

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

IN THE MATTER OF 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

B E T W E E N :

NHE CAPITAL CORP.

Applicant

- and -

111 SHERWOOD INVESTMENTS INC.

Respondent

**FACTUM OF THE RECEIVER
(Motion Returnable January 30, 2025)**

January 27, 2025

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and not in its personal capacity

TO: THE SERVICE LIST

TABLE OF CONTENTS

PART I:	OVERVIEW	1
PART II:	FACTS	3
A.	Background and Overview	3
B.	The Proposed Transaction and Vesting Order	4
1.	The Sales Process.....	4
2.	The Transaction	5
C.	The Ancillary Order	6
1.	The Proposed Distributions to NHE	6
2.	Approval of Activities, Second Report and Fees and Disbursements	6
3.	Sealing the Confidential Appendices.....	8
4.	The Discharge of the Receiver	8
PART III:	ISSUES	9
PART IV:	LAW AND ANALYSIS	9
A.	The Approval and Vesting Order Should be Granted.....	9
1.	The APS and the Transaction Should be Approved	9
B.	The Ancillary Order Should be Granted.....	12
1.	The Distributions to NHE Should be Authorized	12
2.	The Receiver’s Conduct, Fees and Activities Should be Approved.....	13
(a)	The Receiver’s Conduct and Activities	13
(b)	The Receiver’s Fees and Disbursements	15
3.	The Confidential Appendices Should be Sealed.....	16
4.	The Receiver should be Discharged and Released	17
PART V:	RELIEF REQUESTED	19

PART I: OVERVIEW

1. On April 19, 2024, the Court granted an order (the “**Receivership Order**”) pursuant to subsection 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, as amended (the “**BIA**”), and section 101 of the Ontario *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended (the “**CJA**”), appointing KSV Restructuring Inc. (“**KSV**”) as receiver and manager (in such capacity, the “**Receiver**”), without security, of all of the assets, undertakings and properties of 111 Sherwood Investments Inc. (the “**Company**”), including the property municipally known as 111 Sherwood Drive, Brantford, Ontario (the “**Real Property**”).¹

2. NHE Capital Corp. (“**NHE**”) is the Company’s first ranking senior secured creditor pursuant to a secured loan in the principal amount of \$12 million.² As of January 10, 2025, the Company is indebted to NHE for approximately \$13.6 million, with interest, costs and expenses continuing to accrue (the “**Indebtedness**”).³

3. On June 3, 2024, this Court granted an order (the “**Sales Process Approval Order**”), among other things, approving a sales process in respect of the Real Property (the “**Sales Process**”), and approving a listing agreement between the Receiver and Colliers Macaulay Nicolls Inc. (“**Colliers**”).⁴

4. The Receiver conducted the Sales Process in accordance with the Sales Process Approval Order and now brings this motion seeking:

- (a) an order (the “**Approval and Vesting Order**”), among other things:
 - (i) approving the sale transaction (the “**Transaction**”) contemplated by an agreement of purchase and sale between 10 John Holdings Inc. (the “**Purchaser**”) and the Receiver (as may be amended, the “**APS**”); and

¹*In the Matter of the Receivership Proceedings of 111 Sherwood Investment Inc.* (April 19, 2024), Toronto, CV-23-00699908-00CL ([Receivership Order](#)) (ONSC) [Receivership Order]; Second Report of the Receiver dated January 21, 2025 [Second Report], Appendix “A”, Motion Record of the Receiver dated January 21, 2025 [Motion Record] at Tab 2(A).

² Second Report, *ibid* at section 3.1, para 2, Motion Record at Tab 2.

³ Second Report, *ibid*, Motion Record at Tab 2.

⁴ Second Report, *ibid* at section 1.0, para 4, Motion Record at Tab 2.

- (ii) vesting in Sherwood 111 Investments Inc., the assignee of the Purchaser (the “**Assignee**”), all of the Company’s rights, title and interest in and to the property described in the APS; and
- (b) an order (the “**Ancillary Order**”), among other things:
- (i) authorizing the Receiver to distribute the net sale proceeds of the Transaction and any other funds realized as part of these receivership proceedings to NHE as set out in the Second Report (as defined below), up to the amount of the Indebtedness and secured by NHE’s mortgage (the “**Mortgage**”);
 - (ii) approving the Second Report of the Receiver dated January 21, 2025 (the “**Second Report**”) and the Receiver’s activities described therein;
 - (iii) approving the fees and disbursements of the Receiver and its counsel, Bennett Jones LLP (“**Bennett Jones**”), as detailed in the Fee Affidavits appended to the Second Report;
 - (iv) approving a fee accrual in the amount of \$150,000 (the “**Fee Accrual**”);
 - (v) sealing the Confidential Appendices (as defined below);
 - (vi) discharging the Receiver upon the filing of a certificate with the Court certifying that all outstanding matters in these receivership proceedings have been completed to the satisfaction of the Receiver (the “**Discharge Certificate**”); and
 - (vii) releasing and discharging the Receiver, upon the filing of the Discharge Certificate, from any and all liabilities that it now has or may hereafter have by any reason of, or in any way arising out of, its acts or omissions while

acting as Receiver, save and except for any gross negligence or willful misconduct.⁵

PART II: FACTS

5. The facts underlying this motion are more fully set out in the Second Report. All capitalized terms used but not defined herein have the meaning ascribed to them in the Second Report.

A. Background and Overview

6. The Company is an Ontario corporation, with its principal asset being the Real Property.⁶ The Real Property comprises approximately 10.31 acres with roughly 197,914 square feet of leasable space that can be used for retail, office, flex or industrial purposes.⁷

7. As previously noted, NHE, as the Company's most senior secured creditor, holds the first Mortgage on the Real Property.⁸ There are two charges subordinate to the Mortgage registered against the Real Property: Olympia has a second ranking charge registered in the amount of \$7,965,000, and Reif has a third ranking charge registered in the amount of \$500,000.⁹

8. The Canada Revenue Agency has made a claim against the Company for HST Obligations in the amount of \$124,386.81, exclusive of interest and penalties.¹⁰ However, given that the Mortgage was registered prior to the period in which the HST Obligations arose, the Receiver is of the view that NHE's security, including the Mortgage, ranks in priority to the HST Obligations in accordance with the *Excise Tax Act (Canada)*.¹¹

⁵ Second Report, *ibid* at s. 1.1, paras 1(g), 1(f), Motion Record at Tab 2.

⁶ Second Report, *ibid* at s. 2, para 1, Motion Record at Tab 2.

⁷ Second Report, *ibid*, Motion Record at Tab 2.

⁸ Second Report, *ibid* at s. 3.3, para 3, Motion Record at Tab 2.

⁹ Second Report, *ibid* at s. 3.3, para 1, Motion Record at Tab 2.

¹⁰ Second Report, *ibid* at s. 3.2, para 1, Motion Record at Tab 2.

¹¹ Second Report, *ibid*, Motion Record at Tab 2.

B. The Proposed Transaction and Vesting Order

1. The Sales Process

9. The purpose of the proposed Sales Process was to sell the Real Property in a manner that maximized value for the Company's stakeholders.¹²

10. Colliers commenced the Sales Process on June 13, 2024 and canvassed the market broadly, including by: (i) distributing an offer summary to its database of over 800 prospective purchasers, (ii) maintaining a virtual data room, which included, among other things, a template APS, copies of the tenant's leases, drawings of the property, and environmental assessments, and (iii) coordinating tours of the Real Property.¹³

11. As of July 25, 2024 (the "**Offer Not Before Date**"), 23 interested parties had signed confidentiality agreements, six interested parties had attended site tours, and four interested parties had submitted offers (including a conditional offer from the Purchaser) (the "**Initial Offers**").¹⁴ However, based on the conditions, purchase price, deposit amount and/or financial ability to close, the Receiver did not accept any of the Initial Offers. Colliers encouraged all interested parties to improve the terms of their respective offer.¹⁵

12. Following the Offer Not Before Date, the Receiver and Colliers continued to market the property.¹⁶ Colliers received an additional 23 executed confidentiality agreements and three offers from interested parties (the "**Subsequent Offers**") – however, the Subsequent Offers were similarly not accepted due to their conditionality and/or purchase price.¹⁷

13. On October 28, 2024, the Purchaser submitted a revised unconditional offer which contemplated the highest consideration value out of both the Initial Offers and the Subsequent Offers – other than a conditional offer submitted by Mr. Mark Accardi, a director and officer of

¹² Second Report, *ibid* at s. 1.0, para 3, Motion Record at Tab 2.

¹³ Second Report, *ibid* at s. 4.0, paras 3-5, 7, Motion Record at Tab 2.

¹⁴ Second Report, *ibid* at s. 4.0, para 7, Motion Record at Tab 2.

¹⁵ Second Report, *ibid*, Motion Record at Tab 2.

¹⁶ Second Report, *ibid* at s.4, para 11, Motion Record at Tab 2.

¹⁷ Second Report, *ibid*, Motion Record at Tab 2.

the Company.¹⁸ Notwithstanding efforts made by both Colliers and the Receiver, Mr. Accardi did not submit a firm offer.¹⁹

2. The Transaction

14. Subject to this Court's approval, the Receiver has agreed to sell, assign, convey and transfer to the Purchaser and the Purchaser has agreed to purchase the Purchased Assets free and clear of all Encumbrances, other than the Permitted Encumbrances (each as defined in the APS).²⁰ The Purchased Assets include:

- (a) the Lands and the Buildings;
- (b) the Leases;
- (c) certain prepayments and deposits made relating to the Real Property;
- (d) the Permits; and
- (e) certain intellectual property held by the Company, as applicable (each as defined in the APS).²¹

15. In accordance with section 15.10 of the APS, the Purchaser has assigned all its rights and obligations under the APS to the Assignee.²²

16. As will be discussed in greater detail below, the Receiver is seeking to seal the purchase price of the Transaction for a limited time.²³ The Purchase price will be satisfied in part by two deposits totaling \$750,000 in the aggregate, which are being held by the Receiver's counsel in trust.²⁴ The remaining portion of the purchase price will be paid by certified wire transfer on closing and is subject to standard adjustments commonly found in real estate transactions, including for property taxes.²⁵

¹⁸ Second Report, *ibid* at s. 4, para 12, Motion Record at Tab 2.

¹⁹ Second Report, *ibid* at s. 4, paras 9, 12, Motion Record at Tab 2.

²⁰ Second Report, *ibid* at Appendix "F", para 3.1(a), Motion Record at Tab 2(F).

²¹ Second Report, *ibid* at s. 4.1, para 2(b), Motion Record at Tab 2.

²² Second Report, *ibid* at Appendix "F", Motion Record at Tab 2(F).

²³ Second Report, *ibid* at s. 4.1, para 2(c), Motion Record at Tab 2.

²⁴ Second Report, *ibid* at s. 4.1, para 2(d), Motion Record at Tab 2.

²⁵ Second Report, *ibid* at s. 4.1, at para 2(c), Motion Record at Tab 2.

17. The Transaction is on an “as is, where is” basis, and includes limited representations and warranties from both parties.²⁶ The only material condition to closing is the issuance of the Approval and Vesting Order.²⁷

18. Pursuant to the terms of the APS, if approved, the Transaction will close on the later of: (i) the first business day which is ten business days after the receipt of the proposed Approval and Vesting Order, and (ii) March 3, 2025.²⁸

C. The Ancillary Order

1. The Proposed Distributions to NHE

19. The proposed Ancillary Order, among other things, authorizes the Receiver to make one or more distributions to NHE as partial repayment of the Indebtedness.²⁹ Pursuant to the terms of the Ancillary Order, the Receiver is seeking authorization to distribute the net sale proceeds from the Transaction to NHE, subject to the Fee Accrual and any accrued and unpaid expenses.³⁰

20. In addition, the Receiver is also seeking the authority to make further distributions (as necessary) to NHE from any unused portion of the Fee Accrual or other funds recovered in these receivership proceedings, up to the amount of the Indebtedness and secured by the Mortgage.³¹ Notwithstanding the foregoing, it is not expected that NHE will be repaid in full.³² Accordingly, the Receiver is not seeking the authorization to make any further distributions to any of the Company’s other creditors at this time.³³

2. Approval of Activities, Second Report and Fees and Disbursements

21. In addition to seeking approval of the Second Report and the activities of the Receiver referred to therein, the Receiver is also seeking approval of the Fee Accrual and the fees and disbursements of KSV and Bennett Jones as set out in the Fee Affidavits.³⁴ The Fee Accrual is

²⁶ Second Report, *ibid*, Appendix “F”, Article 12, Motion Record at Tab 2(F).

²⁷ Second Report, *ibid* at s. 4.1, para 2(h), Motion Record at Tab 2.

²⁸ Second Report, *ibid* at s. 4.1, para 2(g), Motion Record at Tab 2.

²⁹ Second Report, *ibid* at s.6, para 1, Motion Record at Tab 2.

³⁰ Second Report, *ibid*, Motion Record at Tab 2.

³¹ Second Report, *ibid* at s. 6, para 2, Motion Record at Tab 2.

³² Second Report, *ibid*, Motion Record at Tab 2.

³³ Second Report, *ibid*, Motion Record at Tab 2.

³⁴ Second Report, *ibid* at s.1.0 para 1.1(g), Motion Record at Tab 2.

expected to provide the Receiver and its counsel with sufficient funding to complete their remaining ancillary duties prior to the termination of these receivership proceedings, including closing the Transaction.³⁵

22. The fees of the Receiver and Bennett Jones from the commencement of this mandate to December 31, 2024, total \$219,642.00 and \$134,353.50, respectively, excluding disbursements and HST.³⁶ The Fee Affidavits and accompanying invoices for the Receiver and Bennett Jones are attached as Appendices “G” and “H” to the Second Report, respectively.³⁷

23. The Receiver’s activities since the First Report, include, among other things:

- (a) corresponding on a regular basis with Bennett Jones regarding all aspects of its receivership mandate;
- (b) discussing certain operational matters regarding the Real Property with NHE;
- (c) corresponding with Markland, as property manager, regarding operational matters including dealing with tenants, maintenance and repairs;
- (d) reviewing Markland’s monthly reporting;
- (e) corresponding with tenants regarding the collection of monthly rent and lease extensions;
- (f) entering into lease extension agreements with certain tenants;
- (g) corresponding with PayQuad Solutions, the software platform provider used to collect rent;
- (h) corresponding with the Bank of Nova Scotia, the Company’s banking provider, to arrange for ongoing transfers of rent collections to the Receiver’s bank account;
- (i) corresponding with the Canada Revenue Agency regarding HST obligations;

³⁵ Second Report, *ibid* at s. 7.0, para 5, Motion Record at Tab 2.

³⁶ Second Report, *ibid* at s. 7.0, para 1, Motion Record at Tab 2.

³⁷ Second Report, *ibid*, Motion Record at Tab 2.

- (j) corresponding with the Company's insurance broker regarding the insurance policy for the Real Property;
- (k) preparing an Interim Report of the Receiver for the Company pursuant to subsection 246(2) of the *Bankruptcy and Insolvency Act* (Canada); and
- (l) drafting the Second Report and reviewing all motion materials filed in connection with this motion.³⁸

3. Sealing the Confidential Appendices

24. The Ancillary Order contemplates the sealing of the Confidential Appendices until further order of this Court or the closing of the Transaction.³⁹ The Confidential Appendices, being the unredacted APS and the unredacted sales process and offer summary prepared by Colliers (the "Colliers Summary"), contain confidential information that if disclosed could have a material adverse impact on a future sales process of the Real Property (as may be required).⁴⁰ Specifically, the Colliers Summary includes details pertaining to the Sales Process, such as the names of the participants and the economic terms of each bid.⁴¹

25. The redactions made to the copy of the APS attached to the Second Report as Appendix "F" were limited to the quantum of the purchase price.⁴²

4. The Discharge of the Receiver

26. Following the closing of the Transaction, if approved, the Receiver is seeking to be discharged from its role as Receiver in these proceedings.⁴³ Upon filing the Discharge Certificate, the Receiver will have satisfied its mandate and completed all of its remaining duties and responsibilities under the Receivership Order.⁴⁴ The Receiver is unaware of any outstanding matters that would require these receivership proceedings to continue.⁴⁵

³⁸ Second Report, *ibid* at s. 5.0, para 1, Motion Record at Tab 2.

³⁹ Second Report, *ibid* at s. 4.3, para 1, Motion Record at Tab 2.

⁴⁰ Second Report, *ibid* at s. 4.3, paras 1-2, Motion Record at Tab 2.

⁴¹ Second Report, *ibid* at s. 4.0, para 13, Motion Record at Tab 2.

⁴² Second Report, *ibid* at s. 4.1, para 1, Motion Record at Tab 2.

⁴³ Second Report, *ibid* at s. 1.1(g); Motion Record at Tab 2.

⁴⁴ Second Report, *ibid* at s. 8.2, Motion Record at Tab 2.

⁴⁵ Second Report, *ibid* at s. 8.1, Motion Record at Tab 2.

PART III: ISSUES

27. The issues to be considered on this motion are whether this Court should:
- (a) approve the Transaction and vest the Purchased Assets in the Assignee free and clear of all claims and encumbrances (except for the Permitted Encumbrances);
 - (b) authorize the distributions to NHE;
 - (c) approve the Second Report and the activities of the Receiver described therein;
 - (d) approve the Fee Accrual and the fees and disbursements of KSV and Bennett Jones;
 - (e) seal the Confidential Appendices; and
 - (f) upon the filing of the Discharge Certificate, discharge KSV as Receiver and release KSV from any liability it may or may have incurred in connection with its role as Receiver.

PART IV: LAW AND ANALYSIS

A. The Approval and Vesting Order Should be Granted

1. The APS and the Transaction Should be Approved

28. Pursuant to section 100 of the CJA, this Court has the jurisdiction to grant an order vesting in any person an interest in real or personal property.⁴⁶ Additionally, in *Third Eye Capital Corporation v Ressources Dianor Inc./Dianor Resources Inc.*, the Ontario Court of Appeal clarified that a court's jurisdiction under section 243(1) of the BIA includes the authority to vest property in a purchaser free and clear of encumbrances and extinguishing liabilities.⁴⁷ This power extends to receivers appointed under the BIA.⁴⁸

⁴⁶ *Courts of Justice Act*, RSO 1990, c. C.43 s 100 [CJA]; *First Source Financial Management v Chacon Strawberry Fields Inc.*, 2024 ONSC 7229 at para 39; *The Bank of Nova Scotia v Lackey and Lackey*, 2021 ONSC 2628 at para 23.

⁴⁷ *Third Eye Capital Corporation v Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508 at paras 25, 85-87 [*Third Eye*]; *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, s 243(1) [BIA].

⁴⁸ *Third Eye*, *ibid.*

29. The Receiver is also authorized and empowered by paragraph 3(1) of the Receivership Order to “apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property.”⁴⁹

30. The principles to be applied when determining whether to approve a sale transaction were articulated by the Ontario Court of Appeal in *Royal Bank of Canada v Soundair Corp.* (“*Soundair*”):

- (a) whether the receiver has made sufficient effort to obtain the best price and has not acted improvidently;
- (b) the efficacy and integrity of the process by which offers have been obtained;
- (c) whether the interests of all parties have been considered; and
- (d) whether there has been unfairness in the working out of the process.⁵⁰

31. Deference is to be afforded to a receiver when evaluating its sales process. Absent a violation of the *Soundair* principles or the existence of other exceptional circumstances, the court should uphold the business judgment of the receiver, as its court officer.⁵¹

32. The proposed Transaction satisfies the *Soundair* principles for the following reasons:

- (a) ***The Transaction is the Best Offer in the Circumstances*** – the Transaction contemplates the highest consideration out of all other offers received in the Sales Process, other than a conditional offer from the Company’s current director that never became firm.⁵² The market was canvassed broadly and 46 interested parties executed confidentiality agreements – yet, the Purchaser submitted the highest and best unconditional offer.⁵³ Moreover, NHE no longer supports the continuation of

⁴⁹ *Receivership Order*, *supra* note 1, Motion Record at Tab 2(A).

⁵⁰ *Royal Bank of Canada v Soundair Corp.*, [1991] 46 OAC 321 at para 16; *Kingsett Mortgage Corporation v Churchill Lands United Inc.*, 2024 ONSC 7127 at para 16; *Home Trust Co v 2122775 Ontario Inc.*, 2014 ONSC 1039 at para 11.

⁵¹ *Crown Trust Co. et al. v. Rosenberg et al.*, 1986 CanLII 2760 (ON SC) at paras 77, 84; *Homedale-Eagle Corporation v 253 Queen Street Inc.*, 2024 ONSC 6590 at para 35 [Homedale-Eagle].

⁵² Second Report, *supra* note 1 at s. 4.0, para 12, Motion Record at Tab 2.

⁵³ Second Report, *ibid* at s. 4.0, paras 7, 11, Motion Record at Tab 2.

these receivership proceedings, meaning there is no additional funding available to continue the marketing of the Real Property.⁵⁴ As such, the Transaction is the best and only alternative in the circumstances;

- (b) ***The Sales Process was Extensive, Reasonable and Fair*** – the Sales Process was carried out in accordance with the terms of the Sales Process Approval Order.⁵⁵ The APS and the Transaction are the culmination of: (i) the expansive Sales Process developed by the Receiver and Colliers, a reputable real estate broker with considerable experience selling real property in the Southwestern Ontario area;⁵⁶ (ii) multiple rounds of offers and negotiations over a four and a half month period;⁵⁷ and (iii) Colliers’ and the Receivers’ extensive efforts to solicit interest in the Real Property, including by preparing and disseminating marketing materials, soliciting prospective purchasers, maintaining a virtual data room, and facilitating walk-throughs of the Real Property.⁵⁸ Additionally, the Receiver scheduled regular update calls with both NHE and Golden Horseshoe, the second mortgagee’s agent, to keep them apprised of developments and ensure a transparent Sales Process.⁵⁹ The Receiver did not act improvidently, and worked alongside Colliers to ensure a fair and equitable process;
- (c) ***The Receiver and Colliers Support the Transaction*** – the Receiver and Colliers support the Transaction and believe it is the best offer in the circumstances.⁶⁰ In light of the extensive Sales Process, coupled with the Company’s marketing efforts prior to these receivership proceedings, Colliers is of the view that there is nothing to indicate that a longer listing period would generate superior offers,⁶¹ and
- (d) ***The Transaction is in the Best Interest of all Stakeholders*** – the Transaction is supported by NHE, notwithstanding the fact that the Indebtedness is not expected

⁵⁴ Second Report, *ibid* at s. 4.2, para 1(g), Motion Record at Tab 2.

⁵⁵ Second Report, *ibid* at s. 4.0, para 1, Motion Record at Tab 2.

⁵⁶ Second Report, *ibid* at s. 4.2, para 1(b), Motion Record at Tab 2.

⁵⁷ Second Report, *ibid* at s. 4.0, paras 3-12, Motion Record at Tab 2.

⁵⁸ Second Report, *ibid* at s. 4.0, paras 3-4, Motion Record at Tab 2.

⁵⁹ Second Report, *ibid* at s. 4.0, para 6, Motion Record at Tab 2.

⁶⁰ Second Report, *ibid* at s. 4.2, para 1(e), Motion Record at Tab 2.

⁶¹ Second Report, *ibid* at s. 4.0, para 14, Motion Record at Tab 2.

to be repaid in full.⁶² The APS contemplates an “as is, where is” unconditional sale of the property (subject to this Court approval), which is anticipated to significantly reduce closing risks and provide additional certainty for the Company’s stakeholders.

33. The Sales Process was a fair and commercially reasonable process which obtained the highest offer available in the circumstances. As such, the Receiver believes that the Transaction and the APS should be approved and that the proposed Approval and Vesting Order is both appropriate and reasonable in the circumstances.

B. The Ancillary Order Should be Granted

1. The Distributions to NHE Should be Authorized

34. The Receiver is seeking authorization to make the proposed distributions to NHE (the “**Distributions**”) in accordance with the terms of the Second Report. Orders granting distributions are routinely granted by Canadian courts in insolvency proceedings and receiverships.⁶³

35. The Court in *Abitibi* considered several factors in assessing whether to approve an interim distribution under the *Companies Creditors’ Arrangement Act*, R.S.C. 1985, c. C-36, including, among others: (i) whether the payee’s security is valid and enforceable; (ii) the amounts owed to the payee exceed the distribution; and (iii) the distribution would result in significant interest savings.⁶⁴ These factors are equally applicable to receivership proceedings.

36. The facts in this case support approving the distributions:

- (a) NHE is the senior secured creditor of the Company and holds security over the Real Property which is subject to the Transaction;

⁶² Second Report, *ibid* at s. 4.2, para 1(f), Motion Record at Tab 2.

⁶³ [Kingsett Mortgage](#), *supra* note 50 at para 43; [AbitibiBowater inc. \(Arrangement relatif à\)](#), 2009 QCCS 6461 (CanLII) at [paras. 70-75](#) [*Abitibowater*]; See *Genesis Mortgage Investment Corporation v 1776411 Ontario Ltd. and 1333 Weber Street Kitchener LP* (October 8, 2024), Toronto, CV-23-00706813-00CL ([Distribution and Ancillary Relief Order](#)) (ONSC) at para 3 [*Genesis Mortgage*].

⁶⁴ [Abitibowater](#), *ibid*.

- (b) the Receiver's counsel has provided an opinion that NHE's security is valid and enforceable, subject to the usual qualifications and assumptions,⁶⁵ and
- (c) as previously discussed, NHE is not anticipated to be fully repaid from the Distributions, and will only receive proceeds or funds up to the amount secured by its first-ranking Mortgage.⁶⁶

37. Following the Transaction, if approved, the Receiver will be taking steps to terminate these receivership proceedings. As part of its remaining duties, the Receiver is required to distribute any remaining funds of the estate.⁶⁷ To avoid the additional costs associated with bringing a further motion to this Court, the Receiver believes it is appropriate in the circumstances to also seek the authorization to make any remaining distributions to NHE, as may be applicable. This authorization will, among other things, reduce costs, maximize recoveries for NHE and facilitate an efficient closing of these receivership proceedings.

38. The Receiver respectfully submits that the proposed Distributions are appropriate and should be authorized in accordance with the proposed Ancillary Order. The distribution language included in the proposed Ancillary Order is consistent with the Model Discharge Order of the Commercial List.

2. The Receiver's Conduct, Fees and Activities Should be Approved

(a) The Receiver's Conduct and Activities

39. This Court has the inherent jurisdiction to approve a court-appointed receiver's reports and present and past activities.⁶⁸ This Court frequently grants such approval in the context of receivership proceedings,⁶⁹ recognizing that it:

⁶⁵ Second Report, *supra* note 1 at s. 3.1, para 3, Motion Record at Tab 2.

⁶⁶ Second Report, *ibid* at s. 6.0, para 2, Motion Record at Tab 2.

⁶⁷ Second Report, *ibid* at s. 8.0, para 2, Motion Record at Tab 2.

⁶⁸ *BIA*, *supra* note 47, s 183(1); *Re Confectionately Yours Inc (2002)*, [OJ No. 3569](#) at [para 36](#) citing F. Bennett, *Bennett on Receiverships*, 2nd ed. (Scarborough: Carswell, 1999) at 459-460.

⁶⁹ *Truist bank v Kew Media Group Inc. and Kew Media International (Canada) Inc.* (May 25, 2023), Toronto, CV 20-00637081-00CL ([Fee Approval and Discharge Order](#)) (ONSC) at para 1 [Truist bank]; *Bank of Montreal v 2243080 Ontario Inc. and 2496287 Ontario Inc.* (April 29, 2024), Toronto, CV-23-00698764-00CL ([Discharge Order](#)) at para 3 [Bank of Montreal]; *Peakhill Capital Inc. v 1000093910 Ontario Inc.* (July 9, 2024), Toronto, CV-23-00004031-0000 ([Order](#)) (ONSC) at para 4 [Peakhill Capital]; *Genesis Mortgage*, *supra* note 63 at para 1.

- (a) brings the receiver's activities before the court;
- (b) enables the court to satisfy itself that the receiver's activities have been conducted prudently and diligently;
- (c) allows the concerns of stakeholders to be considered and addressed;
- (d) provides stakeholders with an opportunity to bring to the fore any concerns they may have regarding the receiver's diligence and prudence;
- (e) provides protection for the receiver not otherwise provided by statute;
- (f) permits the receiver to move forward with the next steps in the proceedings; and
- (g) protects creditors from the delay and expense that would be caused by:
 - (i) the re-litigation of the steps taken in the proceedings to date; and
 - (ii) potential indemnity claims by the receiver.⁷⁰

40. The proposed Ancillary Order limits the benefit of any such approval of the Receiver's activities to only the Receiver, in its personal capacity, as is customary in receivership proceedings. The Receiver also notes that the approval of receivers' activities is expressly contemplated by the Model Discharge Order of the Commercial List.

41. The activities of the Receiver described in the Second Report were carried out in good faith in accordance with the Receivership Order and were in each case undertaken in the best interest of the stakeholders of the Company. Given the aforementioned benefits of approving a court-appointed receiver's activities,⁷¹ the Receiver submits that it is appropriate for this Court to exercise its jurisdiction to approve the Second Report and its activities and conduct therein.

⁷⁰ *Re Hanfeng Evergreen Inc*, 2017 ONSC 7161 at paras 15-17, 21; *Triple-I Capital Partners Limited v 12411300 Canada Inc*, 2023 ONSC 3400 at paras 65-66 [*Triple-I*].

⁷¹ *Triple-I*, *ibid* at para 66.

(b) The Receiver's Fees and Disbursements

42. The Receiver is also seeking approval of the Fee Accrual and the professional fees and disbursements incurred by it and its legal counsel as described in the Fee Affidavits attached to the Second Report.⁷²

43. Section 18 of the Receivership Order provides that the Receiver and its counsel shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, unless otherwise ordered by the court.⁷³ Further, the Receiver and its counsel were granted a charge against the Real Property to secure such fees and disbursements.⁷⁴

44. In determining whether to approve the accounts of a court-appointed receiver and its counsel, the court will consider the overall value contributed, taking into account: (a) the nature, extent and value of the assets, (b) the complications encountered, (c) the degree of assistance provided by the debtor, (d) the time spent, (e) the receiver's knowledge, experience and skill, (f) the diligence and thoroughness displayed, (g) the responsibilities assumed, (h) the results of the receiver's efforts, and (i) the cost of comparable services when performed in a prudent and economical manner.⁷⁵

45. In making its assessment, the court should consider all the factors enumerated above; however, the overall value provided by the Receiver and its counsel should pre-dominate over the aggregate fee amount.⁷⁶

46. The fees and disbursements of KSV and Bennett Jones are proportional to the value of the Real Property and reflect the extensive negotiations required to execute the APS and maintain the Real Property during the pendency of the Sales Process. Moreover, the professional fees, as set out in greater detail in the Fee Affidavits, are fair, reasonable and have been properly incurred. The hourly rates charged by Bennett Jones are comparable to the rates charged by other firms practicing in the downtown Toronto restructuring and insolvency market.⁷⁷

⁷² Second Report, *supra* note 1 at s. 7.0, para 1, Motion Record at Tab 2.

⁷³ *Receivership Order*, *supra* note 1, Motion Record at Tab 2(A).

⁷⁴ *Receivership Order*, *ibid*, Motion Record at Tab 2(A).

⁷⁵ *Bank of Nova Scotia v Diemer*, 2014 ONCA 851 at para 33 [Diemer]; See *Truist bank*, *supra* note 69 at paras 2-5; *Bank of Montreal*, *supra* note 69 at paras 4-6; *Peakhill Capital*, *supra* note 69 at para 5.

⁷⁶ *Diemer*, *ibid*.

⁷⁷ Second Report, *supra* note 1 at s. 7.0, para 4, Motion Record at Tab 2.

47. The Fee Accrual is necessary and reasonable in the circumstances to allow the Receiver and Bennett Jones to complete the Remaining Duties prior to the termination of these receivership proceedings.⁷⁸ As discussed above, any amounts leftover shall be distributed to NHE in accordance with the terms of the Second Report. Accordingly, the Receiver respectfully submits that the payment of the fees and disbursements, including the Fee Accrual, should be authorized and approved.

3. The Confidential Appendices Should be Sealed

48. Subsection 137(2) of the *CJA*, provides that a court may order that any document filed in a civil proceeding be treated as confidential, sealed and not form part of the public record.⁷⁹

49. In *Sherman Estate v. Donovan*,⁸⁰ the Supreme Court of Canada recast the test set out in *Sierra Club of Canada v. Canada (Minister of Finance)*,⁸¹ which requires the moving party to establish the following factors:

- (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.⁸²

50. The Receiver requests that the following documents be treated as confidential and sealed, and not form part of the public record: (i) the unredacted APS; and (ii) the unredacted Colliers Summary (together, the “**Confidential Appendices**”). Together, these documents contain commercially sensitive information, including the names of the parties who participated in the Sales Process, the economic terms of the offers, and the purchase price included under the APS.⁸³

⁷⁸ Second Report, *ibid* at s. 7.0, para 5, Motion Record at Tab 2.

⁷⁹ *CJA*, *supra* note 43; *Kingsett Mortgage*, *supra* note 50 at para 6.

⁸⁰ [2021 SCC 25](#) at [para 38](#) [Sherman Estate].

⁸¹ [2002 SCC 41](#).

⁸² *Sherman Estate*, *supra* note 82 at para 38. *Kingsett Mortgage*, *supra* note 50 at para 6.

⁸³ Second Report, *supra* note 1 at s. 4.0, para 13 and s. 4.1, para 1, Motion Record at Tab 2.

- (a) **Public Interest** – courts have recognized the “important public interest of maximizing recoveries in an insolvency that could be compromised by the premature public disclosure of confidential information about the value of a property that a receiver is attempting to sell in a transaction that has not yet closed.”⁸⁴ Similarly here, if the sealing order is not granted, the information contained in the Confidential Appendices could prejudice the Receiver or the Company’s ability to secure competitive offers for the Real Property should the Transaction ultimately not be approved or close;
- (b) **Lack of a Reasonable Alternative** – courts in other receivership proceedings have granted similar relief, finding that no reasonable alternative to a sealing order exists where declining to grant the proposed order would materially impair the maximization of asset value for the benefit of stakeholders;⁸⁵ and
- (c) **Proportionality** – the benefits of the proposed sealing order greatly exceed the deleterious effects of doing so in the circumstances. The sealing relief included under the proposed Ancillary Order is discrete, proportionate and limited – both in scope and temporally.⁸⁶ The only information proposed to be redacted with respect to the APS is the purchase price – all other terms of the agreement have been disclosed.⁸⁷ Notably, the Receiver is only seeking to temporarily seal the Confidential Appendices until the Transaction closes or further order of this Court.⁸⁸

4. The Receiver should be Discharged and Released

51. The proposed Ancillary Order authorizes the Receiver to issue the Discharge Certificate following the completion of the Transaction and the administration of the Receiver’s Remaining Duties.

52. The discharge of the Receiver upon the issuance of the Discharge Certificate is appropriate,

⁸⁴ *Kingsett Mortgage*, *supra* note 50 at para 6; *Homedale-Eagle*, *supra* note 51 at [para 112](#).

⁸⁵ *Kingsett Mortgage*, *ibid*; *Homedale-Eagle*, *ibid*.

⁸⁶ *Kingsett Mortgage*, *ibid*; *Metropolitan Partners Group Administration, LLC v International Credit Experts Inc.*, [2024 ONSC 4601](#) at [para 54](#).

⁸⁷ Second Report, *supra* note 1 at s. 4.1, para 1, Motion Record at Tab 2.

⁸⁸ Second Report, *ibid* at s. 4.3, para 1, Motion Record at Tab 2.

given that:

- (a) all of the Company's known assets will have been realized and such proceeds will have been distributed in accordance with the proposed Ancillary Order;
- (b) the Receiver's administration of its mandate will be complete and there are no known outstanding matters that would require these receivership proceedings to continue; and
- (c) under the terms of the proposed Ancillary Order, KSV will remain the Receiver for the performance of such incidental duties as may be required to complete the administration of these receivership proceedings.⁸⁹

53. The releases included in the proposed Ancillary Order shall, if granted, release the Receiver from any current or future liability arising out of its actions or omissions. The proposed releases are consistent with the releases granted by this Court in other receivership proceedings and include the standard carve outs for gross negligence or willful misconduct.⁹⁰ This Court has recognized that in absence of any evidence of improper or negligent conduct on the part of a receiver, the releases should be issued.⁹¹

54. The proposed discharge of the Receiver is consistent with the Model Discharge Order of the Commercial List and is appropriate in the circumstances. There is no evidence of any improper or negligent conduct in these receivership proceedings. As such, the Receiver respectfully submits that the releases are reasonable and will provide certainty and finality to these proceedings.

⁸⁹ Second Report, *supra* note 1 at s. 8, para 1; Motion Record at Tab 2; Draft Ancillary Order at para 13, Motion Record at Tab 5.

⁹⁰ *Truist bank*, *supra* note 69 at paras 7-8; *Bank of Montreal*, *supra* note 69 at paras 11-12; *Peakhill Capital*, *supra* note 69 at paras 7-8.

⁹¹ *Pinnacle v. Kraus*, 2012 ONSC 6376 at para 47; *Kingsett Mortgage*, *supra* note 50 at para 47.

PART V: RELIEF REQUESTED

55. The Receiver submits that the relief sought on the within motion is appropriate in the circumstances and respectfully requests that the proposed form of the Approval and Vesting Order and the Ancillary Order be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 27TH DAY OF JANUARY, 2025

Bennett Jones LLP

BENNETT JONES LLP

SCHEDULE A – LIST OF AUTHORITIES

Cases Cited

1. [*AbitibiBowater inc. \(Arrangement relatif à\)*, 2009 QCCS 6461 \(CanLII\)](#)
2. [*Bank of Nova Scotia v Diemer*, 2014 ONCA 851](#)
3. [*Crown Trust Co. et al. v. Rosenberg et al.*, 1986 CanLII 2760 \(ON SC\)](#)
4. [*First Source Financial Management v Chacon Strawberry Fields Inc.*, 2024 ONSC 7229](#)
5. [*Home Trust Co v 2122775 Ontario Inc.*, 2014 ONSC 1039](#)
6. [*Homedale-Eagle Corporation v 253 Queen Street Inc.*, 2024 ONSC 6590](#)
7. [*Kingsett Mortgage Corporation v Churchill Lands United Inc.*, 2024 ONSC 7127](#)
8. [*Metropolitan Partners Group Administration, LLC v International Credit Experts Inc.*, 2024 ONSC 4601](#)
9. [*Pinnacle v. Kraus*, 2012 ONSC 6376](#)
10. [*Re Confectionately Yours Inc* \(2002\), OJ No. 3569](#)
11. [*Re Hanfeng Evergreen Inc.*, 2017 ONSC 7161](#)
12. [*Royal Bank of Canada v Soundair Corp.*, 1991 CanLII 2727 \(ONCA\)](#)
13. [*Sherman Estate v. Donovan*, 2021 SCC 25](#)
14. [*Sierra Club of Canada v. Canada \(Minister of Finance\)*, 2002 SCC 41](#)
15. [*The Bank of Nova Scotia v Lackey and Lackey*, 2021 ONSC 2628](#)
16. [*Third Eye Capital Corporation v Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508](#)
17. [*Triple-I Capital Partners Limited v 12411300 Canada Inc.*, 2023 ONSC 3400](#)

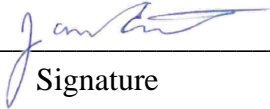
Other Materials

1. [*Bank of Montreal v 2243080 Ontario Inc. and 2496287 Ontario Inc.* \(April 29, 2024\), Toronto, CV-23-00698764-00CL \(Discharge Order\) \(ONSC\)](#)
2. [*Genesis Mortgage Investment Corporation v 1776411 Ontario Ltd. and 1333 Weber Street Kitchener LP* \(October 8, 2024\), Toronto, CV-23-00706813-00CL \(Distribution and Ancillary Relief Order\) \(ONSC\)](#)
3. [*In the Matter of the Receivership Proceedings of 111 Sherwood Investment Inc.* \(April 19, 2024\), Toronto, CV-23-00699908-00CL \(Receivership Order\) \(ONSC\)](#)

4. [Peahill Capital Inc. v 1000093910 Ontario Inc. \(July 9, 2024\), Toronto, CV-23-00004031-0000 \(Order\)\(ONSC\)](#)
5. [Truist bank v Kew Media Group Inc. and Kew Media International \(Canada\) Inc. \(May 25, 2023\), Toronto, CV 20-00637081-00CL \(Fee Approval and Discharge Order\) \(ONSC\)](#)

I certify that I am satisfied as to the authenticity of every authority.

Dated: January 27, 2025



Signature

SCHEDULE B – STATUTES AND REGULATIONS RELIED ON

Bankruptcy and Insolvency Act, R.S.C. 1985, c C-36

Courts vested with jurisdiction

183 (1) The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers:

- (a) in the Province of Ontario, the Superior Court of Justice;
- (b) [Repealed, 2001, c. 4, s. 33]
- (c) in the Provinces of Nova Scotia and British Columbia, the Supreme Court;
- (d) in the Provinces of New Brunswick and Alberta, the Court of Queen’s Bench;
- (e) in the Province of Prince Edward Island, the Supreme Court of the Province;
- (f) in the Provinces of Manitoba and Saskatchewan, the Court of Queen’s Bench;
- (g) in the Province of Newfoundland and Labrador, the Trial Division of the Supreme Court; and
- (h) in Yukon, the Supreme Court of Yukon, in the Northwest Territories, the Supreme Court of the Northwest Territories, and in Nunavut, the Nunavut Court of Justice.

Superior Court jurisdiction in the Province of Quebec

(1.1) In the Province of Quebec, the Superior Court is invested with the jurisdiction that will enable it to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during its term, as it is now, or may be hereafter, held, and in vacation and in chambers.

Courts of appeal — common law provinces

(2) Subject to subsection (2.1), the courts of appeal throughout Canada, within their respective jurisdictions, are invested with power and jurisdiction at law and in equity, according to their ordinary procedures, except as varied by this Act or the General Rules, to hear and determine appeals from the courts vested with original jurisdiction under this Act.

Court of Appeal of the Province of Quebec

(2.1) In the Province of Quebec, the Court of Appeal, within its jurisdiction, is invested with power and jurisdiction, according to its ordinary procedures, except as varied by this Act or the General Rules, to hear and determine appeals from the Superior Court.

Supreme Court of Canada

(3) The Supreme Court of Canada has jurisdiction to hear and to decide according to its ordinary procedure any appeal so permitted and to award costs.

R.S., 1985, c. B-3, s. 183, R.S., 1985, c. 27 (2nd Supp.), s. 10 1990, c. 17, s. 3, 1998, c. 30, s. 14, 1999, c. 3, s. 15, 2001, c. 4, s. 33, 2002, c. 7, s. 83, 2015, c. 3, s. 9

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.

1992, c. 27, s. 89, 2005, c. 47, s. 115, 2007, c. 36, s. 58

Courts of Justice Act, R.S.O. 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.

NHE CAPITAL CORP.

- and -

111 SHERWOOD INVESTMENTS INC.

Applicant

Respondent

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

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