

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

B E T W E E N:

**MARSHALLZEHR GROUP INC.**

Applicant

- and -

**98 JAMES SOUTH (2022) INC. and 98 JAMES SOUTH (2022) LIMITED  
PARTNERSHIP**

Respondents

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

**FACTUM OF THE RECEIVER  
(Motion returnable January 16, 2025)**

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**Lawyers for KSV Restructuring Inc., in its  
capacity as Court-Appointed Receiver**

TO: **THE SERVICE LIST**

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SUPERIOR COURT OF JUSTICE  
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**FACTUM OF THE RECEIVER**

**PART I – OVERVIEW**

1. KSV Restructuring Inc. (“**KSV**”), in its capacity as court-appointed receiver (the “**Receiver**”) without security, of all assets, undertakings, and properties of 98 James South (2022) Inc. and 98 James South (2022) Limited Partnership (collectively, the “**Debtors**”), including all proceeds thereof (the “**Property**”), seeks an order:

- (i) if necessary, abridging the time for service of this Notice of Motion and the Receiver’s motion materials;
- (ii) approving the proposed transaction (the “**Transaction**”) for the sale of the Purchased Assets (as defined below) pursuant to a Stalking Horse Agreement of Purchase and Sale dated November 1, 2024 (the “**Stalking Horse APS**”) between the Receiver and Vantage Acquisition Inc. (“**Vantage**”), as amended;

- (iii) vesting title in the Purchased Assets in Hamilton 98 LP by its general partner, Hamilton 98 GP Inc. (the “**Purchaser**”), as assignee of Vantage, free and clear of all liens, claims and encumbrances;
  - (iv) authorizing and directing the Receiver to make one or more distributions of the net sale proceeds from the Transaction to MarshallZehr Group Inc. (“**MarshallZehr**”);
  - (v) approving the Second Report of the Receiver dated January 7, 2025 (the “**Second Report**”) and the activities of the Receiver as described therein;
  - (vi) approving the fees and disbursements of the Receiver, its legal counsel, Chaitons LLP (“**Chaitons**”), and its counsel solely with respect to a review of MarshallZehr’s security, Fasken Martineau DuMoulin LLP (“**Fasken**”), as detailed in the Second Report, and an accrual of \$150,000 (the “**Fee Accrual**”) to complete the administration of these proceedings; and
  - (vii) discharging and releasing the Receiver.
2. Capitalized terms not defined herein have the meanings ascribed to them in the Second Report.

## PART II – FACTS

### BACKGROUND

3. The Debtors are the registered owners of the real property located at 98 James Street South, Hamilton, Ontario (the “**Real Property**”), which is the Debtors’ primary asset.<sup>1</sup> The Debtors acquired the Real Property from Hue Developments & Investments Canada Inc. (“**Hue**”) in August 2022.

4. The acquisition of the Real Property by the Debtor was financed by a loan from MarshallZehr (the “**Loan**”) made pursuant to a commitment letter dated August 19, 2022 (the “**Commitment Letter**”) and a vendor takeback mortgage from Hue in the principal amount of \$14,000,000 (the “**VTB Mortgage**”).<sup>2</sup>

5. As security for the Loan, MarshallZehr was granted a first ranking mortgage registered against title to the Real Property (the “**MZ Mortgage**”), a general assignment of rents, and a general security agreement in its favour from the Debtor.<sup>3</sup>

6. Pursuant to a subordination and standstill agreement dated September 9, 2022, Hue agreed to subordinate and postpone its VTB Mortgage to the MZ Mortgage.<sup>4</sup>

7. On August 14, 2024, on an application by MarshallZehr, the Ontario Superior Court of Justice (Commercial List) (the “**Court**”) issued the Receivership Order and KSV was appointed as Receiver.<sup>5</sup>

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<sup>1</sup> Second Report at para. 2.0(1).

<sup>2</sup> Second Report at para. 3.0(2) and 3.0(5).

<sup>3</sup> Second Report at para. 3.0(2).

<sup>4</sup> Second Report at para. 3.0(5).

<sup>5</sup> Second Report at para. 1.0(1).

8. Before the Real Property was sold to the Debtor, Hue had paid development charges (the “DCs”) of approximately \$2.47 million to the City of Hamilton (the “City”) in or around 2019, which were made in connection with the City’s issuance of an Excavation and Shoring Building Permit (the “**Building Permit**”).<sup>6</sup>

9. The Real Property also includes a heritage-designated structure, which requires a heritage permit for any alterations, development or repairs (the “**Heritage Permit**”). At the start of the receivership proceeding, the Heritage Permit was valid until March 31, 2025 (the “**Heritage Permit Expiration Date**”).<sup>7</sup>

10. As described in greater detail in the Receiver’s First Report to the Court dated November 4, 2024 (the “**First Report**”), based on discussions and correspondence with the City, the Receiver understood that:

- (a) the City’s development charge rates have increased significantly since 2019;
- (b) at the start of these receivership proceedings, the Building Permit contained a condition that shoring and excavation work be commenced by December 18, 2024 (the “**Building Permit Expiration Date**”) or the Building Permit would be revoked by the City;
- (c) if the Building Permit is revoked, any proposed development will incur development charges at the City’s current rate, which would result in a significant increase in development charges and a reduction in the Real Property’s value.<sup>8</sup>

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<sup>6</sup> Second Report at para. 4.0(1).

<sup>7</sup> Second Report at para. 4.0(3).

<sup>8</sup> Second Report at para. 4.0(2).

11. Following extensive discussions between the Receiver, Vantage and the City, the City agreed to extend the Building Permit Expiration Date to December 31, 2026 and the Heritage Permit Expiration Date to December 31, 2028.<sup>9</sup>

## **SALE PROCESS**

12. On November 12, 2024, the Court granted an order (the “**Sale Process Order**”), among other things:

- (a) approving a sale process for the Real Property (the "**Sale Process**"); and
- (b) authorizing the Receiver to enter into the Stalking Horse APS to be used as a stalking horse bid in the Sale Process.<sup>10</sup>

13. Immediately following the issuance of the Sale Process Order , the receiver launched the Sale Process on November 13, 2024 and established a bid deadline of December 18, 2024 at 5pm EST, being 35 days following the launch of the Sale Process (the “**Bid Deadline**”).<sup>11</sup>

14. The Receiver conducted the Sale Process in accordance with the Sale Process Order. In connection with the Sale Process, the Receiver:<sup>12</sup>

- (a) launched the Sale Process on November 13, 2024 by distributing by email a marketing brochure (the “**Teaser**”) to a targeted list of 170 potential purchasers, which included prominent real estate investment and development companies with expertise in

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<sup>9</sup> Second Report at para. 4.0(4).

<sup>10</sup> Second Report at para. 1.0(3).

<sup>11</sup> Second Report at para. 5.1.4.

<sup>12</sup> Second Report at para. 5.1.

condominium development and investment, particularly in the southern Ontario market, as well as developers with a national scope and the financial capability to advance the Development;

- (b) finalized a form of non-disclosure agreement (an “NDA”) that interested parties were required to sign in order to obtain access to a virtual data room (the “VDR”), which contained information regarding the Development, including a confidential information memorandum prepared by the Receiver summarizing the investment opportunity, architectural sets, permits, site plan, various environment, geotechnical, engineering reports, and other diligence information that had been provided to the Receiver by the Debtors, the City, and other third-party consultants; and
- (c) marketed the Real Property through prominent real estate news platforms Storeys and Urban Toronto, publishing articles that were promoted through email newsletters and social media campaigns, as more fully detailed in the Second Report. These articles highlighted key selling points, including the value of the extension of the Building Permit Expiration Date.

15. Seven parties, which included Marcus Gillam, a representative of the Debtors, executed the NDA and were provided access to the VDR to perform additional due diligence.<sup>13</sup>

16. No Qualified Bids were submitted prior to the Bid Deadline, and the Stalking Horse APS was deemed to be the Successful Bid (as defined in the Sale Process).<sup>14</sup>

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<sup>13</sup> Second Report at para. 5.2(1)

<sup>14</sup> Second Report at para. 5.2(2).

## THE STALKING HORSE APS

17. Key aspects of the Stalking Horse APS are summarized in the following table (capitalized terms have the meanings ascribed to them in the Stalking Horse APS):<sup>15</sup>

<b>Purchase Price</b>	\$13,000,000
<b>Deposit</b>	\$650,000, which was paid on November 4, 2024
<b>Purchased Assets</b>	Substantially all of the Debtors' and the Vendor's right, title and interest in its property and assets, including the following: <ul style="list-style-type: none"> <li>(i) the Assumed Contracts;</li> <li>(ii) the Cash Collateral;</li> <li>(iii) the Real Property;</li> <li>(iv) the Permits;</li> <li>(v) the Prepaid Expenses and Deposits;</li> <li>(vi) the Project Documents; and</li> <li>(vii) all Rights under or pursuant to all warranties, representations and guarantees, express, implied, or otherwise of or made by suppliers to the Debtors in connection with the Purchased Assets.</li> </ul>
<b>Excluded Assets</b>	The Purchaser may, at its option and upon written notice to the Vendor not less than two Business Days prior to the Closing Date, exclude any of the Purchased Assets from the Transaction
<b>Assumed Liabilities</b>	Include: <ul style="list-style-type: none"> <li>(i) the Permitted Encumbrances;</li> <li>(ii) all Liabilities under the Assumed Contracts; and</li> <li>(iii) all Liabilities arising from the Purchaser's ownership of the Purchased Assets after Closing.</li> </ul>
<b>Closing Date</b>	No later than the day that is 10 Business Days following the date on which the Court grants the AVO or such other date that the Parties may agree in writing.
<b>Representations and Warranties</b>	Consistent with the standard terms of an insolvency transaction, i.e., on an "as is, where is" basis, with limited representations and warranties.
<b>Outside Date</b>	February 28, 2025

<sup>15</sup> Second Report at para. 6.1.



## **PROPOSED DISTRIBUTIONS**

18. The Receiver obtained a legal opinion from Fasken that, subject to the standard assumptions and qualifications contained therein, MarshallZehr's security granted by the Debtor in favour of MarshallZehr, including the MZ Mortgage, is valid and enforceable.<sup>16</sup>

19. The Receiver proposes to distribute the net proceeds of the Transaction to MarshallZehr as partial payment of the balance owing by the Debtors to MarshallZehr less any accrued and unpaid professional fees and receivership expenses and the Fee Accrual to complete the administration of these proceedings. As the purchase price is less than the balance owing to MarshallZehr, there will be no distributions available to other creditors.<sup>17</sup>

## **ACTIVITIES OF THE RECEIVER**

20. Paragraph 9.0 of the Second Report includes a detailed summary of the Receiver's activities since the date of the Receiver's First Report.<sup>18</sup>

## **DISCHARGE AND RELEASE**

21. The Real Property represents the Debtor's primary asset. If the Transaction is approved, following the closing of the Transaction, the Receiver's mandate will be substantially complete. To avoid incurring the costs of making a further motion to the Court, the Receiver is seeking an order discharging KSV as Receiver upon the filing by the Receiver of a certificate confirming that it has

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<sup>16</sup> Second Report at para. 3.0(3).

<sup>17</sup> Second Report at para. 7.0(1).

<sup>18</sup> Second Report at para. 9.0.

completed the remaining duties described at paragraph 8 of the Second Report (the “**Outstanding Activities**”).<sup>19</sup>

#### **FEES OF KSV AND ITS LEGAL COUNSEL**<sup>20</sup>

22. The fees of the Receiver since the commencement of the receivership proceeding to December 31, 2024 total \$176,924.25, excluding disbursements and HST, as more particularly set out in the Affidavit of Noah Goldstein sworn January 6, 2025.

23. During the period from August 15, 2024 to December 31, 2024, Chaitons expended a total of 75.1 hours in connection with this matter, giving rise to fees and disbursements totalling \$46,644.37 (comprised of fees of \$41,055.00, of disbursements of \$233.80, and HST of \$5,355.57), as more particularly set out in the Affidavit of David Im sworn January 7, 2025.

24. The fees for Fasken for the period November 6, 2024 to December 31, 2024 amount to \$16,535.50, plus disbursements of \$159.95 and HST of \$2,159.77, as more particularly set out in the Affidavit of Daniel Richer sworn January 6, 2025.

25. In addition, the Receiver requests the Court approve the Fee Accrual of \$150,000 to cover its and Chaitons’ further fees and disbursements and certain ancillary expenses incurred or to be incurred from and after January 1, 2025 until the filing of the Discharge Certificate.

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<sup>19</sup> Second Report at para. 8.0.

<sup>20</sup> Second Report at para. 10.0.

### PART III – ISSUES

26. The issues to be determined on this motion are:
- (a) Should the Court approve the Transaction and grant the approval and vesting order?
  - (b) Should the Court approve the proposed distributions to MarshallZehr?
  - (c) Should the Court grant the order approving the Receiver’s activities, fees and disbursements, as well as the Fee Accrual?
  - (d) Should the Court approve the discharge and release of KSV as Receiver?

### PART IV – LAW AND ARGUMENT

#### The Transaction Should Be Approved

27. 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.<sup>21</sup> In *Royal Bank v. Soundair*, the Ontario Court of Appeal stated that the following factors must be considered when considering the approval of a proposed sale:

- (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;

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<sup>21</sup> [Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc., 2019 ONCA 508](#) at para. 73.

- (c) whether there has been unfairness in the working out of the process; and
- (d) the interests of all parties.<sup>22</sup>

28. Each of these factors are satisfied in respect of the Sale Process. The Sale Process was 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. The Receiver and Colliers facilitated due diligence requests submitted.

29. It is respectfully submitted that the *Soundair* test is readily met on the facts of this case and that the Court should grant the AVO for the following reasons:<sup>23</sup>

- (a) the process undertaken by the Receiver to market the Property was commercially reasonable, conducted in accordance with the terms of the Sale Process Order and provided for a fair, transparent and thorough marketing of the Real Property;
- (b) it is unlikely that exposing the Real Property to the market for additional time will result in a superior transaction;
- (c) the Receiver is of the view that the Transaction provides for the highest recovery available for the benefit of the Debtors' stakeholders in the circumstances;
- (d) the Purchaser has paid a non-refundable deposit and the Transaction is unconditional, except for Court approval;

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<sup>22</sup> [\*Royal Bank of Canada v. Soundair Corp.\*, 1991 CanLII 2727 \(ON CA\)](#) at para. 16 [“*Soundair*”].

<sup>23</sup> Second Report at para. 6.2.

- (e) the timely closing of the Transaction increases the likelihood of meeting the City's deadlines for the Building Permit and Heritage Permit. This is critical to preserving the value of the Real Property. Failure to meet these deadlines could result in a material reduction in value;
- (f) MarshallZehr, the Debtors' senior secured lender, supports the Transaction notwithstanding that it will suffer a shortfall on the net sale proceeds from the Transaction; and
- (g) as at the date of this Report, the Receiver is not aware of any objections to the relief being sought pursuant to the proposed AVO.

### **Proposed Distribution Should Be Approved**

30. The Receivership Order provides that all funds received or collected by the Receiver, including without limitation from the sale of assets, shall be paid out in accordance with the terms of the Receivership Order or any further Order of the Court.<sup>24</sup>

31. The Receiver has received a legal opinion from Fasken, which confirms that the MZ Mortgage is both valid and enforceable.

32. The Receiver proposes to make one or more distributions of the net proceeds of the Transaction to MarshallZehr as partial payment of the balance owing by the Debtors to MarshallZehr,

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<sup>24</sup> *MarshallZehr Group Inc. and 98 James South (2022) Inc. and 98 James South (2022) Limited Partnership* (August 14, 2024), Toronto, Court File No. CV-24-00717051-00CL, [[Order \(Appointing Receiver\)](#)] (ONSC) (Commercial List), (The "Receivership Order") at para. 12.

less any accrued and unpaid professional fees and expenses and the Fee Accrual to complete the administration of these proceedings.

33. As the purchase price is less than the balance owing to MarshallZehr, there will be no distributions available to other creditors.

### **The Activities of the Receiver Should be Approved**

34. The Court has the inherent jurisdiction to review and approve the activities of a court-appointed receiver as set out in the receiver's reports.<sup>25</sup>

35. It is common practice for court officers to bring motions to seek approval of their reports and the activities set out therein. Court approval, among other things, allows the court officer to bring its activities before the court and presents an opportunity to address concerns of stakeholders, while enabling the Court to satisfy itself that the court officer's activities have been conducted in a prudent and diligent matter.<sup>26</sup>

36. The activities of the Receiver described in the Second Report were all necessary and undertaken in good faith pursuant to the Receiver's duties and powers set out in the Receivership Order.

37. The Receiver therefore respectfully submits that the Second Report and the activities described therein should be approved at this time.

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<sup>25</sup> [\*Bank of America Canada v. Willann Investments Ltd.\*, 1996 CanLII 2782 \(ONCA\).](#)

<sup>26</sup> [\*Target Canada Co. \(Re\)\*, 2015 ONSC 7574 at paras 2 and 23; \*Triple-I Capital Partners Limited v 12411300 Canada Inc.\*, 2023 ONSC 3400 at paras 65-66.](#)

### **The Receiver's Fees and Disbursements Should Be Approved**

38. KSV is seeking approval of its professional fees and disbursements incurred by it as Receiver, as well as those of its legal counsel, Chaitons, and Fasken, in addition to the Fee Accrual.

39. The Receivership Order provides that KSV 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 on the passing of accounts.<sup>27</sup>

40. 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 the following factors:<sup>28</sup>

- (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

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<sup>27</sup> Receivership Order, *supra* note 23 at para. 17.

<sup>28</sup> *Bank of Nova Scotia v. Diemer*, 2014 ONCA 851 at [para 33](#) [*"Diemer"*].

- (i) the cost of comparable services when performed in a prudent and economic manner.

41. 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.<sup>29</sup>

42. The Receiver is of the view that its fees and the fees of Chaitons and Fasken are consistent with the rates charged by similar firms and are reasonable and appropriate in the circumstances.<sup>30</sup>

43. The Receiver is also of the view that the Fee Accrual is reasonable and appropriate in the circumstances as it provides for the estimated fees incurred or to be incurred by the Receiver and Chaitons and any ancillary costs prior to the filing of the Discharge Certificate. To the extent there is any surplus remaining from the Fee Accrual following the filing of the Discharge Certificate, the Receiver will distribute those funds to MarshallZehr as partial repayment of the remaining Loan owing to MarshallZehr.<sup>31</sup>

44. The Receiver respectfully submits that it is appropriate to approve the fees and disbursements of KSV, its counsel Chaitons, and Fasken in the circumstances.

### **The Receiver’s Discharge and Release Should Be Approved**

45. If the Transaction is approved, once the Receiver has completed the Outstanding Activities, as described in the Second Report, it will have completed its mandate. The Receiver therefore respectfully submits that this receivership proceeding should be terminated and the Receiver should

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<sup>29</sup> *Diemer*, at paras. 44-45.

<sup>30</sup> Second Report at para. 10.0(5).

<sup>31</sup> Second Report at para. 10.0(6).



be discharged and released following the filing of the Discharge Certificate with the Court, certifying that it has completed the Remaining Activities.

46. The order contains standard provisions providing for the Receiver's release from liability upon its discharge (subject to the usual expectations for gross negligence and wilful misconduct) and permitting the Receiver to continue to perform any incidental and necessary duties.

**PART V – RELIEF SOUGHT**

47. The Receiver respectfully recommends and requests that the Court grant the relief sought on this motion.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 13<sup>th</sup> day of January 2025



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**CHAITONS LLP**

**Maya Poliak**

*Lawyers for the Receiver, KSV Restructuring Inc.*

## SCHEDULE “A”

### LIST OF AUTHORITIES

1. [\*Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.\*, 2019 ONCA 508](#)
2. [\*Royal Bank of Canada v. Soundair Corp.\*, 1991 CanLII 2727 \(ON CA\)](#)
3. [\*Bank of America Canada v. Willann Investments Ltd.\*, 1996 CanLII 2782 \(ONCA\)](#)
4. [\*Target Canada Co. \(Re\)\*, 2015 ONSC 7574](#)
5. [\*Triple-I Capital Partners Limited v 12411300 Canada Inc.\*, 2023 ONSC 3400](#)
6. [\*Bank of Nova Scotia v. Diemer\*, 2014 ONCA 851](#)

## **SCHEDULE “B”**

### **STATUTORY AUTHORITIES**

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

#### **PART XI**

#### **Secured Creditors and Receivers**

#### **Court may appoint receiver**

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

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

MARSHALLZEHR GROUP INC.

-and-

98 JAMES SOUTH (2022) INC. and 98 JAMES SOUTH (2022)  
LIMITED PARTNERSHIP

Applicant

Respondents

Court File No. CV-24-00717051-00CL

**ONTARIO**  
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**(COMMERCIAL LIST)**  
PROCEEDING COMMENCED AT  
TORONTO

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