

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

B E T W E E N:

**MARSHALLZEHR GROUP INC.**

Applicant

- and -

**FERNWOOD DEVELOPMENTS (ONTARIO) CORPORATION**

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 THE RECEIVER  
(Approval of Sale Transaction)**

May 7, 2021

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**PART I. NATURE OF THE MOTION**

1. This is a motion brought by RSM Canada Limited ("**RSM**"), in its capacity as Court-appointed receiver (the "**Receiver**") of the property, assets and undertakings of Fernwood Developments (Ontario) Corporation ("**Fernwood**" or the "**Debtor**") for an order:

- (a) authorizing and directing the Receiver to enter into an asset purchase agreement (the "**APA**") with 2815864 Ontario Inc. (the "**Purchaser**") and approving the sale transaction (the "**Transaction**") contemplated thereby;
- (b) vesting in the Purchaser the Debtor's right, title and interest in and to the "Purchased Assets" (as defined in the APA), free and clear of all claims and encumbrances other than permitted encumbrances, upon delivery of a certificate by the Receiver to the Purchaser;
- (c) approving the Receiver's conduct and activities to April 30, 2021, as set out in the Third Report of the Receiver dated April 30, 2021 (the "**Third Report**");
- (d) authorizing and directing the Purchaser to pay the Receiver the Priority Payables (as defined in the APA) to be held in trust by the Receiver pending further order of this court or the consent of both MarshallZehr Group Inc. ("**MarshallZehr**") and the respective lien claimant for whom the Priority Payable is being held;

- (e) sealing Confidential Appendix “1” to the Third Report pending closing of the Transaction or further Order of the Court; and
- (f) such further and other relief as counsel may request and this Honourable Court may permit.

## **PART II. OVERVIEW**

2. The Receiver and the Purchaser have agreed to a form of APA, pending court authorization. The Purchaser is an affiliate of MarshallZehr, the senior secured creditor of Fernwood who is credit bidding for all of the Purchased Assets. The APA is the culmination of extensive discussions between MarshallZehr and the Receiver. The Transaction is consistent with *Soundair* principles and should be approved.

3. The Receiver believes that the APA represents a commercially reasonable disposition of Fernwood’s property, assets and undertakings, and recommends that the Court approve the pending Transaction because:

- (a) the Receiver has made reasonable and good faith efforts to sell the Purchased Assets;
- (b) a broad marketing of the Real Property (defined below) was carried out by the Receiver in accordance with the Court-approved Sale Process (defined below);
- (c) the APA represents, by far, the highest and best offer for the Real Property and Fernwood’s Litigation Claims; and

- (d) the aggregate consideration for all the Purchased Assets (plus the funding of the Potential Priority Claims, defined below) is materially in excess of any realization that the Receiver could expect to achieve if the assets were marketed and sold separately.

4. The Receiver has filed under seal a confidential appendix, which contains summaries of the offers received for the Real Property. The Receiver requests that Confidential Appendix “1” to the Third Report be sealed pending closing of the Transaction or further Order of the Court, to avoid prejudice in the event that the contemplated sale does not close.

### **PART III. FACTS**

#### **A. *Background***

5. Fernwood was the developer of a 94 residential unit stacked townhouse phased condominium complex known as Schoolhouse Barrie (formerly known as Georgian Meadows), located in Barrie, Ontario (the “**Development**”). The Development was marketed as an investment opportunity, with the intention that purchasers would acquire the units and lease them to, among others, students attending Georgian College in Barrie, Ontario.<sup>1</sup>

6. Each of the three phases of the Development consists of two buildings. Phases 1 and 2 are complete and Fernwood has sold all but 26 residential units (collectively,

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<sup>1</sup> Third Report at paras. 9-10, Motion Record (motion for approval of sale transaction) (“**MR**”) Tab 3, p. 42 (PDF p. 51).

the “**Residential Units**”) and 26 parking spaces in these two phases of the Development.<sup>2</sup>

7. There currently are 49 tenants of the Residential Units, paying monthly rent of approximately \$30,625 in aggregate.<sup>3</sup>

8. Phase 3 of the Development, which consists of 32 residential units, is incomplete and in various stages of construction. The residential units in Phase 3 have yet to be sold by Fernwood and are not subject to agreements of purchase and sale and have no tenants.<sup>4</sup>

9. MarshallZehr provided Fernwood with construction financing of \$19.95 million (the “**Loan**”) pursuant to a commitment letter dated September 20, 2016, as amended. The Loan was repayable on demand and matured on September 1, 2019.<sup>5</sup>

10. MarshallZehr’s security over Fernwood’s property and assets includes a charge/mortgage in the principal amount of \$22 million (the “**Charge**”) and a general assignment of leases and rents, both registered on title to Fernwood’s real property, including the Residential Units, parking spaces, and Phase 3 of the Development (the “**Real Property**”), and a general security agreement (the “**GSA**”).<sup>6</sup> MarshallZehr holds a valid and perfected security interest in all of Fernwood’s personal property pursuant to

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<sup>2</sup> Third Report at para. 11, MR Tab 3, p. 42 (PDF p. 51).

<sup>3</sup> Third Report at para. 12, MR Tab 3, p. 43 (PDF p. 52).

<sup>4</sup> Third Report at para. 13, MR Tab 3, p. 43 (PDF p. 52).

<sup>5</sup> Third Report at para. 14, MR Tab 3, p. 43 (PDF p. 52).

<sup>6</sup> Third Report at para. 15, MR Tab 3, p. 43 (PDF p. 52).

the GSA, and the Charge constitutes a valid and enforceable first charge on the Real Property.<sup>7</sup>

11. Fernwood is indebted to MarshallZehr in excess of \$26.0 million for principal, interest, fees and costs (collectively, the “**Secured Debt**”).<sup>8</sup>

12. MarshallZehr’s receivership application was originally scheduled to be heard on February 10, 2020. At the request of counsel to Fernwood, the hearing date was adjourned to February 12, 2020. On February 11, 2020, Fernwood commenced an action against MarshallZehr (the “**MZ Litigation**”).<sup>9</sup>

13. On February 12, 2020, RSM was appointed Receiver, without security, of all of the assets, undertakings and properties of Fernwood acquired for, or used in relation to a business carried on by Fernwood (the “**Property**”).<sup>10</sup>

14. On July 7, 2020, the Court granted an order approving the Receiver’s proposed sale process (the “**Sale Process**”) for the Property (the “**Approval Order**”).<sup>11</sup>

## **B. Sale Process**

15. In accordance with the Approval Order, the Receiver carried out the Sale Process as follows:

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<sup>7</sup> Third Report at para. 16, MR Tab 3, pp. 43-44 (PDF pp. 52-53); Appendix “D” to the Third Report – Legal Opinion, MR Tab 3-D, pp. 118-140 (PDF pp. 127-149).

<sup>8</sup> Third Report at para. 17, MR Tab 3, p. 44 (PDF p. 53).

<sup>9</sup> Third Report at para. 29, MR Tab 3, p. 48 (PDF p. 57); Appendix “F” to the Third Report – Statement of Claim, MR Tab 3-F, pp. 176-191 (PDF pp. 185-200).

<sup>10</sup> Third Report at paras. 1, 30, MR Tab 3, pp. 39, 48 (PDF pp. 48, 57); Appendix “A” to the Third Report – Appointment Order, MR Tab 3-A, pp. 59-77 (PDF pp. 68-86).

<sup>11</sup> Third Report at para. 5, MR Tab 3, p. 40; Appendix “C” to the Third Report – Approval Order, MR Tab 3-C, pp. 113-116 (PDF pp. 122-125).

- (a) the Receiver contacted approximately 62 parties and provided a copy of the marketing brochure for the Real Property;
- (b) the Receiver advertised the Sale Process in the Financial Post and in a local Barrie newspaper; and
- (c) 23 parties signed a non-disclosure agreement and received a confidential information memorandum and access to a data room.<sup>12</sup>

16. At the outset of the Sale Process, MarshallZehr informed the Receiver that it wished to make a credit bid offer for all of the Property. MarshallZehr's ability to make a credit bid for the Property was expressly contemplated in the Sale Process.

17. The Receiver extended the bid deadline from July 30, 2020 to August 14, 2020 in the hopes of allowing prospective bidders more time to view the Real Property and consider making a bid.

18. Ultimately, only two offers were made for the Real Property. Each offer was significantly less than the amount that Fernwood is indebted to MarshallZehr. Moreover, each offer was subject to due diligence conditions.<sup>13</sup>

19. The Receiver decided to reject the two offers for the Real Property. Based on its experience conducting the Sale Process, the Receiver concluded at the time that there

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<sup>12</sup> Third Report at para. 18, MR Tab 3, p. 44 (PDF p. 53).

<sup>13</sup> Third Report at paras. 19, 21, MR Tab 3, p. 44-45 (PDF p. 53-54).

was no reasonable prospect of selling the Real Property for an amount that could possibly come close to paying out MarshallZehr's indebtedness.<sup>14</sup>

20. At the same time, MarshallZehr continued to express an interest in acquiring Fernwood's assets through a credit bid. In the Receiver's view, this was the most desirable approach. Accordingly, the Receiver began discussions with MarshallZehr on structuring such a transaction.<sup>15</sup>

21. Given the complexities of a potential credit bid, it took time to work through numerous issues and scenarios including, among others, whether MarshallZehr would provide financing to the Receiver to complete the construction of the Phase 3 Lands or whether MarshallZehr would acquire the Real Property in its current state. Ultimately, MarshallZehr concluded that it wished to pursue a credit bid transaction with the Real Property in its current state. This was also the Receiver's preferred option.<sup>16</sup>

### **C. The APA**

#### **1. Summary**

22. The Purchaser has submitted a signed form of APA to the Receiver. The Receiver has not yet signed the APA but intends to do so upon the Court granting authorization for the Receiver to enter into the APA. The Purchaser is a newly incorporated company that is affiliated with MarshallZehr. A summary of the Transaction is as follows:

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<sup>14</sup> Third Report at para. 22, MR Tab 3, p. 45 (PDF p. 54).

<sup>15</sup> Third Report at para. 23, MR Tab 3, p. 45 (PDF p. 54).

<sup>16</sup> Third Report at para. 24, MR Tab 3, pp. 45-46 (PDF pp. 54-55).



- (a) **Purchase Price**: is in excess of \$25.25 million and is comprised of (i) approximately \$24.93 million of the Secured Debt, (ii) an amount necessary to satisfy all “Priority Payables” (as defined in the APA), (iii) all amounts secured by the Receiver’s Charge under the Appointment Order and a further \$150,000 as an estimate of the fees and expenses to be incurred by the Receiver up to the Receiver’s discharge, and (iv) assumption of certain liabilities;
- (b) **Purchased Assets**: substantially all of Fernwood’s property, assets and undertaking including the Real Property and the Litigation Claims;
- (c) **Closing**: the first business day following the expiry of the applicable appeal period for the approval and vesting order;
- (d) **Representations and Warranties**: “as is, where is” transaction with limited representations and warranties;
- (e) **Material Condition**: issuance of an approval and vesting order.<sup>17</sup>

23. Although some stakeholders raised the issue that there has been an increase in the residential property market since completion of the Sales Process, the Receiver’s view remains that, based on the results of that Sales Process, there is no reasonable prospect of generating a superior offer to the MarshallZehr credit bid and APA.

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<sup>17</sup> Third Report at para. 25, MR Tab 3, pp. 46-47 (PDF pp. 55-56); Appendix “E” to the Third Report – Asset Purchase Agreement, MR Tab 3-E, pp. 142-174 (PDF pp. 151-183).

24. As a result, the Receiver is firmly of the view that it is not in the best interests of Fernwood's creditors to undertake the significant time and cost to run an additional sale process at this time, notwithstanding an increase in the residential property market, if any.<sup>18</sup>

## 2. Litigation Claims

25. The Purchased Assets includes Fernwood's interest in:

- (a) the MZ Litigation, commenced by Fernwood against MarshallZehr on the day before the Receiver's appointment; and
- (b) any cause of action (the "**Pensio Cause of Action**" and with the MZ Litigation, the "**Litigation Claims**") that Fernwood may have against Pensio Property Management Group Inc., Ai Guarantee Inc., Nationwide Rentsure Canada Corp., and any affiliated parties (collectively, "**Pensio**").<sup>19</sup>

26. The Receiver has not yet conducted an independent review or investigation into the allegations made by Fernwood in the MZ Litigation.<sup>20</sup>

27. On February 9, 2020, the Receiver's counsel sent a letter to counsel to Fernwood and the former principals of Fernwood to advise them of this motion, which was originally returnable on February 24, 2021. The Receiver's counsel requested that, before the APA was finalized, the former principals of Fernwood advise whether they

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<sup>18</sup> Third Report at para. 26, MR Tab 3, p. 47 (PDF p. 56).

<sup>19</sup> Third Report at paras. 27, 41-43, MR Tab 3, pp. 47, 50-51 (PDF pp. 56, 59-60).

<sup>20</sup> Third Report at para. 31, MR Tab 3, p. 48 (PDF p. 57).

have any interest in acquiring the MZ Litigation by 5 pm on February 12, 2020 and propose a purchase price.<sup>21</sup>

28. Fernwood's counsel responded to the Receiver's counsel on February 12, 2021 to advise that it needed more time to consider its client's position. Fernwood's counsel also sought confirmation that the Receiver would hold the sale of the MZ Litigation in abeyance.<sup>22</sup>

29. On February 18, 2021, the Receiver's counsel told Fernwood's counsel that the motion was adjourned to March 12, 2021 and that, accordingly, their clients now had more than sufficient time to consider whether they had any interest in acquiring any of the MZ Litigation. Counsel requested that any offer for the Litigation Claims be submitted by February 25, 2021.<sup>23</sup>

30. On February 25, 2021, Fernwood's counsel responded with an offer for the Litigation Claims by Fernwood's principal, Mr. Zukowski (the "**Zukowski Offer**"). The Zukowski Offer provided a purchase price for the MZ Litigation of: (i) \$10,000, payable by Mr. Zukowski to the Receiver; and (ii) a contingent amount of 25% of the net proceeds of any successful settlement or final judicial determination of the MZ Litigation, to be paid to the Receiver upon receipt by the Plaintiff.<sup>24</sup>

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<sup>21</sup> Third Report at para. 32, MR Tab 3, p. 48 (PDF p. 57); Appendix "G" to the Third Report – Letter dated February 9, 2021, MR Tab 3-G, p. 193 (PDF p. 202).

<sup>22</sup> Third Report at para. 33, MR Tab 3, p. 49 (PDF p. 58); Appendix "H" to the Third Report – Letter dated February 12, 2021, MR Tab 3-H, pp. 195-196 (PDF pp. 204-205).

<sup>23</sup> Third Report at para. 34, MR Tab 3, p. 49 (PDF p. 58); Appendix "I" to the Third Report – Letter dated February 18, 2021, MR Tab 3-I, p. 198 (PDF p. 207).

<sup>24</sup> Third Report at paras. 35-36, MR Tab 3, p. 49 (PDF p. 58); Appendix "J" to the Third Report – Letter dated February 25, 2021, MR Tab 3-J, pp. 200-201 (PDF pp. 209-210).

31. Any meaningful realization from the Zukowski Offer is contingent on the successful prosecution of the MZ Litigation. On an aggregate basis, the Zukowski Offer is materially lower than MarshallZehr's offer for all of the Purchased Assets.<sup>25</sup>

32. Based on the purchase price under the APA and the offers received, the Receiver is satisfied that fair consideration is being provided by the Purchaser for the Purchased Assets, including the MZ Litigation, even if the MZ Litigation has merit.<sup>26</sup>

33. Indeed, the aggregate consideration for all of the Purchased Assets (plus the funding of the Potential Priority Claims, as defined and described below) is materially in excess of any realization that the Receiver could expect to achieve if the assets were marketed and sold separately. The terms of the Zukowski Offer for the MZ Litigation only reinforce the Receiver's conclusion and recommendation.<sup>27</sup>

### **3. Priority Payables**

34. Under the APA, on closing, the Purchaser is required to satisfy any amount that has priority over MarshallZehr's security. In addition to the claims discussed below, there is less than \$3,000 owed to Canada Revenue Agency in connection with an employee source deduction deemed trust amount.<sup>28</sup>

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<sup>25</sup> Third Report at para. 37, MR Tab 3, pp. 49-50 (PDF pp. 58-59).

<sup>26</sup> Third Report at para. 38, MR Tab 3, p. 50 (PDF p. 59).

<sup>27</sup> Third Report at para. 39, MR Tab 3, p. 50 (PDF p. 59); Appendix "K" to the Third Report – Letter dated March 30, 2021, MR Tab 3-K, pp. 203-204 (PDF pp. 212-213).

<sup>28</sup> Third Report at para. 44, MR Tab 3, p. 51 (PDF p. 60).

35. Six parties have registered construction liens against the Phase 3 Lands with respect to goods and/or services supplied to Fernwood. Each of the lien claimants contracted directly with Fernwood.<sup>29</sup>

36. The Receiver has not yet determined the validity, enforceability, quantum or priority of any of the construction liens. Rather, the Receiver has only attempted to determine the maximum amount of each lien claimant's potential priority claim over the Charge (the "**Potential Priority Claims**"). The Purchaser has agreed to pay the Potential Priority Claim amounts to the Receiver to be held in trust. Accordingly, in the Receiver's view, each of the lien claimants will be protected in the event their respective priority claim is ultimately established.<sup>30</sup>

37. The Receiver has calculated the Potential Priority Claims as follows:<sup>31</sup>

<u>Lien Claimant</u>	<u>Quantum of Lien Claims</u>	<u>Potential Priority Claim (10% of value of services provided. Amount based on total contract value as stated in liens)</u>
Duncan Drywall	\$178,195.00 plus HST	\$ 24,000.00 plus HST
Ground Electrical Services	\$106,939.80	\$ 10,693.98
Jeff McKeever Plumbing	\$173,489.63	\$ 21,198.96
Priority Mechanical Services Ltd.	\$231,154.55	\$107,098.77

<sup>29</sup> Third Report at para. 45, MR Tab 3, p. 51 (PDF p. 60).

<sup>30</sup> Third Report at paras. 48-49, MR Tab 3, p. 52 (PDF p. 61).

<sup>31</sup> Third Report at para. 50, MR Tab 3, p. 53 (PDF p. 62).

<u>Lien Claimant</u>	<u>Quantum of Lien Claims</u>	<u>Potential Priority Claim (10% of value of services provided. Amount based on total contract value as stated in liens)</u>
Nezz Electric	\$122,285.30	\$ 17,924.74
Mack Construction	\$ 28,740.00	\$ 2,874.00

38. The Receiver and its counsel have been in contact with counsel to the lien claimants to confirm the quantum of the Potential Priority Claims. Four out of the six lien claimants, Nezz Electric, Ground Electrical Services, Mack Construction, and Priority Mechanical Services, have each advised that they agree with the Potential Priority Claim calculations in respect of their clients.<sup>32</sup>

39. Two of the lien claimants, Duncan Drywall and Jeff McKeever Plumbing (“**JMP**”), are represented by Paul Daffern of Paul J. Daffern Law Firm. Mr. Daffern does not agree with the Potential Priority Claim calculations in respect of his two clients.<sup>33</sup>

40. In the case of Duncan Drywall, while the Receiver has advised Mr. Daffern that it is not aware of circumstances in which Duncan Drywall’s priority claim could exceed the Potential Priority Claim of \$24,000 (10% of the value of services supplied), Duncan Drywall maintains that it has priority over the Charge for the full amount of its lien of \$178,195, plus HST. In the absence of any further agreement between the parties, on

<sup>32</sup> Third Report at paras. 51-52, MR Tab 3, p. 53 (PDF p. 62).

<sup>33</sup> Third Report at para. 53, MR Tab 3, pp. 53-54 (PDF p. 62-63); Appendix “M” to the Third Report – Correspondence between Paliare Roland and Paul Daffern, MR Tab 3-M, pp. 209-213 (PDF pp. 218-222).

closing of the Transaction the Purchaser has agreed to pay to the Receiver in trust the full amount of Duncan Drywall's lien claim of \$178,195, plus HST.<sup>34</sup>

41. In the case of JMP, it asserts a priority claim of \$173,489, plus HST. However, JMP has not even made a claim for priority in its Statement of Claim with respect to its lien, nor did JMP name MarshallZehr, the mortgagee, as a party to the claim. Both of these steps are required to validly assert priority over the Charge.

42. Nevertheless, the Receiver still proposes that the amount of \$21,198.96, being 10% of the value of services supplied as indicated in the chart above, be held in respect of JMP's Potential Priority Claim. The Purchaser has agreed to provide for this amount on closing.

43. The amounts being paid by the Purchaser to the Receiver in trust on closing are on a without prejudice basis to any argument the Purchaser and/or MarshallZehr may make as to the validity, enforceability, quantum and/or priority of the construction liens.<sup>35</sup>

#### **PART IV. ISSUES, LAW AND ARGUMENT**

44. The Receiver's motion raises the following two legal issues:

- (a) should the Court approve the Transaction contemplated by the APA, including the sale of the Litigation Claims to MarshallZehr?
- (b) is it appropriate for the Court to seal Confidential Appendix "1" to the Third Report pending closing of the Transaction or further Order of the Court?

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<sup>34</sup> Third Report at para. 55, MR Tab 3, p. 54 (PDF p. 63).

<sup>35</sup> Third Report at para. 56, MR Tab 3, p. 54 (PDF p. 63).

**A. The Court Should Approve the Transaction**

45. The Transaction contemplated by the APA is consistent with the principles set out in *Royal Bank v. Soundair Corp*<sup>36</sup> and the Court should approve the Transaction.

**1. The Transaction is consistent with *Soundair* principles**

46. In assessing whether to approve a sale by a receiver, a court should consider:

- (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.<sup>37</sup>

47. Having regard to the foregoing, this Court should approve the Transaction and the related relief sought by the Receiver. In particular, the Receiver notes that:

- (a) the Real Property was publicly listed for sale and marketed in accordance with the Approval Order;<sup>38</sup>
- (b) the Real Property was exposed to the market for a sufficient period of time in the Sale Process, and the bid deadline was extended by the Receiver;<sup>39</sup>

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<sup>36</sup> [1991 CanLII 2727 \(ONCA\)](#) [*“Soundair”*].

<sup>37</sup> [Soundair](#) at para. 16.

<sup>38</sup> Third Report at para. 18, MR Tab 3, p. 44 (PDF p. 53).

<sup>39</sup> Third Report at para. 19, MR Tab 3, p. 44 (PDF p. 53).



- (c) the Sale Process led to two offers for the Real Property, as well as MarshallZehr's credit bid for all of the Property, which culminated in the APA with the Purchaser;<sup>40</sup>
- (d) it is well-established in Canadian insolvency law that a secured creditor is permitted to credit bid its debt in lieu of providing cash consideration, and no stakeholder is prejudiced by MarshallZehr's credit bid;<sup>41</sup>
- (e) the former principals of Fernwood were given more than sufficient time to consider whether they had any interest in acquiring the MZ Litigation;<sup>42</sup>
- (f) the Receiver is satisfied that fair consideration is being provided by the Purchaser for the Purchased Assets, and that the aggregate consideration for all of the Purchased Assets is materially in excess of any realization that the Receiver could expect to achieve if the assets were marketed and sold separately;<sup>43</sup>
- (g) the APA provides for the satisfaction on closing of any Priority Payables;<sup>44</sup> and
- (h) the Purchaser has agreed to pay the maximum amount of the Potential Priority Claims to the Receiver to be held in trust, so that the construction

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<sup>40</sup> Third Report at paras. 19-24, MR Tab 3, pp. 44-45 (PDF pp. 53-54).

<sup>41</sup> See *Elleway Acquisitions Ltd. v. 4358376 Canada Inc.*, [2013 ONSC 7009 \(Commercial List\)](#) at paras. 38-41 [*"Elleway"*]; *8527504 Canada Inc. v. Liquibrands Inc.*, [2015 ONSC 5912 \(Commercial List\)](#) at paras. 19-22 [*"Liquibrands"*], ref'g leave to appeal [2015 ONCA 916](#).

<sup>42</sup> Third Report at paras. 32-35, MR Tab 3, pp. 48-49 (PDF p. 57-58).

<sup>43</sup> Third Report at paras. 38-39, MR Tab 3, p. 50 (PDF p. 59).

<sup>44</sup> Third Report at para. 44, MR Tab 3, p. 51 (PDF p. 60).

lien claimants will be protected in the event their priority claims are ultimately established.<sup>45</sup>

48. These factors are consistent with a properly run sale process pursuant to *Soundair* principles.

49. The Receiver is of the view that the Transaction represents the most advantageous offer for Fernwood's creditors, and recommends approval of the Transaction.

50. As the Court affirmed in *Soundair*,

If the court were to reject the recommendation of the Receiver in any but the most exceptional circumstances, it would materially diminish and weaken the role and function of the Receiver both in the perception of receivers and in the perception of any others who might have occasion to deal with them. It would lead to the conclusion that the decision of the Receiver was of little weight and that the real decision was always made upon the motion for approval. That would be a consequence susceptible of immensely damaging results to the disposition of assets by court-appointed receivers.<sup>46</sup>

51. In this case, there are no exceptional circumstances which would warrant rejecting the Receiver's recommendation.

**2. The Receiver has not acted improvidently by preferring MarshallZehr's credit bid over the Zukowski Offer for the MZ Litigation**

52. Litigation commenced by a debtor is an asset which may be marketed and sold by a receiver in receivership proceedings.<sup>47</sup> The receiver may accept a bid from a secured creditor that has been named as a defendant in the debtor's litigation, even

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<sup>45</sup> Third Report at para. 49, MR Tab 3, p. 52 (PDF p. 61).

<sup>46</sup> *Soundair* at para. 21.

<sup>47</sup> *8527504 Canada Inc. v. Liquibrands Inc.*, [2014 ONSC 7015 \(Commercial List\)](#) at para. 37, ref'g leave to appeal 2015 CarswellOnt 5295 (C.A.).

where accepting the bid puts an end to the litigation.<sup>48</sup> In such circumstances, Ontario courts have supplemented the *Soundair* analysis with the following principles:

- (a) there is nothing improper about a defendant secured creditor purchasing litigation claims against it by way of a credit bid;<sup>49</sup>
- (b) the receiver is generally entitled to prefer an unconditional offer over an offer that is contingent, in whole or in part, on a potential recovery in the litigation, particularly where there are limited funds in the estate and recovery in the litigation is uncertain;<sup>50</sup>
- (c) in conducting the sale process, the receiver is not required to value the litigation or determine its merits by permitting it to proceed to trial;<sup>51</sup> and
- (d) the “court must exercise extreme caution before it interferes with the process adopted by the receiver to sell an unusual asset”, such as litigation claims.<sup>52</sup>

53. Applying the foregoing principles, the Receiver’s decision to accept MarshallZehr’s credit bid over the Zukowski Offer should not be interfered with.

54. First, as in *Liquibrands* and *Elleway*, MarshallZehr’s credit bid does not prejudice the former principals of Fernwood or any of Fernwood’s creditors, because:

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<sup>48</sup> [Liquibrands](#) at paras. 15-18.

<sup>49</sup> [Liquibrands](#) at paras. 19-22.

<sup>50</sup> *Katz, Re*, [1991] O.J. No. 1369 (Gen. Div.) at para. 9 [“**Katz**”]; *Geler (Bankruptcy), Re*, [2005 CanLII 18283 \(ON SC\)](#) at para. 11 [“**Geler**”].

<sup>51</sup> [Liquibrands](#) at para. 23.

<sup>52</sup> *Fifth Third Bank v. MPI Packaging Inc.*, [2010 ONSC 73 \(Commercial List\)](#) at paras. 17, 23 [“**Fifth Third Bank**”], aff’d [2010 ONCA 431](#).

- (a) the reduction of the indebtedness owed to MarshallZehr by way of the credit bid will still leave a shortfall of Secured Debt, which has a valid, first-priority security interest in such property; as a result, if cash was paid in lieu of a credit bid, such as the \$10,000 contemplated under the Zukowski Offer, this cash would all accrue to the benefit of MarshallZehr and not any unsecured creditors;<sup>53</sup>
- (b) the Purchaser is providing for the satisfaction of all Priority Payables and Potential Priority Claims that may rank in priority to MarshallZehr's security;<sup>54</sup> and
- (c) MarshallZehr's credit bid has not had a chilling effect on would-be bidders for the Litigation Claims; the former principals of Fernwood – the individuals most knowledgeable about the MZ Litigation – have not submitted a competitive bid, although the Receiver has given them ample opportunity to do so.<sup>55</sup>

55. Second, the Receiver is entitled to prefer MarshallZehr's unconditional bid over the Zukowski Offer which is contingent on the successful prosecution of the MZ Litigation for any meaningful realization. In this respect, the Zukowski Offer resembles other offers which courts have held were reasonably rejected:

- (a) In *Katz*, the trustee-in-bankruptcy marketed the bankrupt's action claiming damages of \$3 million. The trustee accepted the defendants' cash bid of

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<sup>53</sup> See [Liquibrands](#) at para. 21; [Elleway](#) at para. 40.

<sup>54</sup> See [Elleway](#) at para. 40.

<sup>55</sup> See [Liquibrands](#) at paras. 22, 24.

\$15,100 and rejected the bankrupt's offer for \$6,000 cash and a percentage of the net recovery in the action. The Court held that the trustee had acted in accordance with *Soundair* principles, and had not acted unreasonably in refusing to speculate by accepting an offer tied to an uncertain recovery.<sup>56</sup>

- (b) In *Geler*, the trustee-in-bankruptcy marketed the bankrupt's action and accepted the defendants' cash bid of \$16,050 over the bankrupt's bid of 15% of the bankrupt's recovery. The court approved the trustee's sale, noting that in the circumstances, "a bird in the hand is to be preferred over two in the bush".<sup>57</sup>

56. Moreover, even if the MZ Litigation has merit, the aggregate consideration set out in the APA for all of the Purchased Assets is materially in excess of any realization that the Receiver could expect to achieve if the assets were marketed and sold separately.<sup>58</sup> In these circumstances, the Receiver's duty to maximize the value of Fernwood's Property is best served by accepting MarshallZehr's credit bid.

57. Third, the MZ Litigation is an unusual, speculative asset. If Receiver has acted reasonably, prudently, fairly and not arbitrarily in marketing and selling this type of asset, then it is "only in an exceptional case that the court will intervene and proceed contrary to the Receiver's recommendations".<sup>59</sup> This is not an exceptional case.

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<sup>56</sup> [Katz](#) at paras. 3, 5, 9.

<sup>57</sup> [Geler](#) at paras. 7, 11.

<sup>58</sup> Third Report at paras. 37-39, MR Tab 3, pp. 49-50 (PDF pp. 59-59).

<sup>59</sup> [Fifth Third Bank](#) at paras. 17, 23.

58. The Receiver has conducted the Sale Process, including the sale of the MZ Litigation, fairly, reasonably, and not arbitrarily, in accordance with *Soundair* principles. The Receiver has not acted improvidently by preferring MarshallZehr's credit bid over the Zukowski Offer.

**B. *Duncan Drywall and JMP***

59. Duncan Drywall and JMP each filed responding motion records on May 5, 2021. In affidavits, Duncan Drywall and JMP make a number of claims and demands for relief.

60. Many of the allegations in Duncan Drywall and JPM's affidavits go to determining the validity, enforceability, quantum and/or priority of the construction liens, which is expressly not the subject of the Receiver's motion for approval of the Transaction.

61. Duncan Drywall and JMP each seek a reserve of 25% of the amount of their lien claims on account of legal costs. There is no legal basis for such a reserve in the circumstances. The *Construction Act*, R.S.O. 1990, CHAPTER C.30 provides that where a person is bringing a motion to vacate a lien pursuant to s. 44 of the *Construction Act*, without notice, 25% of the amount of the claim must be paid into Court on account of legal costs (in addition to the full amount of the claim); however, the Receiver is not attempting to vacate any lien claims under this section. As a result, the process for vacating a lien, including the requirement to pay 25% for legal costs into Court, is wholly inapplicable.

62. Both Duncan Drywall and JMP seek payment of the Priority Payables into Court, as opposed to the Receiver, in trust. This request is unreasonable. The APA provides that the Priority Payables are a part of the purchase price, to be paid by the Purchaser

to the Receiver. The Receiver, a Court officer acting pursuant to a Court order, will hold these funds in trust pending determination as to the validity, enforceability, quantum and/or priority of the construction liens. There is no basis to have these funds paid into Court, contrary to the terms of the APA, and doing so will only increase costs.

63. Further, both Duncan Drywall and JMP seek to have their lien claims heard in a variety of different proceedings in Barrie. Fernwood is subject to both bankruptcy proceedings and a receivership over the Property. As a result, the lien claimants' actions in respect of the Property are stayed by both the automatic stay under the *BIA* upon bankruptcy and the stay imposed under the terms of the Appointment Order. The stay is a crucial component of insolvency proceedings, ensuring the integrity of the single proceeding model. As the Ontario Court of Appeal held, "lifting the automatic stay is far from a routine matter".<sup>60</sup> The onus is on the party seeking to lift the stay to establish that there are "sound reasons, consistent with the scheme of the *Bankruptcy and Insolvency Act*, to relieve against the automatic stay."<sup>61</sup>

64. In this case, lifting the stay and granting leave for Duncan Drywall and JMP to pursue their claims outside the bankruptcy and receivership proceedings would result in a multiplicity of proceedings in different Courts. This would significantly increase professional costs and could result in conflicting decisions.

65. JMP also requests an adjournment of the sale approval hearing, claiming that the Receiver's motion was short-served. The Receiver's motion record was served on April 30, 2021, in advance of the ten-day service deadline applicable to a motion for sale

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<sup>60</sup> *Ma v. Toronto-Dominion Bank*, [2001 CanLII 24076 \(Ont. C.A.\)](#) at para. 3 ["*Ma*"].

<sup>61</sup> *Ma* at para. 3.

approval under the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3. Moreover, counsel to JMP has had notice that the Receiver will be bringing this motion for months—JMP has had ample time to prepare any responding materials. JMP has also had ample opportunity to bring any motions of its own, such as a motion to lift the stay.

**C. The Court Should Seal the Confidential Appendix**

66. The Receiver seeks an Order sealing the Confidential Appendix “1” to the Third Report, containing summaries of the offers for the Real Property, pending closing of the Transaction or further Order of the Court.

67. In *Sierra Club of Canada v. Canada (Minister of Finance)*, the Supreme Court described two circumstances in which a court should seal part of a record before it:

- (a) when an order is needed 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) when the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which includes public interest in open and accessible court proceedings.<sup>62</sup>

68. In the context of court-supervised sale proceedings, this Court has routinely applied *Sierra Club* and held that it is appropriate to seal information and documentation filed in support of a motion to approve a sale where the materials “disclose the

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<sup>62</sup> *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002 SCC 41 \(CanLII\)](#) at para. 53 [**“Sierra Club”**].



valuations of the assets under sale, the details of the bids received by the court-appointed officer and the purchase price contained in the offer for which court approval is sought".<sup>63</sup>

69. Sealing the summaries of the offers received is necessary to protect the integrity and fairness of the sale process, preventing competitors or potential bidders from gaining an unfair advantage by obtaining commercially sensitive information, and ensuring the Receiver can maximize value for the Debtor's estate if the Transaction does not close.<sup>64</sup>

#### **PART V. ORDER REQUESTED**

70. The Receiver respectfully requests orders substantially in the form attached as Tab 2 to the Motion Record.

#### **ALL OF WHICH IS RESPECTFULLY SUBMITTED**

May 7, 2021



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Jeffrey Larry/Elizabeth Rathbone

**Paliare Roland Rosenberg Rothstein LLP**

Lawyers for RSM Canada Limited

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<sup>63</sup> *GE Canada Real Estate Financing Business Property Co. v. 1262354 Ontario Inc.*, [2014 ONSC 1173 \(CanLII\)](#) at para. 32 [*"GE Canada"*].

<sup>64</sup> *GE Canada* at paras. 32-34.

## SCHEDULE “A” – LIST OF AUTHORITIES

1. *Royal Bank v. Soundair Corp.*, [1991 CanLII 2727 \(ONCA\)](#)
2. *Elleway Acquisitions Ltd. v. 4358376 Canada Inc.*, [2013 ONSC 7009 \(Commercial List\)](#)
3. *8527504 Canada Inc. v. Liquibrands Inc.*, [2015 ONSC 5912 \(Commercial List\)](#),  
ref’g leave to appeal [2015 ONCA 916](#)
4. *8527504 Canada Inc. v. Liquibrands Inc.*, [2014 ONSC 7015 \(Commercial List\)](#),  
ref’g leave to appeal 2015 CarswellOnt 5295 (C.A.)
5. *Katz, Re*, [1991] O.J. No. 1369 (Gen. Div.)
6. *Geler (Bankruptcy), Re*, [2005 CanLII 18283 \(ON SC\)](#)
7. *Fifth Third Bank v. MPI Packaging Inc.*, [2010 ONSC 73 \(Commercial List\)](#), aff’d  
[2010 ONCA 431](#)
8. *Ma v. Toronto-Dominion Bank*, [2001 CanLII 24076 \(Ont. C.A.\)](#)
9. *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002 SCC 41 \(CanLII\)](#)
10. *GE Canada Real Estate Financing Business Property Co. v. 1262354 Ontario Inc.*, [2014 ONSC 1173 \(CanLII\)](#)

**MARSHALLZEHR GROUP INC.**

**Applicant**

-and-

Court File No. CV-20-00635523-00CL

**FERNWOOD DEVELOPMENTS (ONTARIO)  
CORPORATION  
Respondent**

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

PROCEEDING COMMENCED AT  
TORONTO

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**FACTUM OF THE RECEIVER**

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