

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

B E T W E E N:

MARSHALLZEHR GROUP INC.

Applicant

and

LA PUE INTERNATIONAL INC.

Respondent

**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**

**FACTUM OF 1000835091 ONTARIO INC., THE PROPOSED PURCHASER**

February 20, 2025

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1000835091 Ontario Inc.

TO: **SERVICE LIST**

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**TABLE OF CONTENTS**

	<b>Page No.</b>
<b>PART I - INTRODUCTION .....</b>	<b>1</b>
<b>PART II - SUMMARY OF FACTS .....</b>	<b>3</b>
<b>PART III - STATEMENT OF ISSUES, LAW &amp; AUTHORITIES .....</b>	<b>6</b>
<b>PART IV - ORDER REQUESTED.....</b>	<b>13</b>

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AMENDED**

**FACTUM OF 1000835091 ONTARIO INC., THE PROPOSED PURCHASER**

**PART I - INTRODUCTION**

1. 1000835091 Ontario Inc., (the "**Purchaser**") files this factum in response to the motion brought by La Pue International Inc. (the "**Debtor**") dated January 27, 2025 for, amongst other things, granting the Debtor leave to redeem the mortgage indebtedness owed to the Applicant, MarshallZehr Group Inc. and payout all associated costs of this receivership proceeding.

2. The motion arises out of an AVO made by the Honourable Justice Dietrich on January 7, 2025 (the "**AVO**"). The AVO approved a sale contemplated by an Asset Purchase Agreement dated April 4, 2024, as amended thereafter between Lakeshore Luxe Design & Build Group ("**Lakeshore**") and the Receiver and vesting in the Purchaser as assignee of Lakeshore (the "**Transaction**") for, amongst other things, the Debtor's

right, title and interest in respect of the lands and premises municipally known as 5528 Ferry Street, Niagara Falls, Ontario (the “**Property**”).

3. The Debtor’s motion effectively seeks 2 things. First, it seeks an order dismissing the motion brought by KSV Restructuring Inc., in its capacity as receiver (the “**Receiver**”) of the assets, undertakings and property of the Debtor to seeking to amend the AVO. Secondly, the Debtor also seeks an order allowing the Debtor to redeem the mortgage indebtedness owed to the Applicant.

4. The first issue is no longer applicable. The Receiver advised the Court on February 3, 2025, that it was no longer proceeding with its motion.

5. The only remaining issue to be determined is whether or not the Debtor should be able to redeem the mortgage indebtedness prior to the Purchaser’s purchase of the property.

6. It is respectfully submitted that the Court should not exercise its discretion to allow the Debtor to exercise its right of redemption. This redemption motion is made at the 11<sup>th</sup> hour, after the Court has approved the transaction and the Debtor’s appeal of the AVO has been dismissed. The evidence before this Court discloses no “unusual” or “exceptional” circumstances that warrant the Court to grant the Debtor’s 11<sup>th</sup> hour redemption motion. The time for this redemption motion has passed. Had the Debtor wanted to redeem, it ought to have done so during the sale process. It did not.

7. Recent appellant authority has confirmed that, in the absence of exceptional circumstances, late breaking requests to redeem ought not to proceed on the basis that

to do so, would undermine the integrity of the sale process. Unlike in *Peakhill*<sup>1</sup>, there are no unusual and exceptional circumstances that exist to support granting the Company's right to redeem at this time. It is respectfully submitted that the Court should follow established precedent and refuse to grant the Debtor's motion to redeem.

## **PART II - SUMMARY OF FACTS**

8. The Debtor's principal asset is the Property. The Receiver was appointed on the application of the Debtor's senior secured creditor, MarshallZehr Group Inc. ("**MarshallZehr**"), for the principal purpose of marketing the Property for sale in a court supervised sale process.<sup>2</sup>

9. On December 20, 2023, the Court granted an Order approving the process for marketing and the sale of the Real Property (the "**Sale Process Order**"). The Sale Process resulted in two offers – one from Lakeshore and another that was substantially less than Lakeshore's offer.<sup>3</sup>

10. The Receiver and Lakeshore entered into an Asset Purchase Agreement on April 4, 2024 (the "**Original Agreement**"), which was subsequently assigned to the Purchaser. Due to a lack of financing at the time, the Original Transaction was terminated and the Receiver subsequently re-listed the Property for sale.<sup>4</sup>

11. On June 21, 2024, Justice Penny granted an AVO in respect of the transaction contemplated by the Original Agreement. That transaction did not close because the

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<sup>1</sup>

<sup>2</sup> Endorsement of Justice Dietrich dated January 6, 2025 ("**Endorsement**"), at para. 9.

<sup>3</sup> Endorsement, at para. 11.

<sup>4</sup> Endorsement, at para. 10.

Purchaser failed to pay to the Receiver the second deposit contemplated under the Original Agreement (the “**Second Deposit**”) and the remaining amount of the purchase price. Consequently, the Receiver terminated the Original Agreement.<sup>5</sup>

12. On July 12, 2024, the Receiver and the Purchaser entered into a Reinstatement Agreement (the “**First Reinstatement**”), pursuant to which the Purchaser agreed to, *inter alia*, increase the purchase price by \$50,000 and provide two more deposits in addition to the Second Deposit.<sup>6</sup> The Purchaser paid the Second Deposit but failed to pay the two additional deposits and, consequently, the Receiver terminated the First Reinstatement.<sup>7</sup>

13. On October 8, 2024, the Receiver and the Purchaser entered into a Second Reinstatement and Amending Agreement (the “**Second Reinstatement**”), pursuant to which the Purchaser agreed to pay a further deposit and assume—subject to the Purchaser obtaining a vendor and builder license from the Home Construction Regulatory Authority (the “**HCRA**”)—the pre-construction sale agreements previously entered into by the Debtor with purchasers for 359 units at the Real Property (the “**Pre-Construction Agreements**”).<sup>8</sup> After the further deposit wasn’t paid, the Receiver terminated the Second Reinstatement and re-listed the Real Property and other assets for sale.<sup>9</sup>

14. In November 2024, the Purchaser advised the Receiver that it had access to another additional deposit, and MarshallZehr advised that it was prepared to finance the balance of the purchase price. At the Receiver’s request, on November 18, 2024, the

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<sup>5</sup> Endorsement, at para. 11.

<sup>6</sup> Endorsement, at para. 11.

<sup>7</sup> Endorsement, at para. 11.

<sup>8</sup> Endorsement, at para. 12 – 13.

<sup>9</sup> Endorsement, at para. 13.

Purchaser delivered the entirety of the additional deposit to be held in trust by its counsel, and the Receiver entered into the Third Reinstatement and Amending Agreement (the “**Third Reinstatement**”).<sup>10</sup>

15. As a result of the Purchaser’s negotiations with the Receiver, the Transaction contemplated by the Original Agreement was substantially similar to that approved by Justice Penny on June 21, 2024, with the following exceptions: (a) the purchase price was increased by \$50,000; (b) a deposit in the aggregate amount of 18% of the purchase price was paid by the Purchaser; and (c) the Purchaser would only assume the Pre-Construction Agreements if it obtained the HRCA license(s) within 90 days of closing the Transaction.<sup>11</sup>

16. On January 6, 2025, Justice Dietrich exercised her discretion and granted the AVO. In approving the Transaction, Her Honour found:

[...] what should be considered is the information available to the Receiver at the time it made a decision to proceed with the Transaction. At that time, the Transaction represented the best offer in terms of purchase price that it had received.

[...] the receivership proceeding has been ongoing for over fourteen months, the Company is not coming with a cheque in hand to pay out all creditors. Rather, Mr. Fugiel has been attempting to participate as a bidder for the Real Property and is only raising the possibility of redemption (and requesting more time to put together the necessary funds) as an alternative option to delay sale approval.<sup>12</sup>

[emphasis added]

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<sup>10</sup> Endorsement, at para. 14.

<sup>11</sup> Endorsement, at para. 15.

<sup>12</sup> Endorsement, at para. 29.

17. On January 16, 2025, the Debtor served a notice of appeal in respect of the AVO. The Debtor also brought another motion for an order authorizing it to redeem MarshallZehr's mortgage.

18. On January 23, 2025, the Receiver filed its motion record seeking to amend the AVO on the basis that it had been advised by the Purchaser that it wished to assign the AVO to another party. The Receiver asked the Court that the motion be heard in writing.

19. On the same day, counsel for the Debtor confirmed that it would need additional time to respond to the motion.

20. On January 27, 2025, the Debtor served a cross-motion record opposing the Receiver's motion to amend the AVO and seeking an order granting the Company leave to redeem the mortgage indebtedness owed to the Applicant.

21. On February 3, 2025, the Receiver, after receiving confirmation from the Purchaser that that it had withdrawn its request to amend the name of the purchaser set out in the AVO, advised the Court that no amendment to the AVO was required to complete the transaction and withdrew its motion to amend the AVO.

22. On February 7, 2025, the Ontario Court of Appeal heard the Receiver's motion for directions concerning the Debtor's Appeal. On February 19, 2025, the Court of Appeal dismissed the Debtor's motion for leave to appeal the AVO.

### **PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES**

23. It is respectfully submitted that the issue for determination by this Court should not be whether the Debtor has a right to redeem. Instead, the Court ought to address the



more pragmatic issue of whether the Debtor should be permitted to exercise that right once the court-approved sales process had run its course, a bidder was identified, an agreement of purchase and sale was executed, and an AVO order was obtained.

24. This was the very question addressed in [Rose-Isli Corp. v. Smith](#) (“**Rose-Isli**”), a late 2023 Ontario Court of Appeal case that affirmed the Court’s findings in [B&M Handelman Investments Limited v. Mass Properties Inc.](#)<sup>13</sup> (2009), 55 C.B.R. (5th) 271 (Ont. S.C.), where the Court stated, at [para. 22](#):

A mockery would be made of the practice and procedures relating to receivership sales if redemption were permitted at this stage of the proceedings. A receiver would spend time and money securing an agreement of purchase and sale that was, as is common place, subject to Court approval, and for the benefit of all stakeholders, only for there to be a redemption by a mortgagee at the last minute. This could act as a potential chill on securing the best offer and be to the overall detriment of stakeholders.<sup>14</sup>

25. In circumstances very similar to the instant case, *Rose-Isli* concerned the appeal of an AVO issued by the motions judge that authorized the receiver to proceed with a sale of a property in receivership.

26. The receivership order in [Rose-Isli](#), like this case, contemplated that the Receiver would engage in a sales process for the property. Again, as in this case, the receiver secured court approval for the sales process, conducted the sales process, and then sought court approval of the successful bid. At this point, the appellants brought a cross-motion that opposed the proposed sale and, instead, sought an order that the second mortgagee could redeem the first mortgage or, alternatively, be recognized as a

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<sup>13</sup> [B&M Handelman Investments Limited v. Mass Properties Inc](#) (2009), 55 C.B.R. (5th) 271 (Ont. S.C.)

<sup>14</sup> [Rose-Isli Corp. v. Smith](#), 2023 ONCA 548, para. 10 quoting [B&M Handelman Investments Limited v. Mass Properties Inc.](#) (2009), 55 C.B.R. (5th) 271 (Ont. S.C.) at para. 22.

successful creditor bidder. The motions judge, the Honourable Justice Kimmel, granted the receiver's approval motion and dismissed the appellants' cross-motion for redemption.

27. On appeal, the appellants argued that the motions judge erred in dismissing their cross-motion because the second mortgagee had an absolute right to redeem the first mortgage at any time, where a court-approved sales process has been undertaken and the receiver was seeking court approval of the successful bid.

28. The Court disagreed with the appellants and dismissed the appeal. The Court found that the appellants have sought the appointment of the receiver, the receiver has undertaken the sales process approved by the Court; and the receiver had not been discharged. Accordingly, the Court found that the ability of the second mortgagee "to exercise a right of redemption has to take into account the reality that the property remained subject to an active receivership, which engaged interests beyond those of the second mortgagee."<sup>15</sup>

29. Critically, the Court found no error in Justice Kimmel's conclusions that the balance favoured protecting the integrity of the sales process over the appellants right to redeem. This is in line with recent case law on this issue. What emerges from the more recent cases is that, if the sale process is approved by the Court, bids are canvassed, a purchaser is identified and an approval motion is pending, then the longer a sales process progresses, the more crucial maintaining the integrity of the court approved sale process becomes. If a court ordered sale process is found to be sound, it should not be permitted

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<sup>15</sup> [Rose-Isli Corp. v. Smith, 2023 ONCA 548, para. 8.](#)

to be interfered with by a later attempt to redeem.<sup>16</sup> The case law also focuses on the importance of the timing of the process in relation to the purported exercise of the right to redeem. For instance, in [BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.](#)<sup>17</sup>, on the issue of the timing of a purported request to redeem, the Court found:

[35] The Receiver points to [B&M Handelman Investments Limited v. Mass Properties Inc., 2009 CanLII 37930](#), where Pepall J. (as she then was) dealt with language similar to paragraph 11 and held:

In the face of these provisions, Ms. Singh does not have an automatic right to redeem. A mockery would be made of the practice and procedures relating to receivership sales if redemption were permitted at this stage of the proceedings. A Receiver would spend time and money securing an agreement of purchase and sale that was, as is common place, subject to Court approval, and for the benefit of all stakeholders, only for there to be a redemption by a mortgagee at the last minute. This could act as a potential chill on securing the best offer and be to the overall detriment of stakeholders.

[BDC v. Marlwood Golf & Country Club, 2015 ONSC 3909](#) and [Home Trust Company v. 2122775 Ontario Inc., 2014 ONSC 1039](#) are to similar effect.

[36] The Receiver fairly volunteers that the issue arose in [Handelman](#) and the cases that follow it at a much later stage than it does with respect to Clover. **In Handelman, the Receiver had already run a bid process, had selected a purchaser and was moving to approve the purchase. Different considerations arise at that late a stage. Allowing debtors to redeem property on the sale approval motion would discourage potential purchasers from submitting bids in the first place and threaten the utility of the receivership process more generally. Here the debtor is seeking to redeem before a SISP is approved. (Emphasis added)**<sup>18</sup>

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<sup>16</sup> [Rose-Isli Corp. v. Frame-Tech Structures Ltd., 2023 ONSC 832, at para. 82](#). Affirmed in [Rose-Isli Corp. v. Smith, 2023 ONCA 548](#).

<sup>17</sup> [BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc 2020 ONSC 3659](#).

<sup>18</sup> [BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc., 2020 ONSC 3659, at para. 35 – 36](#).

30. In considering whether a debtor should be able to exercise its right to redeem, a balancing analysis is required whereby the Court balances the guiding principles of the sanctity of the receivership sales process with that of the right of the debtor to redeem.<sup>19</sup>

31. In this case, the Debtor had ample time (nearly 14 months since the receivership order was made) to engage with other lenders to secure financing. The Debtor was aware of the sales process given that it has made two bids to the Receiver during the course of the receivership (both of which were rejected). The Debtor was also kept informed of the Receiver's efforts to sell the Property. It is respectfully submitted that the time for the Debtor to redeem was well before the Third Restatement had been agreed and long before the AVO had been approved by this Court. Waiting until the absolute last minute, having lost its appeal of the AVO, has not found favour with the Courts in recent case law.

32. The Purchaser submits that that, in light of the above case law, the Court ought not to exercise its discretion to allow the Debtor to redeem:

- (a) The Debtor was aware that the Receivership Order contemplated that a sale process would take place.
- (b) Throughout the sale process, the Debtor was afforded multiple opportunities to make an unconditional bid for the Property that was acceptable to the Receiver. It failed to do so.
- (c) The Debtor, despite assertions to the contrary, is not coming to the Court with a cheque in hand that would satisfy all of the stakeholders.

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<sup>19</sup> [Peakhill Capital Inc. v. 1000093910 Ontario Inc., 2024 ONCA 584 \(CanLII\), at para. 9.](#)

- (i) In its factum at paragraph 38, the Debtor claims it is Coming to the Court having secured the funds necessary to repay the indebtedness owed to the Applicant and all associated costs of the receivership proceeding, proof of which has been provided to the Receiver and its counsel. The Debtor's factum then says that the Debtor has agreed to pay the Purchasers reasonable costs. This is not correct. Paragraphs 40 and 41 of Mr. Fugiel's affidavit provide:

41) On the other hand, I have secured financing to redeem the debt and security owed to the Applicant in full. Attached hereto and marked as **Exhibit "G"** is a true copy of the email received from counsel for the lender, confirming that it has \$19,255,160.00 in its trust account and is awaiting receipt of an additional \$2,500,000.00 from my lender.

41) In addition to those funds, I have an additional \$1,455,654.28 as Soft Costs Reserve for the Property. These funds remain held in the trust fund of Schneider Ruggiero Spencer Milburn LLP, as evidenced in the Statement of Advance attached hereto and marked as **Exhibit "H"**.

42) I propose that from the loan proceeds we would pay the Applicant in full (net of funds on hand with the Receiver as a result of the forfeited deposits paid by the Purchaser), the Receiver's fees and disbursements and make satisfactory arrangements with the lien claimants so that the interests of all stakeholders are satisfactorily addressed.

- (ii) Paragraphs 41 to 42 make no mention whatsoever of the Purchaser, save for the motion of deducting costs from the Purchaser's deposits. The Purchaser submits that the Debtor has made no provision whatsoever for those funds being in place on the date when the redemption request has been made.

- (iii) The Debtor is only coming to Court with some \$22 million in financing which, it is submitted, is well below what the Debtor would need to satisfy all the stakeholders, including the Purchaser who would be entitled to its costs thrown away if the Debtor was allowed to redeem the mortgage indebtedness. The Debtor offers no evidence that it has enough funds to cover those costs.
  
- (d) It also does not appear that the Debtor has taken any steps to remove the lien claims which currently exist on title on the Property. Those lien claims would need to be discharged if a successful redemption would be granted. It is not clear that the costs of paying off those lien claimants is included in the financing obtained by the Debtor.
  
- (e) The Purchaser, on the other hand, made a bid in good faith which was accepted by the Receiver and is supported by the Applicant lender.
  
- (f) This Court has already found that the Receiver had complied with the principles outlined by the Court in [Soundair](#) when it conducted the sales process; and
  
- (g) The Purchaser will experience financial prejudice if the transaction is not able to close on the terms reached with the Receiver.

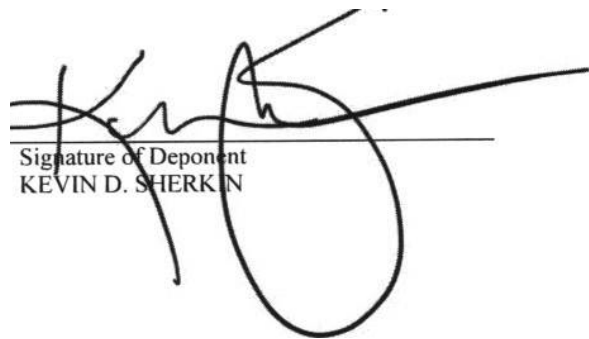
33. Recent case law has established that, in the absence of exceptional circumstances, late breaking requests to redeem ought not to proceed on the basis that to do so would undermine the integrity of the sale process. It is respectfully submitted that there are no such exceptional circumstances in this case and the Court should follow

established precedent and refuse to grant the Debtor's motion to redeem the mortgage indebtedness.

**PART IV - ORDER REQUESTED**

34. An Order dismissing the Debtor's motion.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 20th day of February, 2025.



Signature of Deponent  
KEVIN D. SHERKIN

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**Kevin D. Sherkin**

**MILLER THOMSON LLP**

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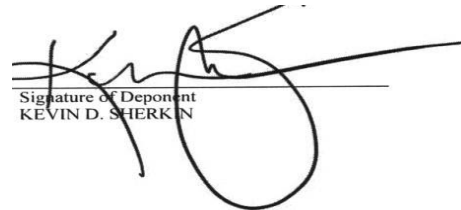
Lawyers for the Proposed Purchaser,  
1000835091 Ontario Inc.

**SCHEDULE "A"**  
**LIST OF AUTHORITIES**

1. [B&M Handelman Investments Limited v. Mass Properties Inc \(2009\), 55 C.B.R. \(5th\) 271 \(Ont. S.C.\)](#)
2. [Rose-Isli Corp. v. Smith, 2023 ONCA 548,](#)
3. [Rose-Isli Corp. v. Frame-Tech Structures Ltd., 2023 ONSC 832,](#)
4. [BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc., 2020 ONSC 3659.](#)
5. [Peakhill Capital Inc. v. 1000093910 Ontario Inc., 2024 ONCA 584 \(CanLII\)](#)
6. [BDC v Marlwood Golf & Country Club, 2015 ONSC 3909 \(CanLII\)](#)
7. [Home Trust Company v. 2122775 Ontario Inc., 2014 ONSC 1039 \(CanLII\)](#)
8. [Royal Bank of Canada v. Soundair Corp., 1991 CanLII 2727 \(ON CA\)](#)

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

*Note: Under the Rules of Civil Procedure, an authority or other document or record that is published on a government website or otherwise by a government printer, in a scholarly journal or by a commercial publisher of research on the subject of the report is presumed to be authentic, absent evidence to the contrary (rule 4.06.1(2.2)).*



Signature of Deponent  
KEVIN D. SHERKIN

Date February 20, 2025

*Signature*

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1000835091 Ontario Inc.



**SCHEDULE "B"**

**TEXT OF STATUTES, REGULATIONS & BY - LAWS**

1. N/A

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Respondent

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

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Proceeding Commenced at TORONTO

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