in the process.⁴⁴ Further, the Purchase Price will be disclosed to any party with a potential claim in priority to the MCAP Indebtedness, provided that such parties first execute a non-disclosure agreement.⁴⁵

B. The Distribution Order Should be Granted

(a) The Distribution Should be Approved

40. Should the Transaction be approved by the Court, the Receiver seeks authorization and direction to distribute to Proceeds in order to repay: (i) \$200,000 borrowed by the Receiver from MCAP pursuant to the Construction Receiver's Borrowings Charge; and (ii) the MCA Indebtedness in full, after payment of the closing costs of the Transaction.⁴⁶

⁴³ *Original Traders Energy Ltd. (Re)*, (January 30 2023), Ont. S.C.J. [Commercial List], Court File No. CV-23-00693758-00CL ([Endorsement of Justice Osborne](#)) at para. 60 [*Original Traders*].

⁴⁴ First Report at para. 5.4.3. See *Elleway Acquisitions*, at para. 48, in which the court held that the beneficial effects of maximizing recoveries in insolvency greatly outweigh any deleterious effects which could result for sealing an APA pending closing the transaction closing.

⁴⁵ First Report at para. 6.0.3. The requirement to sign a non-disclosure agreement in order to access a purchase price has been approved by the court in the past: see, i.e., *GE Canada Real Estate Financing Business Property Company v. 1262354 Ontario Inc.*, [2014 ONSC 1173](#) at paras. 34-37 [*GE Canada*].

⁴⁶ First Report at para. 6.0.1.

41. Courts commonly grant such orders as part of sale approvals in a receivership.⁴⁷ In *AbitibiBowater*, the court approved the distribution of proceeds from sale proceeds from a CCAA sale process on, amongst other grounds: (i) the distributions were made in accordance with a valid and enforceable security interest; (ii) the distributions would leave the debtor with sufficient liquidity; and (iii) the distributions would entail significant savings in interest payments.⁴⁸

42. The proposed Distribution complies with the *AbitibiBowater* criteria, as:

- (a) the security granted in favour of MCAP by Vandyk-Kings Mill and Vandyk Humberstone in respect of the MCAP Indebtedness created valid security interests against the Property and the Beneficial Interest, respectively;⁴⁹ and
- (b) the sum of the Purchase Price is greater than the combined sum of the proposed Distribution plus all amounts potentially in priority to the Construction Receiver's Borrowings Charge and the MCAP Indebtedness (the "**Potential Priority Amounts**"),⁵⁰ permitting the Receiver to pay any Potential Priority Amounts found to be owing following the Distribution.

43. In particular, the Receiver has taken steps to ensure that the amounts remaining after the Distribution will be sufficient to repay any construction liens claims which are part of the Potential Priority Amounts (collectively, the "**Holdback Deficiency Priority Claims**"). The maximum amount estimated to be payable in respect of the Holdback Deficiency Claims is \$2,964,385 (the

⁴⁷ See, i.e., *GE Canada*, at para. 53; *Dorr Capital Corporation v. Highview Building Corp Inc.*, (September 29, 2023) Ont. S.C.J. [Commercial List] Court File No. CV-23-00698632-00CL ([Endorsement of Justice Conway](#)) at para. 4.

⁴⁸ *AbitibiBowater inc. (Arrangement relatif à)*, [2009 QCCS 6461](#) at para. 70-75 [*AbitibiBowater*].

⁴⁹ First Report at paras. 2.2.3, 6.0.2

⁵⁰ See First Report at para. 6.0.3. The Potential Priority Amounts include: (i) approximately \$1.2 million required to pay tax arrears, broker commissions and case costs; and (ii) \$2,964,385 in respect of the Maximum Potential Holdback Deficiency Priority Claims (as defined below).

“**Maximum Potential Holdback Deficiency Priority Claims**”), which, if ultimately determined to be valid, will be able to be paid out of remaining Proceeds following the Distribution.⁵¹

(b) The Fees and Disbursements of the Receiver and Osler Should be Approved

44. The Receiver seeks the approval of the following fees and disbursement of itself and its counsel, Osler:⁵²

- (a) fees of the Receiver from the commencement of these receivership proceedings to May 31, 2024, totalling \$114,677, charged at an average billing rate of \$567 per hour; and
- (b) fees of Osler from the commencement of these receivership proceedings to June 14, 2024, totally \$168,672, charged at an average billing rate of \$827.23 per hour.

45. The role of the court in approving the fees of a receiver and its counsel is to ensure that the fees are “fair and reasonable” in the circumstances, with a focus on the value provided.⁵³ The Receiver is of the view that Osler’s fees are consistent with the rates charged by similar firms and are reasonable and appropriate in the circumstances.⁵⁴

(c) The Reports and the Activities of the Receiver Should be Approved

46. The Receiver also seeks the approval of the Consolidated Report of the Receiver dated March 1, 2024 (the “**Consolidated Report**”) with respect to all matters relating to the Property

⁵¹ See First Report at paras. 6.1.1-6.1.6 for a discussion of the construction lien claims.

⁵² First Report at paras. 8.0.1-8.0.2.

⁵³ *Bank of Nova Scotia v. Diemer*, [2014 ONCA 851](#) at paras. 44-45.

⁵⁴ First Report at para. 8.0.4.

and/or to Vandyk Kings Mill and the First Report, along with the actions, conduct and activities of the Receiver referred to therein.

47. It is well established that the court has inherent jurisdiction to review and approve the activities of a court appointed receiver where the receiver demonstrates that it has acted reasonably, prudently and not arbitrarily.⁵⁵ As has been noted by the court in the CCAA context, requests to approve a monitor's report and activities are not unusual, and there are good policy and practical reasons for the court to do so, including:⁵⁶

- (a) allowing the monitor to move forward with the next steps;
- (b) allowing the monitor to bring its activities before the Court;
- (c) enabling the Court to satisfy itself that a monitor's activities have been conducted in prudent and diligent manners;
- (d) providing protection for a monitor not otherwise provided by the CCAA; and
- (e) protecting creditors from delay that may be caused by re-litigation of steps.

48. Subsequent case law has confirmed that these considerations apply equally to the reports and activities of a receiver,⁵⁷ and such approval is commonly granted as part of orders in receivership proceedings.⁵⁸

49. The Receiver submits that the Consolidated Report, the First Report and the applicable activities described therein should be approved. The activities of the Receiver were carried out in

⁵⁵ *Leslie & Irene Dube Foundation Inc. v. P218 Enterprises Ltd.*, [2014 BCSC 1855](#) at para. 54.

⁵⁶ *Target Canada Co. (Re)*, [2015 ONSC 7574](#) at para. 23.

⁵⁷ *Hanfeng Evergreen Inc., (Re)*, [2017 ONSC 7161](#) at para. 15.

⁵⁸ See, i.e., *Stateview* at para. 24.

accordance with the Receivership Order, and the Receiver has acted reasonably and in good faith throughout.

PART IV - NATURE OF THE ORDER SOUGHT

50. For the reasons set out above, the Receiver requests that this Court grant the proposed AVO and Distribution Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2nd day of July, 2024.

A handwritten signature in blue ink, appearing to read "Marleigh Dick", is written above a horizontal line.

OSLER, HOSKIN & HARCOURT, LLP per Marleigh Dick
P.O. Box 50, 1 First Canadian Place
Toronto, ON M5X 1B8
Lawyers for the Applicants

SCHEDULE “A”: LIST OF AUTHORITIES

Cases

1. *AbitibiBowater inc. (Arrangement relatif à)*, [2009 QCCS 6461](#)
2. *Bank of Montreal v. Dedicated National Pharmacies Inc. et al.*, [2011 ONSC 4634](#)
3. *Bank of Nova Scotia v. Diemer*, [2014 ONCA 851](#)
4. *Danier Leather Inc., Re*, [2016 ONSC 1044](#)
5. *Dorr Capital Corporation v. Highview Building Corp Inc.*, (September 29, 2023) Ont. S.C.J. [Commercial List] Court File No. CV-23-00698632-00CL ([Endorsement of Justice Conway](#))
6. *Elleway Acquisitions Limited v. 4358376 Canada Inc.*, [2013 ONSC 7009](#)
7. *Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Ltd.*, [2012 ONSC 4816](#)
8. *Firm Capital Mortgage Fund Inc. v. Stateview Homes (Hampton Heights) et al.*, (August 18, 2023), Ont. S.C.J. [Commercial List], Court File No. CV-23-00700356-00CL ([Endorsement of Justice Conway](#))
9. *Forjay Management Ltd. v. 0981478 B.C. Ltd.*, [2018 BCSC 527](#)
10. *GE Canada Real Estate Financing Business Property Company v. 1262354 Ontario Inc.*, [2014 ONSC 1173](#)
11. *Leslie & Irene Dube Foundation Inc. v. P218 Enterprises Ltd.*, [2014 BCSC 1855](#)
12. *Hanfeng Evergreen Inc., (Re)*, [2017 ONSC 7161](#)
13. *KingSett Mortgage Corp. v. Stateview Homes et al.*, (November 16, 2023), Ont. S.C.J. [Commercial List], Court File No. CV-23-00698576-00CL ([Endorsement of Justice Osborne](#))
14. *KingSett Mortgage Corp. and Dorr Capital Corp. v. Stateview Homes (Minu Towns) Inc.*, (September 14, 2023), Ont. S.C.J. [Commercial List], Court File No. CV-23-00698576-00CL ([Endorsement of Justice Cavanaugh](#))
15. *Murphy v. Cahill*, [2012 ABQB 220](#)
16. *Original Traders Energy Ltd. (Re)*, (January 30 2023), Ont. S.C.J. [Commercial List], Court File No. CV-23-00693758-00CL ([Endorsement of Justice Osborne](#)),
17. *Peoples Trust Company v. Censorio Group (Hastings & Carleton) Holdings Ltd.*, [2020 BCSC 1013](#)
18. *Royal Bank of Canada v. Soundair Corp.*, [1991 CanLII 2727 \(ON CA\)](#)

19. *Sherman Estate v. Donovan*, [2021 SCC 25](#)
20. *Target Canada Co. (Re)*, [2015 ONSC 7574](#)
21. *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, [2019 ONCA 508](#)
22. *WestLB AG, Toronto Branch v. Rosseau Resort Developments Inc.*, [2009 CanLII 55120 \(ON SC\)](#)
23. *Yukon (Government of) v. Yukon Zinc Corporation*, [2022 YKSC 2](#)

Secondary Sources

1. Frank Bennett, *Bennett on Receiverships*, 4th ed. (Toronto: Thomson Reuters Canada, 2021)

SCHEDULE “B”
TEXT OF STATUTES, REGULATIONS & BY-LAWS
BANKRUPTCY AND INSOLVENCY ACT

R.S.C., 1985, c. B-3, as amended

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.

Advance notice

244 (1) A secured creditor who intends to enforce a security on all or substantially all of

- (a) the inventory,
- (b) the accounts receivable, or
- (c) the other property

of an insolvent person that was acquired for, or is used in relation to, a business carried on by the insolvent person shall send to that insolvent person, in the prescribed form and manner, a notice of that intention.

Period of notice

(2) Where a notice is required to be sent under subsection (1), the secured creditor shall not enforce the security in respect of which the notice is required until the expiry of ten days after sending that notice, unless the insolvent person consents to an earlier enforcement of the security.

No advance consent

(2.1) For the purposes of subsection (2), consent to earlier enforcement of a security may not be obtained by a secured creditor prior to the sending of the notice referred to in subsection (1).

Exception

(3) This section does not apply, or ceases to apply, in respect of a secured creditor

(a) whose right to realize or otherwise deal with his security is protected by subsection 69.1(5) or (6); or

(b) in respect of whom a stay under sections 69 to 69.2 has been lifted pursuant to section 69.4.

Idem

(4) This section does not apply where there is a receiver in respect of the insolvent person.

COURTS OF JUSTICE ACT

R.S.O. 1990, c. C.43, as amended

Injunctions and receivers

101 (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

Terms

(2) An order under subsection (1) may include such terms as are considered just.

[...]

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.

IN THE MATTER OF AN APPLICATION UNDER SUBSECTION 243(1) 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; AND SECTION 68 OF THE *CONSTRUCTION ACT*, R.S.O. 1990, C. C.30

**MCAP FINANCIAL
CORPORATION**
Applicant

and
**VANDYK-BACKYARD
KINGS MILL LIMITED**
Respondent

Court File No: CV-23-00710267-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE**

COMMERCIAL LIST

PROCEEDING COMMENCED AT TORONTO

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