

**ONTARIO
SUPERIOR COURT OF JUSTICE**

FIRST SOURCE FINANCIAL MANAGEMENT INC.

APPLICANT

- AND -

KING DAVID INC. AND HELEN ROMAN-BARBER

RESPONDENTS

**FACTUM OF TDB RESTRUCTURING LIMITED,
IN ITS CAPACITY AS RECEIVER**

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TO: THE SERVICE LIST

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PART I - INTRODUCTION

1. TDB Restructuring Limited ("**TDB**"), in its capacity as receiver (in such capacity, the "**Receiver**") of the Property (as defined below) owned by King David Inc., brings this motion seeking an Order for, among other things, the following relief:

- (a) approving a sale process (the "**Second Sale Process**") substantially in the form of Appendix "C" to the First Report (the "**Sale Process Protocol**") for the sale of the Lands, including the retention of Cushman and Wakefield Inc. (the "**Listing Agent**" or "**Cushman**") to act as the listing agent;
- (b) approving a proposed stalking horse agreement of purchase and sale dated August 8, 2025 (the "**Stalking Horse APS**") between the Receiver and Home Trust Company ("**HTC**"), solely for the purpose of constituting the "stalking horse bid" in the Second Sale Process;

- (c) sealing confidential appendices 1 and 2 to the First Report of the Receiver dated August 8, 2025 (the “**First Report**”)¹, as well as the confidential appendix (collectively, the “**Confidential Appendices**”) to the Receiver’s Report to Court dated September 2, 2025 (the “**Supplemental Report**”),² pending completion of the Second Sale Process or further Order of the Court; and
- (d) approving the Receiver’s cash receipts and disbursements for the period January 12, 2024 to July 31, 2025 (the “**Interim R&D**”).

PART II - SUMMARY OF FACTS

2. Further background in these proceedings is set out in the First Report. Capitalized terms used herein and not otherwise defined have the meaning given to them in the First Report.

Background

3. On December 21, 2023, pursuant to an Order of the Ontario Superior Court of Justice (Commercial List) (the “**Receivership Order**”), RSM Canada Limited (as replaced by TDB pursuant to a Substitution Order dated March 1, 2024) was appointed, without security, as the Receiver of the Property.³ The Lands, which are Phases 2 and 3 of a larger development, remain undeveloped and are adjacent to Phase 1, which is not subject to these receivership proceedings. HTC is the senior secured lender in respect of the Lands.⁴

¹ First Report of the Receiver dated August 8, 2025 (“**First Report**”), Motion Record of the Receiver returnable September 11, 2025 (“**MR**”), Tab 2, p 10.

² Supplemental Report of the Receiver dated September 2, 2025 (“**Supplemental Report**”).

³ “Property” is comprised of the Lands and any personal property located on or which may arise out of, from or in connection with the ownership, use or disposition of the Lands, and any proceeds to be received by the Debtor derived from dealings with the Lands by the Debtor; Appendix “A” (Appointment Order) to the First Report at para 2, MR, Tab 2, p 35.

⁴ First Report at sections 1.0 and 2.0, paras 1.0 and 25, MR, Tab 2, pp 14 and 19-20.

The Previous Sale Process

4. In early 2024, the Receiver engaged Avison Young Commercial Real Estate Services LP (“**Avison Young**”) as the listing agent for the marketing and sale of the Lands. Avison Young was chosen after soliciting proposals from three qualified agents and was chosen for several reasons, including, among other things, because of its strong understanding of the Lands, its confident outlook on the Lands’ value, and its competitive fee proposal.⁵

5. Avison Young began its marketing efforts on June 7, 2024 and took extensive efforts to market the Lands. Among other things, it sent multiple e-blasts to approximately 3,200 potential buyers, sent individualized emails to 155 groups who had previously signed confidentiality agreements through other court-appointed sales, entered into sixteen confidentiality agreements with potential purchasers, and maintained communication with interested parties.⁶

6. A bid deadline of October 3, 2024 was subsequently set, and four offers were received on that deadline. All four offers were highly conditional and not able to be accepted by the Receiver in their initial form.⁷

7. The Receiver decided to pursue the two highest bids to determine if an acceptable agreement could be reached. A further deadline was set for January 2025. The revised bids submitted by the second bid deadline in January 2025 remained unacceptable. One bid remained subject to a financing condition that had not been satisfied or waived, and the Receiver had concerns about the achievability of such condition being met. The other bid had a reduced purchase price and was subsequently withdrawn, and the proposed offer price was

⁵ First Report at section 5.1, paras 30-31, MR, Tab 2, p 21; Appendix “A” of the Redacted Q&A, Supplemental Report at section 13(d), p 14.

⁶ First Report at section 5.2, para 34 and 37, MR, Tab 2, pp 21-22; see Schedule “A” (Avison Young’s Marketing Progress Report) to Appendix “A” of the Redacted Q&A, Supplemental Report, pp 27-31.

⁷ First Report at section 5.3, para 39, MR, Tab 2, p 23.

significantly lower than the original price. HTC also advised it would not support the approval of the revised bids.⁸

8. Neither bid was accepted by the Receiver and the Receiver's listing agreement with Avison Young expired on May 1, 2025.⁹

The Second Sale Process

9. The Receiver, in consultation with HTC, has determined that further marketing of the Lands with a new listing agent is appropriate and reasonable at this time.¹⁰

10. Subject to Court approval, the Receiver intends to engage Cushman as its listing agent.¹¹ A summary of the Second Sale Process timeline is below:¹²

Milestone	Key Dates
Commencement of Sale Process	As soon as practicable after Court approval
Qualified Bid Deadline	6 weeks after commencement
Selection of Successful Bid	As soon as reasonably possible
Application for Approval and Vesting Order	Within 10 business days after the Selection of the Successful Bid
Outside Date of Closing of Successful Bid	As set out in Paragraph 9 of the Sale Process Protocol

11. In order to be considered a Qualified Bid, a bid must meet the criteria specified in the Second Sale Process, including, without limitation:¹³

(a) provide consideration in excess of the sum of:

- (i) \$29,900,000 (exclusive of any sales taxes applicable to the transaction);
- (ii) the listing agent's commission; and

⁸ First Report at section 5.3, para 41, MR, Tab 2, p 23.

⁹ First Report at section 5.3, paras 41 and 43, MR, Tab 2, p 23.

¹⁰ First Report at section 7.1, para 51, MR, Tab 2, p 26.

¹¹ First Report at section 7.1, para 54, MR, Tab 2, p 27.

¹² First Report at section 7.3, para 60, MR, Tab 2, p 28.

¹³ First Report at section 7.5, para 63, MR, Tab 2, pp 29-30.

(iii) \$10,000.

(collectively, the “**Consideration Value**”);

(b) it does not include any request for or entitlement to any break fee, expense reimbursement or similar type of payment;

(c) it is not conditional on approval internally, the outcome of any due diligence or obtaining financing; and

(d) it is accompanied by a cash deposit equal to at least ten percent of the Consideration Value provided for in the bid.

12. If by the Qualified Bid Deadline, no Qualified Bid (other than the Stalking Horse APS) has been received by the Receiver, then the Second Sale Process will be terminated, and the Stalking Horse APS will be deemed the Successful Bid.¹⁴

The Stalking Horse APS

13. The proposed Sale Process includes a stalking horse bid, which was negotiated at arms- length between the Receiver and HTC. The Stalking Horse APS provides a baseline purchase price for the Lands. Certain key terms and conditions of the Stalking Horse APS are provided below:¹⁵

(a) Purchaser: HTC.

(b) Purchased Assets: the Lands and certain associated assets as set out in the Stalking Horse APS.

¹⁴ First Report at section 7.6, para 64, MR, Tab 2, pp 30-31.

¹⁵ First Report at section 6.2, para 48, MR, Tab 2, pp 24-25; see also Appendix “H” (Stalking Horse APS) to the First Report, MR, Tab 2, pp 126-182.

(c) Purchase Price: thirty million (\$30,000,000) Canadian dollars (exclusive of any transaction taxes) to be satisfied by as follows:

- (i) cash consideration for the following items: i) accrued property taxes until Closing; ii) the fees of the Receiver and its counsel; iii) an accrual for the fees and disbursements of the Receiver and its counsel until discharge; and iv) any other amounts with priority to the Secured Indebtedness (other than the Receiver's Certificates); and
- (ii) the balance of the Purchase Price (exclusive of any transaction taxes) to be satisfied by way of a credit bid and the release of the amount of the Secured Indebtedness equivalent to the balance of the Purchase Price.

(d) Material Conditions: the Stalking Horse APS will have been chosen as the Successful Bid in the Second Sale Process and approved pursuant to an approval and vesting order.

(e) "As is Where Is": the Purchased Assets are being conveyed on an as is where is basis.

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

14. The issues for this Court to consider are as follows:

- (a) whether the Second Sale Process, including the retention of the Listing Agent, should be approved;
- (b) whether the Stalking Horse APS should be approved solely as the stalking horse credit bid in the Second Sale Process;

- (c) whether the Confidential Appendices should be sealed pending completion of the Second Sale Process or further Order of the Court; and
- (d) whether the Interim R&D should be approved.

The Second Sale Process Should be Approved

15. Court-appointed receivers have the powers set out in the Orders appointing them. The Receivership Order authorizes and grants the Receiver the powers to market and sell the Lands.¹⁶

16. Pursuant to subsection 243(1)(c) of the *Bankruptcy and Insolvency Act* (“**BIA**”), this Court has jurisdiction to approve the proposed Sale Process.¹⁷ Although the decision to approve a particular form of sale process is distinct from the approval of a proposed sale, courts have held that the reasonableness and adequacy of any sale process proposed by a court-appointed receiver must be assessed with reference to the factors that a court will consider when approving a proposed sale, including the following:¹⁸

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

¹⁶ See Appendix “A” (Appointment Order) to the First Report at section 3, para (j), MR, Tab 2, p 37.

¹⁷ *Bankruptcy and Insolvency Act*, s. [243\(1\)\(c\)](#).

¹⁸ [Royal Bank of Canada v Soundair Corp.](#), 1991 CanLII 2727 at p 8; [CCM Master Qualified Fund v blutip Power Technologies](#), 2012 ONSC 1750 at para [6](#) [[CCM Master](#)]; [Choice Properties Limited Partnership v Penady \(Barrie\) Ltd.](#), 2020 ONSC 3517 at para [16](#) [[Choice Properties](#)].

17. Additional consideration should be given to the following factors:¹⁹

- (a) the fairness, transparency and integrity of the proposed process;
- (b) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and
- (c) whether the sale process will optimize the chances, in the particular circumstance, of securing the best possible price for the assets up for sale.

18. The proposed sale process need not be perfect, only reasonable. A court should give significant weight to the recommendation of its receiver, who is a court-appointed officer with significant expertise in insolvency proceedings.²⁰

19. Approval of the Second Sale Process should be granted at this time for the following reasons, among others:²¹

- (a) the Second Sale Process provides for a robust marketing of the Lands, will test the market for the Lands for the benefit of all stakeholders, and is commercially efficient;
- (b) the Second Sale Process timeline is reasonable given that the First Sale Process which was conducted over a period of 11 months, provided significant market exposure;

¹⁹ See *CCM Master* at para 6; *Choice Properties* at para 16.

²⁰ *Marchant Realty Partners Inc. v 2407553 Ontario Inc.*, 2021 ONCA 375 at paras 10, 15 and 19.

²¹ First Report at sections 7.3 and 7.7, paras 61 and 67, MR, Tab 2, pp 28 and 31.

- (c) the Second Sale Process establishes a protocol through which there is an opportunity for a transaction with greater value than the Stalking Horse APS and optimizes the chances of securing the best possible price for the Lands;
- (d) the Second Sale Process is consistent with sale procedures used in other Court-supervised stalking horse sale processes;
- (e) the Second Sale Process provides a reasonable opportunity for competing bidders to submit offers, and is sufficient to generate the highest and best offer; and
- (f) the Second Sale Process is reasonable and appropriate in the circumstances.

20. In addition, the Court should approve the Receiver's retention of Cushman as the listing agent for the Second Sale Process for the following reasons:²²

- a. the Cushman team has significant experience selling real estate in the Markham area;
- b. Cushman had the strongest opinion of value for the Lands of the brokers who submitted listing proposals;
- c. Cushman's proposal included a detailed analysis of the planning and development challenges that would need to be addressed prior to re-listing the Lands;
- d. the compensation structure offered by Cushman was among the most favourable of the listing proposals and is consistent with market norms;

²² First Report at section 7.0, para 55, MR, Tab 2, p 27.

- e. the Receiver has previously retained the Cushman team on other similar mandates where the Cushman team achieved strong results; and
- f. HTC supports the retention of Cushman.

The Stalking Horse APS Should be Accepted

21. Courts have routinely approved “stalking horse” bids in receivership proceedings, *BIA* proposals, and *Companies’ Creditors Arrangement Act* proceedings.²³ In *Boutique Euphoria Inc. (Re)*,²⁴ the Quebec Superior Court set out the following non-exhaustive factors as important considerations in assessing whether a stalking horse bid process should be approved:²⁵

- (a) has there been some control exercised at the first stage of the competition (namely that to become the stalking horse bidder) and to what extent? In other words, some assurances should exist that the horse chosen is indeed the right one.
- (b) is there a need for stability within a very short time frame for the debtor to continue operations and the restructuring contemplated to be successful?
- (c) are the economic incentives for the stalking horse bidder, in terms of break up fee, topping fee and overbid increments protection, fair and reasonable?
- (d) are the timelines contemplated reasonable to ensure a fair process at the second stage of the competition, namely that to become the successful over bidder?

²³ See *CCM Master* at para 7.

²⁴ *Boutique Euphoria Inc. (Re)*, 2007 QCCS 7129.

²⁵ *Ibid* at para 37.

22. More recently, in *Re DCL Corporation*,²⁶ this Court considered the criteria that had previously been applied by the British Columbia Court in *Freshlocal Solutions*,²⁷ and found the following questions as relevant to the assessment of the acceptance a proposed stalking horse bid:²⁸

- (a) how did the stalking horse agreement arise?
- (b) what are the stability benefits?
- (c) does the timing support approval?
- (d) who supports or objects to the stalking horse agreement?
- (e) what is the true cost of the stalking horse agreement?
- (f) is there an alternative?

23. In the current circumstances, the Stalking Horse APS provides a floor price for the Lands, which is satisfactory to HTC. In *CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.*, the Court confirmed that “the use of stalking horse bids to set a baseline for the bidding process [...] has been recognized by Canadian courts as a reasonable and useful element of a sale process.”²⁹

24. The Receiver has assessed the reasonableness of the proposed price by reference to the results of the First Sale Process, which did not generate any unconditional bids for a similar value. While there have been other appraisals in connection with the Lands, establishing whether fair market value was being offered for purposes of the Stalking Horse APA, the

²⁶ [DCL Corporation \(Re\)](#), 2023 ONSC 3686 [*DCL Corporation*].

²⁷ [Freshlocal Solutions Inc. \(Re\)](#), 2022 BCSC 1616.

²⁸ *DCL Corporation* at para 24.

²⁹ *CCM Master* at para 7; see also the [Endorsement of the Honourable Justice Osborne dated November 12, 2024](#), Ontario Superior Court of Justice (Commercial List), *In the Matter of MarshallZehr Group Inc. v. Spotlight on Courtland Inc.*, Court File No. CV-24-00717917-00CL, para 28 [*MarshallZehr*].

Receiver's actual testing of the market through the First Sale Process represented a better assessment of value.³⁰ Where the market has demonstrated a different value than a hypothetical appraisal value, Courts have preferred market testing to establish value.³¹ In such circumstances, the Courts have noted that given the purpose of a stalking horse is to set a baseline, "the appropriate, fair and transparent manner in which to test value is to conduct the sale process and see what offers the market generates. If, as was submitted, the stalking horse bid is low, the market ([...] a sophisticated one here) will presumably speak in the form of superior bids."³²

25. Additionally, the following factors weigh in favour of approving the Stalking Horse APS within the Second Sale Process:

- (a) the Stalking Horse APS is submitted by HTC, the senior secured lender in the receivership, and arose to set a floor price for the Lands, given the significantly lower offers generated in the First Sale Process;
- (b) the purchase price under the Stalking Horse APS is reasonable given the values arising out of the First Sale Process – which is a more salient marker of value than appraisal value in the circumstances;
- (c) there is no "cost" to the Stalking Horse APS as it does not include any bid protections (i.e., a break fee or expense reimbursement);³³ and

³⁰ Supplemental Report at section 4.0, para 8, pp 5-6.

³¹ See [Business Development Bank v Devine Brokers & Appraisal Ltd.](#), 2013 NSSC 435 at paras 13-14, as cited by [Canadian Western Bank v Goshen Professional Care Inc.](#), 2025 SKKB 5 at para 84; see also [Homedale-Eagle Corporation v 253 Queen Street Inc.](#), 2024 ONSC 6590 at 56.

³² [MarshallZehr](#) at para 17.

³³ First Report at section 6.2, para 49, MR, Tab 2, p 25.

- (d) the likely alternative would be a sale process without a stalking horse; however, in the current circumstances, where there is no break fee or expense reimbursement, there is no prejudice to accepting the Stalking Horse APS.

The Sealing Order Should be Granted

26. The Receiver is requesting that the Confidential Appendices be sealed until further Order of this Court (the “**Sealing Order**”). In *Sierra Club of Canada v Canada (Minister of Finance)*,³⁴ the Supreme Court of Canada held that courts should exercise their discretion to grant sealing orders where: (i) the order is necessary to prevent a serious risk to an important interest, including a commercial interest; and (ii) the salutary effects of the order outweigh its deleterious effects.³⁵ More recently, in *Sherman Estate v Donovan*,³⁶ the Supreme Court of Canada held that a party requesting that a court exercise its discretion in a way that limits the ‘open court’ presumption must establish that: (i) the openness poses a risk to an important interest of the public; (ii) the request sought is necessary to prevent the risk to the identified interest as reasonable alternative measures will not prevent said risk; and (iii) the benefits of the request outweigh the negatives as a matter of proportionality.³⁷

27. The Confidential Appendices include confidential information relating to the following matters:³⁸

- (a) bids submitted during the First Sale Process;

³⁴ [Sierra Club of Canada v Canada \(Minister of Finance\)](#), 2002 SCC 41.

³⁵ *Ibid* at para 53.

³⁶ [Sherman Estate v Donovan](#), 2021 SCC 25.

³⁷ *Ibid* at paras 104-106; see also [Kirby v Woods](#), 2025 ONCA 437 at para 22.

³⁸ First Report at section 8.0, para 68, MR, Tab 2, p 32; Supplemental Report at section 5.0, para 9, p 3.

(b) the listing proposals solicited from listing agents for the First Sale Process and Cushman’s listing proposal for the Second Sale Process (collectively, the “**Proposals**”); and

(c) certain aspects of Avison Young’s marketing progress report, including the identities of the parties who were granted access to the data room.

28. The Proposals were prepared, in part, using market data. Disclosure of the information in the Confidential Appendices could impair the marketing of the Lands during the Second Sale Process and any further marketing efforts that may be required should the Second Sale Process not be approved. In the present circumstances, no stakeholder will be materially prejudiced by the Sealing Order, which is limited in scope.

29. Within the context of insolvency proceedings, it is common to seal commercially sensitive material.³⁹ Accordingly, the Receiver requests that the Confidential Appendices be sealed pending completion of the Second Sale Process or further order of the Court, as the benefits of the requested sealing order outweigh the negative impact on the “open court” principle.

The Interim R&D should be Approved

30. The approval of a receiver’s statement of receipts and disbursements is commonly granted as part of orders in receivership proceedings.⁴⁰ The general standard of review for the accounts of a court-appointed receiver is “whether the amount claimed for remuneration and the disbursements incurred in carrying out the receivership are fair and reasonable.”⁴¹ The

³⁹ See the [Endorsement of Justice Conway dated November 9, 2023](#), *In the Matter of Ignite Services, et al.*, Court File No. CV-23-00708635-00CL, Ontario Superior Court of Justice of Ontario (Commercial List), at para 13.

⁴⁰ See the [Ancillary Order of Justice Steele dated July 2, 2025](#), *In the Matter of the Receivership of the Lion’s Share Group Inc. and the Windrose Group Inc.*, Court File No. CV-24-00717669-00CL, Ontario Superior Court of Justice (Commercial List), at para 10.

⁴¹ [Confectionately Yours Inc. \(Re\)](#), 2002 CanLII 45059 at para 42 [*Confectionately Yours*].

Court is to consider all of the relevant factors in a holistic manner and need not examine “dockets, hours, the explanations or disbursements, line by line.”⁴² The focus on such a review should be the fair and reasonable assessment of what was accomplished, rather than the time it took.⁴³ In the present circumstances, the Interim R&D were reasonable, justified in the circumstances, and undertaken in accordance with the Receivership Order.

PART IV - ORDER REQUESTED

31. For the reasons set out above, the Receiver requests that this Court should grant the proposed Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2nd day of September, 2025.


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Receiver

⁴² [Bank of Nova Scotia v Diemer](#), 2014 ONSC 365 at para 19.

⁴³ [Confectionately Yours](#) at para 42.

SCHEDULE "A"

LIST OF AUTHORITIES

- 1 Ancillary Order of Justice Steele dated July 2, 2025, *In the Matter of the Receivership of the Lion's Share Group Inc. and the Windrose Group Inc.*, Court File No. CV-24-00717669-00CL, Ontario Superior Court of Justice (Commercial List)
- 2 *Bank of Nova Scotia v Diemer*, 2014 ONSC 365
- 3 *Boutique Euphoria Inc. (Re)*, 2007 QCCS 7129
- 4 *Business Development Bank v Devine Brokers & Appraisal Ltd.*, 2013 NSSC 435
- 5 *Canadian Western Bank v Goshen Professional Care Inc.*, 2025 SKKB 5
- 6 *CCM Master Qualified Fund v blutip Power Technologies*, 2012 ONSC 1750
- 7 *Choice Properties Limited Partnership v Penady (Barrie) Ltd.*, 2020 ONSC 3517
- 8 *Confectionately Yours Inc. (Re)*, 2002 CanLII 45059
- 9 *DCL Corporation (Re)*, 2023 ONSC 3686
- 10 Endorsement of Justice Conway dated November 9, 2023, *In the Matter of Ignite Services, et al.*, Superior Court of Justice of Ontario (Commercial List), Toronto, CV-23-00708635-00CL.
- 11 Endorsement of the Honourable Justice Osborne dated November 12, 2024, Ontario Superior Court of Justice (Commercial List), *In the Matter of MarshallZehr Group Inc. v. Spotlight on Courtland Inc.*, Court File No. CV-24-00717917-00CL
- 12 *Freshlocal Solutions Inc. (Re)*, 2022 BCSC 1616
- 13 *Homedale-Eagle Corporation v 253 Queen Street Inc.*, 2024 ONSC 6590
- 14 *Kirby v Woods*, 2025 ONCA 437
- 15 *Marchant Realty Partners Inc. v 2407553 Ontario Inc.*, 2021 ONCA 375
- 16 *Royal Bank of Canada v Soundair Corp.*, 1991 CanLII 2727

- 17 *Sherman Estate v Donovan*, 2021 SCC 25
- 18 *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

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.

First Source Financial Management
Inc.
Applicant

-and-

King David Inc. et al.
Respondents

Court File No.: CV-23-00710411-00CL

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

Proceeding commenced at Toronto

**FACTUM
(SALE PROCESS AND STALKING HORSE)**

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