

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

B E T W E E N:

FIERA FP REAL ESTATE FINANCING FUND, L.P.

Applicant

- and -

VANDYK – 41 WABASH LIMITED, 1000318652 ONTARIO INC.,
VANDYK PROPERTIES INCORPORATED and JOHN VANDYK

Respondents

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 THE RECEIVER
(Approval and Vesting Order and Distribution and Termination Order)**

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capacity as Receiver

TO: **SERVICE LIST**

PART I - NATURE OF THE MOTION

1. On January 23, 2024, the Ontario Superior Court of Justice (the “**Court**”) issued an order (the “**Receivership Order**”) appointing KSV Restructuring Inc. (“**KSV**”) as the receiver and manager (the “**Receiver**”) over all assets, undertakings and properties belonging to Vandyk-41 Wabash Limited (“**the Debtor**”), including certain real property (the “**Real Property**”) acquired for or used in relation to the Debtor’s business, including the proceeds therefrom (collectively, the “**Property**”).

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

3. Following the granting of the Sale Process Order, the Receiver worked diligently with the assistance of the listing agent to implement the Sale Process and solicit interest in the Property. Ultimately, a single offer was received during the Sale Process, resulting in a proposed sale transaction (the “**Transaction**”) between the Receiver and THMR Development Inc. pursuant to a purchase agreement which was subsequently assigned to Telon Land Group Inc. (the “**Purchaser**”). A distribution (the “**Distribution**”) from the proceeds of the Transaction (the “**Proceeds**”) is proposed to be made to Fiera FP Real Estate Financing Fund, L.P. (“**Fiera**”), the Debtor’s senior secured creditor. Fiera, which will incur a shortfall on its secured debt owing by the Debtor, supports the Transaction.

4. The Receiver therefore seeks the following orders:
 - (a) an Approval and Vesting Order (the “**AVO**”), which will, among other things: (i) approve the Transaction; (ii) authorize the Receiver to terminate and disclaim any agreements of purchase and sale for the purchase of any or all of the Real Property (the “**Unit Sales Agreements**”); and (iii) seal the unredacted APA until the closing of the Transaction; and
 - (b) a “**Distribution and Termination Order**” which will, among other things: (i) authorize and direct the Receiver to make the one or more distributions to Fiera; (ii) terminate the receivership in respect of the Debtor and discharge KSV as Receiver upon the filing of the Termination Certificate; (iii) release the Receiver from liability except in respect of its gross negligence or wilful misconduct; (iv) approve the fees and disbursements of the Receiver and its counsel (“**Osler**”); and (v) approve the reports and activities of the Receiver.

5. The Transaction is the best and only qualified transaction to have emerged following a thorough canvassing of the market pursuant to the terms of the court-approved Sale Process. The Transaction represents the most certain and highest recovery available to stakeholders in the circumstances and should be approved by the Court.

PART II - SUMMARY OF FACTS

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

A. Background to the Transaction

7. The Vandyk Group is a real estate developer that mainly developed low, mid and high-rise residential projects in the Greater Toronto Area. As part of the Vandyk Group, the Debtor is a single-purpose real estate development company that owns the Real Property located in Toronto, Ontario, on which it intended to develop a residential townhome project (the “**Project**”). As of the date of the Receivership Order, construction had not started on the Project, and the Real Property currently consists of a vacant commercial building. The Receiver is aware of only one Unit Sales Agreement in respect of the Project.²

8. The Property is subject to the following secured charges:³

(a) Fiera is the Debtor’s senior secured creditor and holds a mortgage and certain other security over the Property. As of August 1, 2024, Fiera was owed approximately \$9.96 million, in respect of which interest and costs continue to accrue (the “**Fiera Indebtedness**”).

(b) 2306610 Ontario Corp. holds a second ranking mortgage charge over the Real Property in the amount of \$1.2 million.

9. In addition to the secured charges described above, the Debtor’s unsecured obligations as of the date of the Receivership Order totalled approximately \$217,000.⁴ The Receiver also

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

² First Report at paras. 2.0.1-2.0.4

³ First Report at para. 3.1.1.

⁴ First Report at para. 3.2.1.

understands that the Debtor is in arrears in respect of approximately \$32,000 in municipal taxes, which constitutes a priority secured claim over the Real Property.⁵

B. The Sale Process

10. On March 8, 2024, the Court granted the Sale Process Order, approving the proposed Sale Process. In accordance with the terms of the Sale Process Order, the Receiver retained Colliers Macaulay Nicolls Inc., Brokerage (“**Colliers**”) to list the Property for sale.⁶

11. Colliers launched the Sale Process on April 2, 2024. Colliers distributed an investment summary (the “**Teaser**”) and a form of non-disclosure (“**NDA**”) to its database of prospective buyers, and further marketed the Property through email campaigns and other advertisements. Interested parties that signed the NDA were given access to a virtual data room (the “**VDR**”) which contained information regarding the property, along with a form of asset purchase agreement.⁷

12. The Receiver, in consultation with Colliers, elected to forego a hard deadline for the submissions of letters of intent (“**LOIs**”), and to instead communicated that it would start accepting bids nine weeks after the beginning of the marketing, on June 3, 2024 (the “**Bid After Date**”). 26 parties executed the NA and were provided with access to the VDR.⁸

13. While a number of parties expressed interest in the Property, the purchase prices contemplated by these parties were substantially less than the Purchase Price. Ultimately, the Purchaser was the only party that submitted a formal offer after Bid After Date, which it submitted on June 27, 2024. Following a review of the Purchaser’s offer, the Receiver and/or Colliers

⁵ First Report at para. 3.2.2.

⁶ First Report at para. 4.1.1(a).

⁷ First Report at paras. 4.1.1(b)-(e).

⁸ First Report at paras. 4.1.2, 4.2.1(b).

engaged in direct discussions with the Purchaser in order to understand its bid, including in relation to any remaining due diligence.⁹

14. Based on Colliers' recommendation and following consultation with Fiera, the Receiver selected the Purchaser as the successful bidder for the Property. The Asset Purchase Agreement (the "APA") was executed on July 14, 2024, and became "firm" on July 29, 2024.¹⁰

C. The Transaction

15. Under the terms of the APA, the Purchaser will purchase all of the Debtors' right, title, and interest in certain Property, including: (i) the Real Property; (ii) the Buildings; (iii) the Additional Assets; and (iv) the Intellectual Property, Property Rights and Documents, to the extent transferrable to the Purchaser (each term as defined in the APA, and together the "**Purchased Assets**"). All property, assets, and undertaking of the Debtors, other than the Purchased Assets, are excluded from the scope of the Transaction.¹¹

16. As is discussed in greater detail below, the Receiver is requesting that purchase price contemplated by the APA (the "**Purchase Price**") be sealed until the closing of the Transaction. The Transaction is scheduled to Close three business days following the date on which any conditions under the APA (including the issuance of the AVO) are satisfied. The Outside Date under the APA is October 15, 2024.¹²

⁹ First Report at paras. 4.2.1(c), 4.2.2.

¹⁰ First Report at para. 4.2.3.

¹¹ See First Report at para. 5.1.2 for a full summary description of the APA.

¹² First Report at para. 5.1.2.

17. The APA contemplates that any Unit Sales Agreements will not be assumed by the Purchaser. The proposed AVO therefore contains a term authorizing and directing the Receiver to terminate and disclaim any Unit Sales Agreements on or prior to closing.¹³

D. Activities of the Receiver

18. Since its appointment, the Receiver, in addition to the activities outlined above, has, with the assistance of counsel, engaged in the following activities in furtherance of its mandate:¹⁴

- (a) corresponding with the Vandyk Group's management and their counsel regarding the Debtor's affairs and these proceedings;
- (b) corresponding with Fiera regarding all aspects of this mandate, including providing periodic status updates;
- (c) reviewing information provided by the Vandyk Group and Fiera relating to the Project, including its development status;
- (d) developing and carrying out, with the assistance of Colliers, the Court-approved Sale Process for the Property;
- (e) reviewing and commenting on drafts of the Sale Process materials, including the Teaser and NDA;
- (f) preparing the Consolidated Report in connection with the Sale Process motion;
- (g) compiling and reviewing information uploaded to the VDRs;

¹³ First Report at paras. 5.1.2, 5.2.1.

¹⁴ First Report at para. 7.0.1.

- (h) dealing with Colliers regarding due diligence requests from prospective purchasers;
- (i) attending update calls with Colliers and Fiera, as applicable, regarding the status of the Sale Process;
- (j) corresponding with the Purchaser and its counsel regarding the APA and the Transaction;
- (k) corresponding with Masters Insurance, the Debtor's insurance broker;
- (l) corresponding with the Debtor's creditors;
- (m) corresponding with representatives of the City of Toronto regarding the status of the Project and the Sale Process;
- (n) arranging for the maintenance, security and general upkeep of the Real Property;
- (o) corresponding with the Canada Revenue Agency regarding the Debtor's HST accounts; and
- (p) drafting the First Report and reviewing the motion materials in respect of same.

PART III - THE ISSUES AND THE LAW

19. The issues on this motion are whether this Court should:
- (a) grant the AVO; including:
 - (i) authorizing the Receiver to enter into the Transaction;
 - (ii) authorizing and directing the Receiver to terminate and disclaim any Unit Sales Agreements; and

- (iii) sealing the unredacted APA until the closing of the Transaction; and
- (b) grant the Distribution and Termination Order, including
 - (i) approving the Distribution;
 - (ii) terminating the receivership proceeding, and discharging and releasing KSV as Receiver;
 - (iii) approving the fees and disbursements of the Receiver and Osler; and
 - (iv) approving the reports and activities of the Receiver.

A. The AVO Should be Granted

(a) The Transaction Should be Approved

20. 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.¹⁵ In *Royal Bank v. Soundair*, the Court of Appeal stated that the following factors must be considered when considering the approval of a proposed sale:¹⁶

- (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;

¹⁵ *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, [2019 ONCA 508](#) at para. 73.

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

- (c) whether there has been unfairness in the working out of the process; and,
- (d) the interests of all parties.

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

- (a) **Fairness, Transparency, and Integrity:** The Sale Process was conducted in accordance with the terms of the Sale Process Order.¹⁷ All potential purchasers were treated fairly and equally, and all potential purchasers that executed the NDA were given access to the VDR.¹⁸ The Receiver facilitated due diligence requests submitted by prospective purchasers throughout the Sale Process,¹⁹ while Colliers facilitated site visits for prospective purchasers over the course of the Sale Process.²⁰
- (b) **Commercial Efficacy:** The Sale Process was conducted by Colliers, which has extensive experience selling development properties in and around the Greater Toronto Area and has acted as listing agent with respect to the Real Property in the past. The Sale Process occurred over the course of nine weeks, during which times prospective purchasers were able to perform any required due diligence, as facilitated by the Receiver.²¹
- (c) **Process Designed to Obtain Best Possible Price:** The market was widely canvassed, with 6,217 potential purchasers being sent the Teaser and the NDA and further marketing occurring by way of email campaigns and print and digital ads.²²

¹⁷ First Report at para. 5.3.1(a).

¹⁸ First Report at para. 4.2.1(b).

¹⁹ First Report at para. 7.0.1(h).

²⁰ First Report at para. 4.1.1(f).

²¹ First Report at paras. 5.3.1(a)-(b)

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

The Purchaser's offer was the only offer received in the Sale Process, and the Receiver is of the view that the Transaction provides for the most certain and highest recovery available for the benefit of the Debtor's stakeholders in the circumstances.²³

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

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

(b) The Receiver Should be Authorized and Directed to Terminate and Disclaim the Unit Sales Agreement

24. It is well-established that the court may direct a receiver to disclaim pre-sale homebuyer agreements in the context of real property receiverships.²⁷ This authority derives from the

²³ First Report at para. 5.3.1(c).

²⁴ First Report at paras. 5.3.1(d)-(e).

²⁵ *Soundair*, at paras. 21, 58.

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

²⁷ See, i.e., *KingSett Mortgage Corp. v. Stateview Homes et al.*, (November 16, 2023), Ont. S.C.J. [Commercial List], Court File No. CV-23-00698576-00CL ([Endorsement of Justice Osborne](#)) at para. 16 [*Stateview Homes*]; *KingSett Mortgage Corp. and Dorr Capital Corp. v. Stateview Homes (Minu Towns) Inc.*, (September 14, 2023),

receiver's duty to maximize the recovery of assets under its jurisdiction, in service of which the receiver may affirm or disclaim contracts.²⁸

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

26. The proposed disclaimer satisfies the criteria identified in *Forjay Management*:

- (a) **Respective Legal Priorities:** The Fiera Indebtedness is the senior charge on the Real Property and ranks in priority over the Unit Sales Agreement, which is not registered on title. Further, the Unit Sales Agreement expressly provides that: (i) the homebuyer subordinates and postpones its agreement to any mortgages on the Real Property, and any advance under such mortgages; and (ii) the homebuyer will not register the agreement on title the Real Property.³⁰ Such provisions have been repeatedly found to effectively subordinate purchasers to mortgagees, and to prevent the purchaser from acquiring any equitable or proprietary interest.³¹

Ont. S.C.J. [Commercial List], Court File No. CV-23-00698576-00CL ([Endorsement of Justice Cavanaugh](#)) at p. 1 [*On the Mark Endorsement*]; *Firm Capital Mortgage Fund Inc. v. Stateview Homes (Hampton Heights) et al.*, (August 18, 2023), Ont. S.C.J. [Commercial List], Court File No. CV-23-00700356-00CL ([Endorsement of Justice Conway](#)) at para. 6 [*Hampton Heights*]; *Forjay Management Ltd. v. 0981478 B.C. Ltd.*, [2018 BCSC 527](#) at paras. 131-132 [*Forjay Management*].

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

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

³⁰ First Report at para. 5.2.5.

³¹ See, i.e., *Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Ltd.*, [2012 ONSC 4816](#), at para. 24 [*Firm Capital Mortgages*]; *Pan Canadian Mortgage Group Inc. v. 679972 B.C. Ltd.*, [2014 BCCA 113](#) at paras. 45-46; *Forjay*

- (b) **Value Maximization:** The APA, which excludes Unit Sales Agreements from the Purchased Assets, represents the best and only offer received for the Property, and the highest recovery available to the Debtors' stakeholders in the circumstances.³² Courts have authorized disclaimer in similar circumstances;³³ and have held that a failure to do so would amount to a preference in favour of homebuyers.³⁴
- (c) **Equitable Considerations:** Equitable considerations do not support departing from the existing priorities and granting a preference to the homebuyer. The deposit paid by the homebuyer under the Unit Sales Agreement is held in trust with Schneider Ruggerio Spencer Milburn LLP and has not been released to the Debtor.³⁵ The Receiver intends to serve the homebuyer with notice of this motion.³⁶

27. In light of the considerations above, the Receiver submits the termination and disclaimer of the Unit Sales Agreement is necessary to maximize recovery for stakeholders and should be approved. The failure to do so would effectively amount to a reordering of the existing priorities in favour of the homebuyer in a manner not supported by the equities.

Management, at paras. 67-69; *Stateview Homes*, at para. 18. Note that even where a purchase agreement might arguably create an equitable or proprietary interest, a subordination clause means that such an interest cannot take priority over a mortgage: *Firm Capital*, at paras. 22-25.

³² First Report at para. 5.2.2.

³³ See *Stateview Homes*, at para. 19, and *Hampton Heights*, at para. 6, in which similar circumstances supported authorizing the receiver to disclaim pre-sale purchase agreements.

³⁴ *bcIMC Construction Fund Corp. v. Chandler Homer Street Ventures Ltd.*, [2008 BCSC 897](#) at para. 96; *Forjay Management*, at para. 93; *Peoples Trust Company*, at para. 57.

³⁵ First Report at para. 5.2.4.

³⁶ First Report at para. 5.2.3.

(c) The Sealing Order Should be Granted

28. Pursuant to s. 137(2) of the *Courts of Justice Act*, R.S.O. c. C.43, the Receiver requests that the unredacted APA be temporarily treated as confidential and sealed, and not form part of the public record, pending the closing of the Transaction.

29. The test for a sealing order was established by the Supreme Court in *Sierra Club*, and subsequently recast in *Sherman Estate*. The test requires the court to consider whether:³⁷

- (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 reasonable alternative measure will not prevent this risk; and
- (c) as a matter of proportionality, the benefits of the order outweigh its negative effects.

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

- (a) **Public Interest:** The maximization of recovery in insolvency has been found to constitute an important public interest for the purpose of obtaining a sealing order. The granting of a sealing order in respect of commercially sensitive information is therefore “standard practice” in insolvency proceedings,³⁸ and courts have approved sealing orders where they are required to protect commercially sensitive information, including the ultimate purchase price.³⁹ As the publication of the Purchase Price prior to the closing of the Transaction could adversely impact the future marketability of the Property should the Transaction not close, the sealing of

³⁷ *Sherman Estate v. Donovan*, [2021 SCC 25](#) at para. 38.

³⁸ *Yukon (Government of) v. Yukon Zinc Corporation*, [2022 YKSC 2](#) at para. 39.

³⁹ *Danier Leather Inc., Re*, [2016 ONSC 1044](#) at para. 84; *Elleway Acquisitions Limited v. 4358376 Canada Inc.*, [2013 ONSC 7009](#) [*Elleway Acquisitions*].

this information is necessary to ensure that recoveries in these receivership proceedings are maximized.⁴⁰

- (b) **Lack of a Reasonable Alternative:** Courts in insolvency proceedings have found that no reasonable alternative to a sealing order exists where declining to grant the proposed order would materially impair the maximization of asset value for the benefit of stakeholders.⁴¹ In the present case, there are no reasonable alternatives to a sealing order which would prevent the risks to the Debtors' stakeholders outlined above.
- (c) **Proportionality:** The benefits of the proposed sealing order greatly exceed any negatives. No party will be prejudiced by the temporary sealing of the commercially sensitive information, and no public interest will be served if they are made public prior to closing, prejudicing stakeholder recoveries in the process.⁴²

B. The Distribution Order Should be Granted

(a) The Distribution Should be Approved

31. Should the Transaction be approved by the Court, the Receiver seeks authorization and direction to distribute the balance of the Proceeds to Fiera as partial payment for the Fiera Indebtedness.

⁴⁰ First Report at para. 5.4.2.

⁴¹ *Original Traders Energy Ltd. (Re)*, (January 30 2023), Ont. S.C.J. [Commercial List], Court File No. CV-23-00693758-00CL ([Endorsement of Justice Osborne](#)), at para. 60 [*Original Traders*].

⁴² First Report at para. 5.4.3. See *Elleway Acquisitions*, at para. 48, in which the court held that the beneficial effects of maximizing recoveries in insolvency greatly outweigh any deleterious effects which could result for sealing an APA pending closing the transaction closing.

32. Courts commonly grant such orders as part of sale approvals in a receivership.⁴³ In *AbitibiBowater*, the court approved the distribution of proceeds from sale proceeds from a CCAA sale process on amongst other grounds: (i) the distributions were made in accordance with a valid and enforceable security interest; and (ii) the distributions would leave the debtor with sufficient liquidity.⁴⁴

33. The proposed Distribution complies with the *AbitibiBowater* criteria. Fiera is the Debtor's principal secured creditor, who is expected to incur a shortfall on its loans to the Debtor. The security granted by the Debtor in respect of the Fiera Indebtedness constitutes valid and enforceable security interests and charges, and the Receiver is not aware of any parties that have an outstanding priority claim ranking ahead of Fiera.⁴⁵

34. Further, the Transaction has been structured so as to ensure that the Receiver retains sufficient liquidity. The Purchase Price is to be adjusted on closing in order to account for various expenses, including property taxes and utilities,⁴⁶ and a portion of the proceeds will be retained by the Receiver in order to pay closing costs (such as broker commissions and property taxes) and the costs of these proceedings (such as the fees and costs of the Receiver and its counsel).⁴⁷

⁴³ See, i.e., *GE Canada Real Estate Financing Business Property Company v. 1262354 Ontario Inc.*, [2014 ONSC 1173](#) at para. 53; *Dorr Capital Corporation v. Highview Building Corp Inc.*, (September 29, 2023) Ont. S.C.J. [Commercial List] Court File No. CV-23-00698632-00CL ([Endorsement of Justice Conway](#)) at para. 4; *Farm Credit Canada v. Whyte's Foods Inc./Les Ailments et. al.*, (November 6, 2023) Ont. S.C.J. [Commercial List] Court File No. CV-23-00707205-00CL ([Endorsement of Justice Steele](#)) at paras. 19-21.

⁴⁴ *AbitibiBowater inc. (Arrangement relatif à)*, [2009 QCCS 6461](#) at para. 75 [*AbitibiBowater*]. While *AbitibiBowater* was a CCAA proceeding, it has been cited by courts in the context of distributions under a receivership: see *Whyte's Food*, at paras. 19-21.

⁴⁵ First Report, at paras. 6.0.1-6.0.3.

⁴⁶ First Report at para. 5.1.2.

⁴⁷ First Report at para. 6.0.2.

(b) The Receiver Should be Discharged and Released

35. The proposed Distribution and Termination Order authorizes the Receiver to issue the Termination Certificate following the completion of the Transaction and any other matters necessary to complete these receivership proceedings. A discharge of the Receiver at the time the Termination Certificate is issued is appropriate, as: (i) all of the Debtor's known assets will have been realized; (ii) the Receiver will have discharged its duties and obligations in accordance with the orders of this Court; (iii) the Receiver's administration will be complete and there are no known outstanding issues; and (iv) under the terms of the proposed Distribution and Termination Order, the Receiver will remain Receiver for the performance of such incidental duties as may be required to complete the administration of the receivership.⁴⁸

36. The proposed discharge of Receiver is consistent with the Commercial List Model Receiver Discharge Order and is appropriate in the circumstances.⁴⁹ The releases granted to the Receiver – which release the Receiver from any current or future liability arising out of its actions or omissions, save for gross negligence or wilful misconduct – is a standard term in orders discharging a receiver, and is granted by the courts in the absence of any evidence of improper conduct on the part of the receiver.⁵⁰

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

37. The Receiver seeks the approval of the following fees and disbursements of itself and its counsel, Osler:⁵¹

⁴⁸ First Report at para. 8.0.1.

⁴⁹ First Report at para. 8.0.1(d).

⁵⁰ *Pinnacle v. Kraus*, [2012 ONSC 6376](#) at para. 47.

⁵¹ First Report at paras. 9.0.1-9.0.2.

- (a) fees of the Receiver from the commencement of these receivership proceedings to July 31, 2024, totalling \$29,308.50, charged at an average billing rate of \$606.80 per hour; and
- (b) fees of Osler from the commencement of these receivership proceedings to July 31, 2024, totalling \$15,456.00, charged at an average billing rate of \$984.46 per hour.

38. 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.⁵² The Receiver is of the view that Osler’s fees are consistent with the rates charged by similar firms and are reasonable and appropriate in the circumstances.⁵³

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

39. The Receiver also seeks the approval of the Consolidated Report of the Receiver dated March 1, 2024 with respect to the Debtor and the Property (the “**Consolidated Report**”) and the First Report, along with the actions, conduct and activities of the Receiver referred to therein.

40. It is well established that the court has inherent jurisdiction to review and approve the activities of a court appointed receiver where the receiver demonstrates that it has acted reasonably, prudently and not arbitrarily.⁵⁴ As has been noted by the court in the CCAA context, requests to approve a monitor’s report and activities are not unusual, and there are good policy and practical reasons for the court to do so, including:⁵⁵

- (a) allowing the monitor to move forward with the next steps;

⁵² *Bank of Nova Scotia v. Diemer*, [2014 ONCA 851](#) at paras. 44-45.

⁵³ First Report at para. 9.0.4.

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

⁵⁵ *Target Canada Co. (Re)*, [2015 ONSC 7574](#) at para. 23.

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

41. Subsequent case law has confirmed that these considerations apply equally to the reports and activities of a receiver,⁵⁶ and such approval is commonly granted as part of orders in receivership proceedings.⁵⁷

42. The Receiver submits that the Consolidated Report and First Report, along with the applicable activities described therein, should be approved. The activities of the Receiver were carried out in accordance with the Receivership Order, and the Receiver has acted reasonably and in good faith throughout.

PART IV - NATURE OF THE ORDER SOUGHT

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

⁵⁶ *Hanfeng Evergreen Inc., (Re)*, [2017 ONSC 7161](#) at para. 15.

⁵⁷ See, i.e., *Stateview Homes* at para. 24.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of August, 2024.

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

OSLER, HOSKIN & HARCOURT, LLP per Marleigh Dick
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Lawyers for the Receiver

SCHEDULE “A”: LIST OF AUTHORITIES

Cases

1. *AbitibiBowater inc. (Arrangement relatif à)*, [2009 QCCS 6461](#)
2. *Bank of Montreal v. Dedicated National Pharmacies Inc. et al*, [2011 ONSC 4634](#)
3. *Bank of Nova Scotia v. Diemer*, [2014 ONCA 851](#)
4. *bcIMC Construction Fund Corp. v. Chandler Homer Street Ventures Ltd.*, [2008 BCSC 897](#)
5. *Dorr Capital Corporation v. Highview Building Corp Inc.*, (September 29, 2023) Ont. S.C.J. [Commercial List] Court File No. CV-23-00698632-00CL ([Endorsement of Justice Conway](#))
6. *Farm Credit Canada v. Whyte’s Foods Inc./Les Ailments et. al.*, (November 6, 2023) Ont. S.C.J. [Commercial List] Court File No. CV-23-00707205-00CL ([Endorsement of Justice Steele](#))
7. *Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Ltd.*, [2012 ONSC 4816](#)
8. *Firm Capital Mortgage Fund Inc. v. Stateview Homes (Hampton Heights) et al.*, (August 18, 2023), Ont. S.C.J. [Commercial List], Court File No. CV-23-00700356-00CL ([Endorsement of Justice Conway](#))
9. *Forjay Management Ltd. v. 0981478 B.C. Ltd.*, [2018 BCSC 527](#)
10. *GE Canada Real Estate Financing Business Property Company v. 1262354 Ontario Inc.*, [2014 ONSC 1173](#)
11. *Leslie & Irene Dube Foundation Inc. v. P218 Enterprises Ltd.*, [2014 BCSC 1855](#)
12. *Hanfeng Evergreen Inc., (Re)*, [2017 ONSC 7161](#)
13. *KingSett Mortgage Corp. v. Stateview Homes et al.*, (November 16, 2023), Ont. S.C.J. [Commercial List], Court File No. CV-23-00698576-00CL ([Endorsement of Justice Osborne](#))
14. *KingSett Mortgage Corp. and Dorr Capital Corp. v. Stateview Homes (Minu Towns) Inc.*, (September 14, 2023), Ont. S.C.J. [Commercial List], Court File No. CV-23-00698576-00CL ([Endorsement of Justice Cavanaugh](#))
15. *Pan Canadian Mortgage Group Inc. v. 679972 B.C. Ltd.*, [2014 BCCA 113](#)
16. *Peoples Trust Company v. Censorio Group (Hastings & Carleton) Holdings Ltd.*, [2020 BCSC 1013](#)
17. *Pinnacle v. Kraus*, [2012 ONSC 6376](#)

18. *Royal Bank of Canada v. Soundair Corp.*, [1991 CanLII 2727 \(ON CA\)](#)
19. *Target Canada Co. (Re)*, [2015 ONSC 7574](#)
20. *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, [2019 ONCA 508](#)

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

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

Court may appoint receiver

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

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

Restriction on appointment of receiver

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

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

Definition of receiver

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

- (a) is appointed under subsection (1); or
- (b) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under
 - (i) an agreement under which property becomes subject to a security (in this Part referred to as a “security agreement”), or

(ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

Definition of receiver — subsection 248(2)

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

Trustee to be appointed

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

Place of filing

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

Orders respecting fees and disbursements

(6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

Meaning of disbursements

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

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

FIERA FP REAL ESTATE FINANCING FUND, L.P.

and

VANDYK – 41 WABASH LIMITED, 1000318652 ONTARIO INC., VANDYK PROPERTIES INCORPORATED et al.

Applicant

Respondents

Court File No.: CV-23-00711612-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT TORONTO

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