

Estate / Court File No.: 31-2481648
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ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF
GREEN EARTH ENVIRONMENTAL PRODUCTS, A GENERAL PARTNERSHIP
ESTABLISHED IN THE PROVINCE OF ONTARIO, AND GREEN EARTH STORES
LTD., A CORPORATION INCORPORATED IN THE PROVINCE OF ONTARIO

Applicants

FACTUM OF THE RECEIVER
(Re: Approval of the Sale of the Real Property)
(Returnable September 25, 2019)

September 20, 2019

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TO: The Service List

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

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PART I - OVERVIEW

1. Pursuant to the Receivership and Distribution Order dated June 13, 2019 made on application by Green Earth Stores Ltd. and Green Earth Environmental Products, and the secured creditors, McBride Enterprises and Beckstette Enterprises, Crowe Soberman Inc. was appointed as receiver of all of the assets, undertakings and properties of the Companies acquired for, or used in relation to a business carried on by them, including the Real Property known municipally as 19-23 Buchanan Court, London, Ontario.

2. This factum is filed by the Receiver in connection with its motion returnable September 25, 2019, for an order seeking, among other things:

(a) approval of the agreement of purchase and sale dated July 26, 2019 entered into between the Receiver and the Purchaser Brian Vaughan, in trust for a company to be incorporated, and approving the Transaction contemplated by the APS;

- (b) vesting title to the Real Property in the Purchaser upon closing of the Transaction;
- (c) sealing the Confidential Appendices to the First Report;
- (d) authorizing the Receiver, upon the closing of the Transaction, to pay various interim distributions including:
 - From the estate of GESL to:
 - (A) the Receiver, Receiver's counsel and Companies' counsel for amounts subject to the Administration Charge;
 - (B) next, to the Secured Creditors until paid in full in accordance with the Receivership and Distribution Order; and
 - (C) all further proceeds are to be retained pending further Order of the Court;
 - From the estate of GEEP to:
 - (A) the Receiver, Receiver's counsel and Companies' counsel for amounts subject to the Administration Charge;
 - (B) next, to the Secured Creditors until paid in full in accordance with the Receivership and Distribution Order; and
 - (C) all further proceeds are to be retained pending further Order of the Court;
- (e) approval of the Interim Statement of Receipts and Disbursements for each of GEEP and GESL from the date of the Receiver's appointment to September 17, 2019;

- (f) approval of the First Report and the Receiver's conduct and activities described therein; and
- (g) approval of the fees of the Receiver and its counsel.

PART II - THE FACTS

3. The facts with respect to this motion are more fully set out in the First Report of the Receiver dated September 19, 2019 (the "First Report"). Capitalized terms used herein but not otherwise defined have the meanings ascribed to them in the First Report. All references to currency in this factum are references to Canadian dollars, unless otherwise indicated.

A. BACKGROUND

4. The Companies were engaged in consumer retail, selling unique items primarily in malls in mid-sized Ontario cities. Due to a number of business challenges, the Companies each filed a Notice of Intention to Make a Proposal pursuant to s. 50.4(1) of the *Bankruptcy and Insolvency Act*¹ on March 4, 2019. Crowe was appointed as Proposal Trustee in the NOI Proceedings.

First Report at para 4; Receiver's Motion Record, Tab 2.

5. The Companies used the NOI Proceedings to initiate a court-supervised sale of their retail operations, including a sale of the Real Property. The Liquidation Sale was concluded on May 29, 2019, at which point it was determined that the Companies were not in a position to make a viable proposal to unsecured creditors. No proposal was filed. The Secured Creditors sought and obtained the appointment of the Receiver on June 13, 2019, and on June

¹ RSC 1985, c B-3 [BIA].

18, 2019, the Companies were each deemed to have filed an assignment in bankruptcy. Crowe is also the Bankruptcy Trustee for each of the Companies.

First Report at para 5, 7 & 9-10; Receiver's Motion Record, Tab 2.

B. THE REAL PROPERTY SALE PROCESS

6. On December 4, 2018, GESL engaged CBRE Limited to sell the Real Property, at an initial listing price of \$6.5 million. CBRE received no formal offers for the Real Property prior to the appointment of the Receiver.

First Report at para 24; Receiver's Motion Record, Tab 2.

7. Following the Receiver's appointment, the Receiver evaluated the sale of the Real Property. Based on its own assessment and discussions with CBRE, the Secured Creditors and the Companies, the Receiver decided to continue CBRE's mandate to sell the Real Property. The Receiver was satisfied with continuing CBRE's mandate given its extensive pre-receivership involvement with the Real Property, its extensive knowledge of the London real estate market, and the market momentum it had acquired since it began its mandate.

First Report at paras 25 & 31; Receiver's Motion Record, Tab 2.

8. On August 13, 2019, the Receiver, on behalf of GESL, entered into a commission agreement with CBRE, which allowed CBRE to continue its sale efforts in connection with the Real Property. This was necessary since CBRE's initial listing agreement expiring on June 30, 2019 and the Receiver wanted CBRE to continue its role in the Sale Process.

First Report at para 33; Receiver's Motion Record, Tab 2.

9. CBRE's marketing strategy formed the basis of the sale process (the "Sale Process").

While providing oversight, the Receiver allowed CBRE to market the Real Property according to industry standards for similar commercial properties. Since CBRE's engagement in 2018 and throughout the duration of the Sale Process, CBRE's marketing efforts included:

- (a) posting the Real Property for sale via MLS commencing on January 7, 2019;
- (b) marketing the Real Property on CBRE's own website and through internal marketing campaigns;
- (c) placing prominent signage on the south side of the Real Property facing Highway 401, which has an average daily traffic count of 62,000 vehicles;
- (d) sending 13 email blasts between January 8, 2019 and July 31, 2019 to over 440 parties identified in CBRE's database as being interested in manufacturing, warehousing and office real estate;
- (e) sending 13 email blasts between January 8, 2019 and July 31, 2019 to over 420 parties on CBRE's internal co-operating commercial broker list;
- (f) sending a separate email blast to over 540 industrial and specialty groups within CBRE Canada; and
- (g) identifying the Real Property as being well-suited to the cannabis industry and reaching out to 40 cannabis companies by targeted mail to inform them of the opportunity to purchase the Real Property;

First Report at para 26; Receiver's Motion Record, Tab 2.

10. CBRE's promotion of the Real Property resulted in it conducting 20 separate physical tours of the Real Property between January 14, 2019 to July 25, 2019. The Purchaser toured the Real Property on July 12, 2019.

First Report at para 28; Receiver's Motion Record, Tab 2.

11. CBRE informed the Receiver that several parties expressed interest in purchasing the Real Property but not at the targeted price per square foot. CBRE also advised the Receiver that the pool of potential purchasers for the Real Property is limited due to the Real Property's unique features, including its large square footage (101,000 square feet), the proportion of office to warehouse space (27%), and the amount of required repairs and deferred maintenance.

First Report at paras 29-30; Receiver's Motion Record, Tab 2.

C. THE VAUGHAN OFFER

12. On July 26, 2019, CBRE forwarded the Vaughan Offer to purchase the Real Property to the Receiver. The Purchaser is an arm's length party and is not related to the Secured Creditors in any way.

First Report at paras 32 & 38; Receiver's Motion Record, Tab 2.

13. The Receiver negotiated conditions of the Vaughan Offer and involved its counsel, the Secured Creditors and CBRE in this process. On August 30, 2019, the Receiver, on behalf of GESL, entered into the APS with the Purchaser. The closing of the Transaction is to occur no later than September 30, 2019. The key terms of the APS are the following:

- (a) The Purchaser is acquiring all of the Real Property and all assets related to the Real Property including certain fixtures and chattels;
- (b) The Purchaser is paying for the Real Property in part with cash and in part with a First Mortgage granted by the Secured Creditors. A deposit of \$300,000 has been paid to CBRE, with a second deposit in the amount of \$475,000 due upon obtaining a Court Order approving the Transaction; and
- (c) The sale is on an "as is, where is" basis with the sole condition being the obtaining of a Court Order approving the Transaction. Due diligence has already been conducted and certain other conditions originally contained in the Vaughan Offer were waived during the negotiations between the Receiver, the Secured Creditors and the Purchaser.

First Report at paras 35-37 & 39; Receiver's Motion Record, Tab 2.

14. Following the execution of the APS, a prospective buyer contacted the Receiver through a sales agent and submitted a non-binding letter of interest to purchase the Real Property. The Receiver, after consulting with its counsel and the Secured Creditors, did not engage with the prospective buyer because its LOI was received after the execution of the APS.

First Report at paras 41-43; Receiver's Motion Record, Tab 2.

15. The Receiver believes that the Sale Process was appropriate for the type of property in question. The Receiver further believes that the sale price is reasonable.

First Report at paras 44-45; Receiver's Motion Record, Tab 2.

16. The Receiver has consulted with the Secured Creditors and has been advised that those parties support the Transaction.

First Report at para 50; Receiver's Motion Record, Tab 2.

17. CBRE is supportive of the Transaction and has provided an opinion letter stating that, amongst other things, the Real Property was marketed and exposed effectively and the purchase price is consistent with other comparable property sales in the London area.

First Report at para 48; Receiver's Motion Record, Tab 2.

D. THE PROPOSED INTERIM DISTRIBUTIONS

18. The Receivership and Distribution Order previously authorized the Receiver to make interim distributions. Payment of post-filing obligations and priority payables have been made to date, as well as distributions to satisfy the RBC Assigned Indebtedness. The Receiver proposes making a further distribution to the Secured Creditors. From the estate of GEEP, Beckstette Enterprises is to receive \$734,867 and McBride Enterprises is to receive \$734,798. From the estate of GESL, Beckstette Enterprises is to receive \$436,077 and McBride Enterprises is to receive \$449,777. These distributions are to be funded from the cash portion of the sale proceeds of the Real Property, and cash on hand from the earlier realization efforts and Liquidation Sale.

First Report at paras 54, 62-64, 67-68; Receiver's Motion Record, Tab 2.

Interim Statement of Receipts and Disbursements; Receiver's Motion Record, Tab 2 Appendix I.

Receivership and Distribution Order at paras 20-21; Receiver's Motion Record, Tab 2 Appendix A.

E. THE FIRST REPORT AND THE RECEIVER'S ACTIVITIES

19. The First Report sets forth a detailed description of the actions and activities of the Receiver since the date of its appointment. The Receiver's actions and activities, as described in the First Report, are lawful and proper, consistent with its powers and duties under the Receivership order and in accordance with the provisions of the *BIA*.

20. The sale of the Real Property has been the Receiver's main focus since its appointment. However, the Receiver's other activities have included communicating with stakeholders, complying with Canada Revenue Agency requirements, finalizing corporate tax returns, paying suppliers, and fulfilling necessary payroll obligations.

First Report at para 16; Receiver's Motion Record, Tab 2.

21. As detailed in the First Report, between June 18, 2019 to September 17, 2019, the Receiver oversaw total receipts of \$4,073,763 and total disbursements of \$3,515,544 for GESL. In the same period, the total receipts for GEEP were \$1,904,687 and the total disbursements were \$1,514,400.

First Report at para 54; Receiver's Motion Record, Tab 2.

F. THE RECEIVERSHIP FEES AND DISBURSEMENTS

22. The Receiver is seeking approval of its fees for the period from June 18, 2019, to September 13, 2019 and those of its counsel Stikeman for the period from June 20, 2019 to August 31, 2019 in connection with the performance of their duties in these proceedings.

23. The Receiver's Fees and Disbursements are \$89,406.06 plus HST in the amount of \$11,633.19, as detailed in the Affidavit of Graeme Hamilton, sworn September 18, 2019. The Stikeman Fees and Disbursements are \$29,708.10 and its expenses and disbursements are \$3,933.28, both figures excluding HST, as detailed in the Affidavit of Elizabeth Pillon, sworn September 18, 2019.

First Report at paras 59-60; Receiver's Motion Record, Tab 2.

24. The Receiver is of the view that the Receivership Fees and Disbursements are fair and reasonable in the circumstances and have been properly incurred.

First Report at para 61; Receiver's Motion Record, Tab 2.
Affidavit of Fees of Graeme Hamilton; Receiver's Motion Record, Tab 2 Appendix J.
Affidavit of Fees of Elizabeth Pillon; Receiver's Motion Record, Tab 2 Appendix K.

PART III - ISSUES

25. The issues before this Court, as addressed below, are:

- (a) should this Court approve the Transaction and grant a vesting order;
- (b) should this Court seal the Confidential Appendices to the First Report;
- (c) should this Court authorize the Receiver, upon the closing of the Transaction, to pay the Interim Distribution;
- (d) should this Court approve the First Report and the Receiver's conduct and activities described therein;
- (e) should this Court approve the fees of the Receiver and its counsel; and

(f) should this Court approve the Interim Statement of Receipts and Disbursements for each of GEEP and GESL.

PART IV - THE LAW

A. THE APS SHOULD BE APPROVED AND THE VESTING ORDER GRANTED

i. The Court has the Jurisdiction to Vest the Real Property in the Purchaser

26. This Court has the jurisdiction to approve a sale of the Companies' assets pursuant to s. 243 of the *BIA*, which authorizes the Court to appoint a receiver to exercise any control that the Court considers advisable over the property of a debtor and its business, and take any other action that the Court considers advisable. The Court's jurisdiction under s. 243 is broad and includes the power to grant a vesting order vesting property in a purchaser.

BIA, supra at s. 243.

Third Eye Capital v Resources Dianor Inc, 2019 ONCA 508 at para 87
[*Third Eye*]; Receiver's Book of Authorities ("BOA"), Tab 1.

27. In addition, s. 100 of the *Courts of Justice Act* provides the Court with the power to vest in any person an interest in real or personal property that the Court has authority to order be conveyed.

Courts of Justice Act, RSO 1990, c. c-43, s. 100.

ii. The Receiver has the Authority to Enter into the APS

28. Court-appointed receivers have the powers set out in the orders appointing them. It is usual for receivers to be granted the power to market the property of a debtor, which is the case under the Receivership and Distribution Order as it authorizes the Receiver to "market any and all of the Property, including advertising and soliciting offers in respect of the

Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate".

Third Eye, supra at para 74; Receiver's BOA, Tab 1.
Receivership and Distribution Order at para 3(j); Receiver's Motion Record, Tab 2 Appendix A.

iii. **The *Soundair* Principles are Satisfied**

29. The criteria used by this Court to determine whether a receiver who has sold a property acted properly are well-established and set out in *Royal Bank v Soundair Corp*:

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

Royal Bank v Soundair Corp (1991), 4 OR (3d) 1 (CA) at para 16 [*Soundair*]; Receiver's BOA, Tab 2.

30. Absent a violation of the *Soundair* principles, the Court should uphold the business judgement of the Receiver and the parties supporting it with respect to the result of a sales process. Only in exceptional circumstances will a court intervene and proceed contrary to the recommendation of its officer, the Receiver.

Re Eddie Bauer of Canada, [2009] OJ No 3784 (Ont SCJ [Commercial List]) at para 22; Receiver's BOA, Tab 3.
Soundair, supra at para 58; Receiver's BOA, Tab 2.

31. The application of the *Soundair* principles to the present case demonstrate why this Court should approve the Transaction and APS and grant a vesting order:

(a) *Sufficient Efforts to Obtain the Best Price*

32. The Receiver is of the opinion that the Sale Process that was undertaken was appropriate for the type of property in question and resulted in the Receiver obtaining a commercially reasonable offer for the Real Property.

First Report at para 44; Receiver's Motion Record, Tab 2.

33. The Sale Process was overseen by the Receiver and conducted with the input of the Secured Creditors. CBRE was responsible for marketing the Real Property, and it did so in a manner consistent with industry standards for commercial real estate. The Real Property was listed on MLS for a period of approximately seven months. Prospective purchasers were given sufficient time and information to formulate an offer for the Real Property.

First Report at para 26; Receiver's Motion Record, Tab 2.

34. CBRE reported that 20 prospective buyers toured the Real Property. This level of interest in the Real Property is in spite of the Real Property having a smaller pool of potential purchasers compared to other commercial properties because of its sizeable square footage, proportion of office to warehouse space, large site coverage, and repair requirements.

First Report at para 29; Receiver's Motion Record, Tab 2.

35. Courts have held that sale processes in the context of receiverships are not to be held to a standard of perfection. Rather, a receiver will be found to be acting providently and making the appropriate effort to get the best price if the receiver carefully considers the

available information and uses its expertise to determine how best to maximize value in the particular circumstances.

National Trust Co v 1117387 Ontario Inc, 2010 ONCA 340 at paras 44 & 50; Receiver's BOA, Tab 4.

36. The Receiver believes that it has taken appropriate measures to maximize the value of the Real Property. It does not believe that additional marketing or an alternative marketing strategy would produce an offer for the Real Property that would be superior to the Purchaser's offer and justify the additional time and cost that further marketing would require.

First Report at para 49; Receiver's Motion Record, Tab 2.

37. CBRE is supportive of the Transaction and has provided an opinion letter to this effect. CBRE's opinion is based, in part, on the purchase price being consistent with other recent comparable property sales in the London area and comments it received on potential purchase prices from parties that did not formally submit an offer for the Real Property.

First Report at para 48; Receiver's Motion Record, Tab 2.

(b) The Transaction Satisfies the Interests of the Parties

38. The Transaction provides for the best possible outcome for all parties with an economic interest in these proceedings. Notably, the Transaction is acceptable to the Secured Creditors. The Secured Creditors have been involved throughout the Sale Process and have granted a mortgage to the Purchaser to finance the Transaction. The combination of the First Mortgage and the proposed Interim Distribution will repay the Secured Creditors in full.

First Report at para 68; Receiver's Motion Record, Tab 2.

(c) The Sale Process was Efficacious and Fair

39. The Receiver submits that the Sale Process was efficacious, fair, and reasonable in the circumstances because:

- (a) the Sale Process was overseen by the Receiver and largely carried out by CBRE using industry-standard marketing techniques for real estate that are designed to maximize interest in, and the value of, the Real Property;
- (b) the Real Property was marketed by CBRE for approximately 9 months before the APS was executed, giving interested parties sufficient time to make an offer;
- (c) the market was widely canvassed by CBRE, who reached out directly to over 440 prospective purchasers, 420 commercial real estate brokers, 540 industry and specialty groups within CBRE and 40 cannabis companies; additionally, CBRE broadly promoted the Real Property through MLS, CBRE's website and prominently displayed signage;
- (d) 20 parties toured the Real Property, resulting in the Vaughan Offer and the LOI, as well as other indicators of value;
- (e) the Secured Creditors were consulted as part of the Sale Process; and
- (f) the quick closing contemplated by the Transaction eliminates further carrying costs.

First Report at paras. 44 & 48; Receiver's Motion Record, Tab 2.

(d) No Unfairness in the Working Out of the Process

40. The Receiver has reviewed the conduct of the Sale Process and concluded that it was fair and reasonable in the circumstances for the reasons set out above. It has not been suggested by any interested stakeholder that there has been any unfairness in the Sale Process or in the period leading to the negotiation and execution of the APS; indeed, as discussed above, the Secured Creditors – two key stakeholders – are providing the financing to facilitate the Transaction (the Secured Creditors are not related to the Purchaser). In such circumstances, courts place significant reliance on the receiver's business judgement and avoid second guessing the receiver.

Soundair, supra at para 73; Receiver's BOA, Tab 2.

41. Given that the *Soundair* principles are satisfied, the Receiver respectfully submits it is appropriate for the Court to grant an order approving the APS and vesting the Real Property in the Purchaser.

B. THE SEALING OF THE CONFIDENTIAL APPENDICES IS APPROPRIATE

42. The Receiver is requesting that the Court seal the Confidential Appendices, which contain (i) an unredacted copy of the listing agreement between GESL and CBRE; (ii) CBRE's detailed listing of the parties that toured the Real Property, including the date and time of their tour and related notes; (iii) an unredacted version of the APS; (iv) the First Mortgage; (v) an appraisal of the Real Property dated May 12, 2015; and (vi) a letter outlining CBRE's opinion on the Transaction.

43. Pursuant to the *Courts of Justice Act*, this Court has the discretion to order that any document filed in a civil proceeding be treated as confidential, sealed and not form part of the public record.

Courts of Justice Act, RSO 1990, c C.43, s. 137(2).

44. In *Sierra Club of Canada v Canada (Minister of Finance)*, Iacobucci J. adopted the following test to determine when a sealing order should be made:

A confidentiality order under R. 151 should only be granted when:

(a) such an order is necessary in order to prevent serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk; and

(b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh the deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

Sierra Club of Canada v Canada (Minister of Finance), 2002 SCC 41 at para 53 [*Sierra Club*]; Receiver's BOA, Tab 5.

45. The Court has evaluated sealing requests by reference to the *Sierra Club* factors and sealed unredacted sale agreements in receivership proceedings on the basis that they contain highly sensitive commercial information, which, if disclosed prior to the closing of the related transaction, could jeopardize dealings with any future prospective purchasers.

Comstock Canada Ltd, Re, 2014 ONSC 493 at para 16; Receiver's BOA, Tab 6.

46. In this case, sealing the Confidential Appendices is appropriate because the Confidential Appendices contain confidential economic terms of the Transaction that, if

disclosed prior to closing of the Transaction, could adversely impact the interests of the Companies and their stakeholders. If the information in the Confidential Appendices is disclosed and the Transaction is not completed, such disclosure would adversely impact the Receiver's negotiating position with potential purchasers and its ability to maximize the value of the Real Property.

First Report at para 28; Receiver's Motion Record, Tab 2.

47. The salutary effects of sealing the Confidential Appendices outweighs any deleterious effect of restricting the openness and accessibility of court proceedings.

48. In such circumstances, the Receiver submits that the *Sierra Club* test is met and that the sealing of the Confidential Appendices pending completion of the Transaction is appropriate and necessary in the circumstances.

C. THE INTERIM DISTRIBUTION SHOULD BE APPROVED

49. Upon the closing of the Transaction, the Receiver is seeking authorization to make the Interim Distribution. Proceeds from the Transaction that are left over and not distributed to either (i) Crowe, Stikeman and Miller Thompson or (ii) the Secured Creditors are to be retained by the Receiver pending further order of this Court.

50. The Receivership and Distribution Order previously authorized the Receiver to make distributions. Orders granting interim distributions are routinely issued by courts in insolvency proceedings and receiverships. The Receiver's proposed distributions are consistent with the said orders as well as orders granted by this Court.

Re Windsor Machine & Stamping Ltd, 2009 CanLII 39772 (ONSC) at paras 8 & 13; Receiver's BOA, Tab 7.
First Report at paras 60-66; Receiver's Motion Record, Tab 2.

D. THE FIRST REPORT AND THE ACTIVITIES DESCRIBED THEREIN SHOULD BE APPROVED

51. In *Target Canada Co (Re)*, Morawetz J. explained that a request to approve a monitor's report in the context of proceedings under the CCAA "is not unusual. [...] In most cases, there is no opposition to such requests, and the relief is routinely granted."

Target Canada Co, Re, 2015 ONSC 7574 at para 2 [*Target*]; Receiver's BOA, Tab 8.

52. Justice Morawetz went on to write that reports of court-appointed officials that support a sales process or a sale of assets are different from other types of reports in that these reports are relied upon and used by the court to make findings of fact and arrive at certain determinations. In such cases, the matter of approving the reports "is put squarely before the court" because the court must rely on the commentary in the report (as well as other forms of evidence) to conclude that the sales process or the sale of assets is, among other things, fair and reasonable in the circumstances.

Target, supra at paras 18-19; Receiver's BOA, Tab 8.

53. The same principles that Morawetz J. described when reviewing a court-appointed official's report in a CCAA proceeding apply in a receivership.

Hanfeng Evergreen Inc, (Re), 2017 ONSC 7161 at para 15; Receiver's BOA, Tab 9.

54. The contents of the First Report inform the relief sought in this motion. Notably, the First Report provides insightful commentary on the Sale Process. The First Report addresses other issues as well, including the activities of the Receiver since its appointment such as the wind down of the day-to-day operations of the Companies.

55. The First Report also provides details on the Receiver's Interim Statement of Receipts and Disbursements, for which the Receiver seeks approval. The Receiver's conduct with respect to the Interim Statement of Receives and Disbursements are within its powers pursuant to the Receivership and Distribution Order.

Receivership and Distribution Order at para 3(a); Receiver's Motion Record, Tab 2 Appendix A.

56. Overall, the First Report was prepared in a manner consistent with the Receiver's powers and duties under the Receivership and Distribution Order and in accordance with the provisions of the *BIA*. The activities of the Receiver as set out in the First Report were all necessary and undertaken in good faith, and were in each case in the best interests of the Companies' stakeholders generally. The Receiver therefore respectfully submits that First Report and the activities detailed therein, including the Interim Statement of Receipts and Disbursements, should be approved by this Court.

E. THE RECEIVERSHIP FEES AND DISBURSEMENTS SHOULD BE APPROVED

57. The Receiver is seeking approval of the Receiver's Fees and Disbursements in the amount of \$89,406.06 and the Stikeman Fees and Disbursements in the amount of \$29,708.10 for fees and \$3,933.28 for expenses and disbursements. All amounts exclude HST.

58. The general standard of review for a Court in reviewing the accounts of a court-appointed receiver is "whether the amount claimed for remuneration and disbursements incurred in carrying out the receivership are 'fair and reasonable'".

Confectionately Yours Inc., Re, [2002] OJ No 3569 (CA) at para 42
[*Bakemates*]; Receiver's BOA, Tab 10.

59. Ontario courts have adopted a number of factors that they consider when assessing whether a receiver's accounts are fair and reasonable. Such factors include: the nature, extent and value of the assets; the complications and difficulties encountered; the time spent; the receiver's knowledge, experience and skill; the result of the receiver's efforts; and the cost of comparable services when performed in a prudent and economical manner. These factors, along with others, are considered non-exhaustive guidelines.

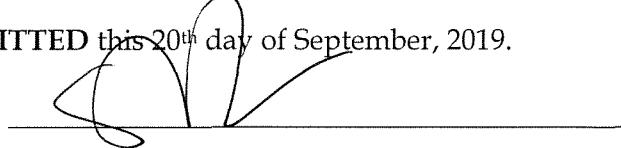
Bakemates, supra at para 44-51; Receiver's BOA, Tab 10.

60. The Receiver is of the opinion that the Receivership Fees and Disbursements are reasonable in the circumstances and have been validly incurred in accordance with the provisions of the Receivership and Distribution Order issued in these receivership proceedings.

PART V - ORDER SOUGHT

61. For all of the foregoing reasons, the Applicants respectfully request that the Court grant an order substantially in the form of the proposed order included with the Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20th day of September, 2019.



Stikeman Elliott LLP
Lawyers for the Applicants

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Third Eye Capital v Resources Dianor Inc*, 2019 ONCA 508
2. *Royal Bank v Soundair Corp* (1991), 4 OR (3d) 1 (CA)
3. *Re Eddie Bauer of Canada*, [2009] OJ No 3784 (Ont SCJ [Commercial List])
4. *National Trust Co v 1117387 Ontario Inc*, 2010 ONCA 340
5. *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41
6. *Comstock Canada Ltd, Re*, 2014 ONSC 493
7. *Re Windsor Machine & Stamping Ltd*, 2009 CanLII 39772 (ONSC)
8. *Target Canada Co, Re*, 2015 ONSC 7574
9. *Hanfeng Evergreen Inc, (Re)*, 2017 ONSC 7161
10. *Confectionately Yours Inc., Re*, [2002] OJ No 3569 (CA)

**SCHEDULE "B"
RELEVANT STATUTES**

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

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.

...

Courts of Justice Act, RSO 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.

[...]

Sealing documents

137 (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.

IN THE MATTER OF NOTICES OF INTENTION TO MAKE A PROPOSAL OF GREEN EARTH
ENVIRONMENTAL PRODUCTS AND GREEN EARTH STORES LTD.

Estate / Court File No.: 31-2481648
Estate / Court File No.: 31-2481649

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
Proceeding commenced at Toronto

FACTUM OF THE RECEIVER
(RETURNABLE SEPTEMBER 25, 2019)

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