

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

B E T W E E N:

MARSHALLZEHR GROUP INC.

Applicant

- and -

AREACOR INC.

Respondent

**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 RSM CANADA LIMITED,
COURT-APPOINTED RECEIVER**

September 28, 2022

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Limited, Court-appointed Receiver**

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PART I – INTRODUCTION

1. This factum is filed by RSM Canada Limited (“**RSM**”), in its capacity as Court-appointed receiver (the “**Receiver**”) of the property, assets and undertakings of Areacor Inc. (“**Areacor**” or the “**Debtor**”), in support of its motion seeking, among other things, Court approval of a sale of the Property (as defined below).

PART II – FACTS

The Property and the Project

2. The Debtor is the owner of real property municipally known as 11-15 Cannon Street West, Hamilton (the “**Property**”).¹

3. The Debtor intended to develop a six-storey condominium project on the Property, consisting of 40 residential units and commercial space on the ground floor, marketed as the “Jamesville Lofts” (the “**Project**”).²

4. A five-storey skeleton structure, consisting of steel framing and pre-cast concrete slabs (the “**Structure**”), was erected on the Property.³

5. The Project was originally intended to be completed by November 2019.⁴ Following numerous delays and budget overruns, construction ceased in or around June 2021.⁵

6. On December 9, 2021, the City of Hamilton (the “**City**”) issued an order to comply (the “**Order to Comply**”), which required that all access to the Project site be suspended immediately. The Order to Comply was issued based on an engineering report that concluded that the Structure was not adequate to support the factored design load, and that, among other things, full steel inspection of the Structure, an up-to-date inspection report for the hollowcore installation, and a concrete reinforcement inspection had to be completed.⁶

¹ Motion Record of RSM Canada Limited dated September 8, 2022, Tab 2, Second Report of RSM Canada Limited dated September 8, 2022 (the “**Second Report**”), para. 8.

² Second Report, para. 10.

³ Second Report, para. 12.

⁴ Application Record of MarshallZehr Group Inc., Tab 2, Affidavit of Murray Snedden sworn January 6, 2022 (“**Snedden Affidavit**”), para. 30.

⁵ Second Report, para. 13; Snedden Affidavit, paras. 31-35.

⁶ Second Report, paras. 30-33.

MarshallZehr and Appointment of the Receiver

7. The Applicant, MarshallZehr Group Inc. (“**MarshallZehr**”), provided construction financing to Areacor that was secured by, among other things, a mortgage on the Property.⁷

8. MarshallZehr’s loan to Areacor matured on September 1, 2021. On December 14, 2021, MarshallZehr demanded payment and delivered a notice of intention to enforce its security.⁸

9. On January 6, 2022, MarshallZehr commenced an application for the appointment of RSM as receiver of Areacor. The Debtor did not oppose the application.⁹

10. On January 13, 2022, RSM was appointed as Receiver pursuant to the Order of The Honourable Mr. Justice Cavanagh (the “**Appointment Order**”).¹⁰

11. Pursuant to paragraph 25 of the Appointment Order, Chaitons LLP (“**Chaitons**”) is counsel to the Receiver in respect of any matter where there is no conflict of interest. Loopstra Nixon LLP (“**Loopstra Nixon**”) is independent counsel to the Receiver.¹¹

12. Loopstra Nixon has provided an opinion to the Receiver that the security of MarshallZehr, including the first-ranking mortgage on the Property, is valid and enforceable.¹²

13. As of May 31, 2022, MarshallZehr was owed in excess of \$7.4 million in connection with the Property.¹³

⁷ Second Report, para. 14.

⁸ Snedden Affidavit, paras. 8-9 and 42.

⁹ Second Report, paras. 15-16.

¹⁰ Second Report, para. 17.

¹¹ Second Report, para. 18.

¹² Second Report, para 53; Security Opinion of Loopstra Nixon LLP, dated April 1, 2022, Appendix “L” to the Second Report.

¹³ Second Report, para. 52.

Sale Process

14. Pursuant to the Appointment Order, the Court authorized the Receiver to market and sell the Property.¹⁴

15. The Receiver completed a marketing and sale process for the Property (the “**Sale Process**”), which included:

- (a) identifying a list of approximately 1,000 potential purchasers (the “**Mailing List**”) and forwarding a teaser letter outlining the opportunity to all parties on the Mailing List;
- (b) establishing an online data room that included, among other things, a confidential information memorandum (“**CIM**”) and a template agreement of purchase and sale; and
- (c) organizing advertisements to be published in: (i) the *Globe and Mail* (National Edition) on April 7 and April 21, 2022, (ii) *Novae Res Urbis* (GTHA Edition) on April 6 and April 20, 2022, (iii) *Novae Res Urbis* (Toronto Edition) on April 8 and April 22, 2022, and (iv) *The Hamilton Spectator* on April 7 and April 21, 2022.¹⁵

16. The parties included in the Mailing List were taken from the Receiver’s extensive list of industry contacts, which included real estate developers, investors, and real estate brokerages such as CBRE, Colliers and Avison Young.¹⁶

¹⁴ Second Report, para. 70; Order (appointing Receiver), issued January 22, 2022, Appendix “A” to the Second Report.

¹⁵ Second Report, para. 71.

¹⁶ Responding Motion Record of Areacor Inc. dated September 26, 2022, Tab 1, Affidavit of Roni Gilyana sworn September 26, 2022 (the “**Gilyana Affidavit**”), para. 23 and Exhibit “B”, e-mail dated April 24, 2022.

17. In response to the Receiver's marketing efforts, it received 35 executed confidentiality agreements, which permitted these parties to have access to the data room established by the Receiver and review, among other things, the CIM.¹⁷

18. Three (3) offers were submitted to the Receiver on the bid deadline. Each of the offers were significantly less than the amount the Debtor was indebted to MarshallZehr, and each was subject to financing and further due diligence conditions.¹⁸

19. The Receiver rejected the three offers given the disparity between the value of the offers received and the amount owed to MarshallZehr.¹⁹

20. Marbelle Estates Inc. (the "**Purchaser**"), an unrelated builder known to MarshallZehr, agreed to acquire the Property through an assumption of the majority of the indebtedness owed by the Debtor to MarshallZehr.²⁰

21. On August 26, 2022, the Purchaser submitted an agreement to purchase the Property to the Receiver (the "**APS**"). If approved, MarshallZehr will be providing financing to the Purchaser with respect to the cash portion of the APS, which includes payment of certain priority payables.²¹

The APS contemplates:

- (a) the highest and best offer received by the Receiver by a wide margin;

¹⁷ Second Report, para. 73.

¹⁸ Second Report, paras. 74-75; Confidential Appendix "1" to the Second Report.

¹⁹ Second Report, para. 77.

²⁰ Second Report, para. 76-78.

²¹ Second Report, paras. 80-81.

- (b) a sale of substantially all of the assets of the Debtor (the “**Purchased Assets**”) on conventional insolvency terms - i.e., “as is, where is”;
- (c) a quick closing (11 days following Court approval);
- (d) no financing or other diligence conditions; and
- (e) is conditional only on the Court (i) granting an approval and vesting order and (ii) authorizing the termination of the existing residential condominium purchase agreements.²²

22. The Receiver understands that time is of essence for completion of the sale transaction, as the Structure cannot be exposed to the elements for another winter season without completing various ‘winterization’ tasks, and prolonged exposure would likely cause further harm to the already deficient Structure.²³

23. The Sale Process that the Receiver undertook was extensive and appropriate for the type of property in question and provided sufficient market exposure for the Property.²⁴

24. Aviva Insurance Company of Canada (“**Aviva**”) has the second-ranking mortgage registered against title to the Property in the principal amount of \$3.5 million.²⁵ The Receiver is not aware of any opposition from Aviva to approval of the sale transaction.²⁶

²² Second Report, paras. 80 and 82; Agreement of Purchase and Sale dated August 26, 2022, Redacted version at Appendix “R” to the Second Report; Unredacted version at Confidential Appendix 2 to the Second Report.

²³ Second Report, para. 87.

²⁴ Second Report, para. 84.

²⁵ Second Report, paras. 47 and 50.

²⁶ Reply Motion Record of RSM Canada Limited dated September 28, 2022, Tab 1, Supplement to the Second Report of the Receiver dated September 28, 2022 (the “**Supplementary Report**”), para. 14.

25. The Property is subject to four construction liens. The Receiver is not aware of any opposition from the lien claimants to approval of the sale transaction.²⁷

26. Various purchasers who had entered into agreements with Areacor to purchase a condominium unit in the Project have contacted the Receiver to advise that they support the recommended transaction.²⁸

PART III – ISSUE

27. Although the Receiver is seeking certain other relief on the within motion, including but not limited to establishing a lien holdback amount and the termination of pre-existing condominium purchase agreements, no stakeholder has indicated it opposes any such relief. Only approval of the proposed sale itself is opposed, by the Debtor.

28. Accordingly, the only issue on this motion is: *should the Court approve the sale transaction and the vesting of the Purchased Assets in and to the Purchaser, as recommend by the Receiver?* The Receiver submits the answer should be – *yes*.

PART IV – LAW AND ARGUMENT

Jurisdiction of the Court

29. Section 243 of the *Bankruptcy and Insolvency Act* provides the Court with jurisdiction to authorize a Court-appointed receiver to enter into an agreement to sell property and, in furtherance of that power, to grant an order vesting purchased assets in a purchaser.²⁹

²⁷ Supplementary Report, para. 13.

²⁸ Supplementary Report, para. 15.

²⁹ [*Bankruptcy & Insolvency Act*, RSC 1985 c. B-3, Section 243; *Third Eye Capital Corporation v. Resources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508 \[“*Dianor*”\], para 85.](#)

30. In addition, receivers have the powers set out in the orders appointing them. The Appointment Order in this proceeding empowers the Receiver to sell the Property and apply for a vesting order to convey the Property, free and clear of any liens or encumbrances affecting the Property.³⁰

31. Section 100 of the *Courts of Justice Act* also 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.³¹

The Test for Approval – The Soundair Principles

32. In *Royal Bank v. Soundair Corp.* (“**Soundair**”), the Court of Appeal set out the following four factors (the “**Soundair Principles**”) that courts must consider when deciding whether to approve a sale by a Court-appointed receiver:

- (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 unfairness in the working out of the process.³²

³⁰ Order (appointing Receiver), dated January 22 2022, Appendix “A” to the Second Report.

³¹ [Courts of Justice Act, RSO 1990, c. C. 43, Section 100.](#)

³² [Royal Bank v. Soundair \(1991\), 4 O.R. \(3d\) 1 \(C.A.\) \[“Soundair”\], para. 16.](#)

The Receiver's Recommendation is Given Deference

33. As noted by the Court of Appeal in *Soundair*, courts rely upon the expertise of receivers. Courts must place a great deal of confidence in the actions taken and in the opinions formed by a receiver. Courts should assume that the receiver is acting properly unless the contrary is clearly shown. Courts should be reluctant to second-guess the considered business decisions made by its receiver.³³

34. Since it is part of the very essence of a receiver's function to make business judgments based on the information available to it, the Court should only reject the recommendation of a receiver based on such judgment in the most exceptional circumstance.³⁴

35. It is only justifiable for the Court to enter into the sale process where it is satisfied that a receiver has not properly conducted the sale which it has recommended to the Court.³⁵

36. Provided a receiver has acted reasonably, prudently and not arbitrarily, a court should not review in detail every element of the procedure by which the receiver made its decision. To do so would be futile and duplicative. It would emasculate the role of the receiver.³⁶

The Recommended Transaction Should be Approved

37. Based on the foregoing, it is respectfully submitted that the Court should approve the sale transaction and grant an approval and vesting order, in accordance with the recommendation of

³³ [Soundair](#), para. 14; [Regal Constellation Hotel Ltd., Re](#), 71 O.R. (3d) 355 (C.A.), para. 23.

³⁴ [9-Ball Interests Inc. v. Traditional Life Sciences Inc.](#), 2012 ONSC 2788 [“*9-Ball*”], para. 28; [Skyepharma PLC v. Hyal Pharmaceutical Corp.](#) (1999), 12 C.B.R. (4th) 87 (S.C.J.) [“*Skyepharma SCJ*”], para. 3.

³⁵ [Soundair](#), para. 31.

³⁶ [Bank of Montreal v. Dedicated National Pharmacies Inc.](#), 2011 ONSC 4634, para.43.

the Receiver. It is the Receiver's position that the sale transaction should be approved by the Court as the *Soundair* Principles have been satisfied:

- (a) ***Sufficient effort was made to obtain the best price.*** The Receiver identified and specifically targeted approximately 1,000 prospective purchasers, including real estate developers, investors, and real estate brokerages, as well as advertised the opportunity publicly in national, regional and industry specific publications. These efforts resulted in thirty-five (35) executed confidentiality agreements and three (3) offers. As the offers were for values well short of the debt owing to MarshallZehr, the Receiver consulted with MarshallZehr and ultimately agreed to seek approval of an offer from a party introduced by MarshallZehr at the highest and best price by a significant margin. The Receiver's view is that the purchase price achieved is fair and reasonable given the exposure to the market, the market conditions, and the state of the Property.

- (b) ***Interests of all parties have been served.*** The sale transaction: provides for the best outcome in the circumstances for all stakeholders; represents the highest and best price; provides for payment of priority amounts, including over \$250,000 in property tax arrears;³⁷ provides for lien holdback amount to allow all the lien claimants and MarshallZehr to litigate or resolve priority lien claims; and, will terminate the condominium purchase agreements and enable such purchasers to seek recovery of their deposits.

³⁷ Second Report, para.68.

- (c) ***The process was run effectively and with integrity.*** The Sale Process was a conventional insolvency sale in accordance with prevailing insolvency practice and procedure. The Property was marketed directly to identified potential purchasers and industry actors and broadly in various publications. When the initial offers were received and it became apparent that MarshallZehr would be the only economic stakeholder in any sale, the Receiver consulted with the MarshallZehr and employed joint counsel (as permitted in the Appointment Order) with a view to determining next steps and saving costs. When MarshallZehr introduced the Purchaser and when it became apparent that the transaction may not be supported, the Receiver relied on independent counsel. The APS was negotiated in good faith, between parties acting at arm's length and is supported or not opposed by all interested parties, other than the Debtor.
- (d) ***There was no unfairness.*** The Sale Process was administered as above. It was run efficiently, and no party was denied participation in the process. In particular, the Receiver was in contact with the Debtor and its counsel between the date of the Receiver's appointment through the April 2022. The Debtor indicated it had a potential purchaser and the Receiver encouraged the Debtor to bring such party to the table but Debtor did not present any such party.³⁸ As above, when it became apparent that MarshallZehr would be the only economic stakeholder in any sale, the Receiver consulted with the MarshallZehr and employed joint counsel (as permitted in the Receivership Order) with a view to determining next steps and

³⁸ Supplementary Report, paras 10-12.

saving costs. The Receiver negotiated the terms of the APS and believes they are fair and reasonable in the circumstances.

38. In light of the reasons set out above, the Receiver states that sale transaction is provident – the purchase price is commercially reasonable given the relevant market conditions and it represents a significant recovery for the Debtor’s senior secured creditor, ancillary benefits to the Debtor’s stakeholders, and would not result in material prejudice to any creditor of the Debtor – and, accordingly, should be approved by the Court.

Opposition of the Debtor

39. In its materials, the Debtor opposes the recommend sale transaction on the vague suggestion that the Sale Process was improperly conducted and that, notwithstanding the considerable value realized, the Property should be re-marketed. Leaving aside the fact that the Debtor has not indicated how such process would be funded or by whom, the Receiver is of the view the Debtor’s opposition should be wholly rejected, including for the following reasons:

- (a) ***Interests of the Debtor do not Trump Creditors.*** Although the interests of the debtor are relevant on a sale of assets, the Receiver’s primary concern is to protect the interests of the Debtor’s creditors and maximize value for their benefit.³⁹ The examination of the sale process by the Court should be focused on the integrity of that process from the perspective of those for whose benefit it has been conducted.⁴⁰
- (b) ***No requirement that a Receiver Obtain an Appraisal.*** The Debtor argues that because the Receiver did not receive an appraisal, the process is flawed. This is

³⁹ [Dianor, para. 73.](#)

⁴⁰ [Skyepharma PLC v. Hyal Pharmaceutical Corp. \(2000\), 47 OR \(3d\) 234 \(CA\), para. 27.](#)

incorrect and has no basis in law. There is no requirement for a Court-appointed receiver to obtain an appraisal to satisfy the *Soundair* Principles. The best evidence of fair market value is listing a property for sale on the open market.⁴¹ As noted by the Alberta Court of Appeal, “[a]t a certain point...it is the market that sets the value of property and appraisals simply become "relegated to not much more than well-meant but inaccurate predictions.⁴² An appraisal is no more than an expert's opinion on what a property's sale price is likely to be if properly exposed to the market for an appropriate length of time. Where property has received a proper and lengthy exposure to the market, “there comes a point where the market speaks loudly and the appraisals become relegated to not much more than well-meant but inaccurate predictions.”⁴³

(c) ***No requirement to Contract with a Broker.*** The Debtor argues that because the Receiver did not contract with a broker, the process is flawed. This is incorrect and has no basis in law. There is no requirement for a Court-appointed receiver to utilize the services of a commercial real estate broker to satisfy the *Soundair* Principles. Regardless, in this case, the Receiver did expose this property to brokers through inclusion of well-known and prominent brokers on the Mailing List.

(d) ***Identity of the Purchaser.*** Additionally, the Debtor expresses concern that the Receiver entered into an agreement with a party introduced by MarshallZehr. However, as set out above, this did not occur until *after* the Sale Process had

⁴¹ [Lash v. Lash Point Association Corp., 2022 ONCA 361, para. 42.](#)

⁴² [Pricewaterhousecoopers Inc v. 1905393 Alberta Ltd., 2019 ABCA 433, para. 16.](#)

⁴³ [Romspen Mortgage Corp. v. Lantzville Foothills Estates Inc., 2013 BCSC 2222, para. 20.](#)

resulted in three offers well short of the debt owed to MarshallZehr and the result only benefits the Debtor and its principal, as it results in the highest and best sale transaction for the Property. As well, to the extent the Receiver relied on Chaitons as its counsel, it was entitled to do so under the Appointment Order (a typical cost-saving initiative in receiverships) and to the extent there was a potential conflict, the Receiver employed Loopstra Nixon as its independent counsel.

40. Finally, the Debtor has introduced certain market “comparables” to argue that the value of the Property is greater than the purchase price under the recommended sale transaction. The Receiver finds this argument very challenged in the face of the Sale Process that it administered and the market response. Additionally, the market “comparables” presented are for much larger scale projects, with occupancy dates between 2025 and 2027 and include numerous amenities (e.g., concierge, security, gym, party room, etc.) that the Jamesville Lofts never had. The Receiver disputes that these are “comparables” at all and are not relevant.

41. Ultimately, in order to successfully oppose the sale approval sought, the Debtor would need to satisfy the Court that this case falls into the exceptional circumstances where the Court should reject the business judgement and recommendation of the Receiver. To do so, the Court would need to find that the Sale Process was deficient or that the Receiver has acted improperly or arbitrarily.

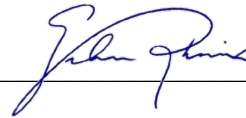
42. The Receiver submits that no such facts exist, and that the Debtor has not tendered evidence sufficient to warrant the Court rejecting the recommendation of the Receiver. As such, the Debtor’s opposition should be dismissed.

43. In light of the reasons set out above, the Receiver states that sale transaction satisfies the *Soundair* Principles and is provident – the purchase price is commercially reasonable in the relevant market conditions and it represents a significant recovery for the Debtor’s senior secured creditor, ancillary benefits to the Debtor’s stakeholders and would not result in material prejudice to any creditor of the Debtor – and, accordingly, should be approved by the Court.

PART V – ORDER REQUESTED

44. For the reasons set forth herein and in the Second Report and the Supplement to the Second Report, the Receiver respectfully requests the granting of the orders substantially in the forms attached to the Notice of Motion as appendices “A” and “B” as may be amended and presented at the hearing of this Motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 28th day of September 2022.



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SCHEDULE “A”
LIST OF AUTHORITIES

1. [*Third Eye Capital Corporation v. Resources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508 \(ONCA\)](#)
2. [*Royal Bank of Canada v. Soundair Corp.* \(1991\), 4 O.R. \(3d\) 1 \(ONCA\)](#)
3. [*Regal Constellation Hotel Ltd., Re*, 71 O.R. \(3d\) 355 \(C.A.\)](#)
4. [*9-Ball Interests Inc. v. Traditional Life Sciences Inc.*, 2012 ONSC 2788](#)
5. [*Skyepharma PLC v. Hyal Pharmaceutical Corp.* \(1999\), 12 C.B.R. \(4th\) 87 \(S.C.J.\)](#)
6. [*Bank of Montreal v. Dedicated National Pharmacies Inc.*, 2011 ONSC 4634](#)
7. [*Skyepharma PLC v. Hyal Pharmaceutical Corp.* \(2000\), 47 OR \(3d\) 234 \(CA\)](#)
8. [*Lash v. Lash Point Association Corp*, 2022 ONCA 361](#)
9. [*Pricewaterhousecoopers Inc v. 1905393 Alberta Ltd*, 2019 ABCA 433](#)
10. [*Romspen Mortgage Corp. v. Lantzville Foothills Estates Inc.*, 2013 BCSC 2222](#)

**SCHEDULE “B”
RELEVANT STATUTES**

1. *Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended*

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.

2. *Courts of Justice Act, R.S.O. 1990, c. B-3, as amended*

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.

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Court File No. CV-22-00674747-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
[Commercial List]**

Proceedings commenced at **Toronto**

**FACTUM OF
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APPOINTED RECEIVER**

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