

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

BETWEEN:

**VECTOR FINANCIAL SERVICES LIMITED**

Applicant

- and -

**HIGHYON DEVELOPMENT NO. 118 LP and HIGHYON GP NO. 118 CORP.**

Respondents

APPLICATION UNDER s. 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, and Section 101 of the *Courts of Justice Act*, R.S.O. 1990, c.C.43

**FACTUM OF THE RECEIVER  
Re: Sale Approval**

January 12, 2021

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Lawyers for the Receiver, RSM Canada Limited

**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**") without security, of the lands and premises municipally known as 9113 & 9125 Bathurst Street, Richmond Hill, Ontario (the "**Property**") for orders, among other things:

- (a) authorizing and directing the Receiver to enter into and carry out the terms of the transaction (the "**Transaction**") contemplated by an agreement of purchase and sale between the Receiver and 6736238 Canada Inc. o/a Altona Group (the "**Purchaser**") dated December 21, 2020 (the "**APS**"), together with any further minor amendments thereto deemed necessary by the Receiver in its sole opinion;
- (b) vesting title to the Property in Altona (Bathurst) Developments Inc., being the party the Purchaser has directed, free and clear of claims and encumbrances, upon closing of the Transaction and the delivery of a Receiver's Certificate to the Purchaser;
- (c) approving the Receiver's First Report dated January 5, 2021 (the "**First Report**") and the Receiver's conduct and activities to set out therein;
- (d) sealing Confidential Appendix "D" to the First Report until the closing of the sale of the Property;
- (e) directing amount(s) to be paid by the Receiver from the net proceeds from the sale of the Property;

- (f) authorizing the Receiver to make the Proposed Distribution (as defined below);
- (g) approving the Receiver's cash receipts and disbursements for the period September 18, 2020 to December 31, 2020;
- (h) approving the fees of the Receiver for the period August 17, 2020 to December 31, 2020;
- (i) approving the fees of Cassels Brock & Blackwell LLP for the period November 3, 2020 to December 31, 2020; and
- (j) approving the fees of Paliare Roland Rosenberg Rothstein LLP for the period September 8, 2020 to December 31, 2020.

## **PART II. OVERVIEW**

- 2. The Receiver has entered into the APS to sell the Property to the Purchaser subject to the approval of this Court.
- 3. The Receiver believes that the APS represents a commercially reasonable disposition of the Property, and recommends that the Court approve the pending Transaction because:
  - (a) the Property was publicly listed for sale;
  - (b) the Property was exposed to the market for a sufficient period of time in the Sale Process (as described and defined below) approved by this Court and conducted by the Receiver and Cushman & Wakefield ULC ("**C&W**");

- (c) the Property was marketed by C&W, an experienced commercial real estate brokerage;
- (d) the marketing process was conducted fairly;
- (e) the marketing process led to multiple offers for the Property, and culminated with the APS with the Purchaser;
- (f) the APS represents the most advantageous offer for the creditors of Highyon Development No, 118 LP ("**Highyon LP**") and Highyon GP No. 118 Corp. ("**Highyon GP**" and, together with Highyon LP, the "**Highyon Entities**" or the "**Debtors**"); and
- (g) the APS has the support of Vector Financial Services Limited ("**Vector**"), which holds the first-ranking and largest registered interest on title to the Property.

4. The Receiver has filed under seal a confidential appendix, which contains, among other things, summaries of the offers received for the Property, and a copy of the APS and the amendment to the APS.

5. The Receiver requests that Confidential Appendix "D" to the First Report be sealed pending closing of the Transaction in order to avoid prejudice in the event that the contemplated sale does not close.

### PART III. FACTS

#### **A. The Property**

6. The Property consists of vacant land, owned by Highyon LP, a real estate holding company. Highyon GP is the general partner of Highyon LP.<sup>1</sup>

#### **B. The Receivership**

7. Vector is a private lender and mortgage broker in the business of originating and administering mortgage loans in Ontario. Vector holds a first mortgage in the principal amount of \$5,550,000 against the Property (the “**Vector Mortgage**”). As of January 5, 2021 the amount estimated to discharge the Vector Mortgage will be \$6,203,316.59 as of January 28, 2021.<sup>2</sup>

8. Highyon LP was in default of the Vector Mortgage, and Vector sought the appointment of the Receiver pursuant to a Notice of Application dated March 9, 2020. On September 8, 2020, pursuant to an application made by Vector, RSM was appointed as receiver of the Property, which became effective on September 18, 2020.<sup>3</sup>

#### **C. Sale Process**

9. The Receivership Order authorizes the Receiver to market the Property for sale, including advertising and soliciting offers in respect of the Property.<sup>4</sup>

10. The Receiver requested and received listing proposals from four commercial real estate firms, ultimately entering into a listing agreement with C&W to market the Property for sale.<sup>5</sup>

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<sup>1</sup> First Report, Motion Record of the Receiver (“Receiver’s MR”), Tab 2, para. 10.

<sup>2</sup> First Report, Receiver’s MR, Tab 2, para. 13.

<sup>3</sup> First Report, Receiver’s MR, Tab 2, paras. 14-17.

<sup>4</sup> First Report, Receiver’s MR, Tab 2, para. 23.

11. The marketing of the Property commenced on November 9, 2020. Interested parties were advised that offers were to be submitted by 5:00 p.m. (EST) on December 8, 2020 (the “**Bid Submission Deadline**”).<sup>6</sup>

12. C&W performed a number of marketing activities, including:

- (a) the Property was listed on the Toronto Real Estate Board MLS on November 11, 2020;
- (b) email brochures were sent out to a targeted list of 13,343 prospective purchasers and 4,349 real estate brokers;
- (c) an advertisement was placed on November 9, 2020 in the Sing Tao Daily publication;
- (d) advertisements in *The Globe and Mail* newspaper were published on November 10 and 12, 2020;
- (e) an advertisement was placed on November 11 and 13, 2020 in the Greater Toronto & Hamilton Area edition of the real estate publication, *Novae Res Urbis*; and,
- (f) an electronic data room was established to provide access to confidential information pertaining to the Property to parties who had executed a Confidentiality Agreement.<sup>7</sup>

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<sup>5</sup> First Report, Receiver’s MR, Tab 2, paras. 24-25.

<sup>6</sup> First Report, Receiver’s MR, Tab 2, para. 26.

<sup>7</sup> First Report, Receiver’s MR, Tab 2, para. 28.

13. In addition, the Receiver engaged PGL Environmental Consultants to prepare an updated Phase I Environmental Site Assessment for the Property. A copy of this environmental assessment was posted to the data room.<sup>8</sup>

***D. The Offers for the Property***

14. As of the Bid Submission Deadline, 18 offers were submitted to C&W for the Property.<sup>9</sup>

15. Following receipt of these offers, and after review and consultation with the Receiver and Vector, C&W contacted the parties who had submitted the ten offers with the most favourable terms. C&W invited these ten parties to improve or amend their offers, and resubmit by 5:00 p.m. on December 14, 2020. A total of 11 parties, including two parties who had not been invited by C&W to participate in the second round, resubmitted offers (the “**Second Round Offers**”). One party who had been invited to participate in the second round decided to remove itself from the process.<sup>10</sup>

16. After reviewing the Second Round Offers and consulting with C&W and Vector, the Receiver found that the top four offers (with the exception of the offer from Highyon LP, which is discussed further in the First Report), were, for all intents and purposes, indistinguishable. As a result, the Receiver invited these four offerors to amend their offers and resubmit their “best and final” offers by 10:00 a.m. on December 16, 2020.<sup>11</sup>

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<sup>8</sup> First Report, Receiver’s MR, Tab 2, para. 29.

<sup>9</sup> First Report, Receiver’s MR, Tab 2, para. 30.

<sup>10</sup> First Report, Receiver’s MR, Tab 2, para. 31.

<sup>11</sup> First Report, Receiver’s MR, Tab 2, para. 32.

17. Three parties elected to amend and resubmit their offers to purchase the Property, while the fourth party did not amend its offer (the “**Third Round Offers**”).<sup>12</sup>

18. The Receiver reviewed and considered the terms of the Third Round Offers with C&W. After considering the Third Round Offers, including the offered purchase prices, proposed due diligence periods, due diligence terms, likelihood of closing on a timely basis, etc., the Receiver proceeded, with the concurrence of Vector, to finalize the offer submitted by the Purchaser.<sup>13</sup>

19. The Receiver worked with Cassels Brock & Blackwell LLP, Vector’s counsel, retained by the Receiver to provide assistance effecting a sale of the Property, to have certain of the terms of the Purchaser’s offer amended in order for the Receiver to be in a position to accept that offer.<sup>14</sup>

20. On December 21, 2020, the Receiver accepted the Purchaser’s offer and executed the APS. The Receiver’s counsel received the deposit contemplated under the APS.<sup>15</sup>

21. As set out in detail in the First Report, Highyon LP, the debtor, submitted two offers to purchase the Property. Although the purchase prices contemplated in these offers were significantly higher than the other offers received, both of Highyon LP’s offers were conditional on securing significant financing. The Receiver was concerned that Highyon LP would not be able to secure the level of financing required to waive its

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<sup>12</sup> First Report, Receiver’s MR, Tab 2, para. 34.

<sup>13</sup> First Report, Receiver’s MR, Tab 2, para. 35.

<sup>14</sup> First Report, Receiver’s MR, Tab 2, para. 35.

<sup>15</sup> First Report, Receiver’s MR, Tab 2, para. 36.



financing condition and close. As a result, C&W wrote to Highyon LP, advising that the Receiver would consider an offer, submitted by 5:00 PM on December 17, 2020, if the offer was fully executed, unconditional, accompanied by a 10% deposit, and accompanied by proof of financing.<sup>16</sup>

22. Highyon LP did not provide this unconditional offer or deposit by the deadline.<sup>17</sup>

***E. Vector's Secured Claims***

23. Vector has provided a Mortgage Payout Statement to the Receiver dated January 5, 2021 (the "**Vector Payout Statement**"). According to the Vector Payout Statement, the amount owing to Vector in respect of the first mortgage and required to discharge the first mortgage will be \$6,203,316.59 as of January 28, 2021.<sup>18</sup>

***F. Proposed Distribution***

24. Subject to retaining an amount as a holdback to address future fees and expenses of the Receiver and its counsel, the Receiver proposes to distribute the following from the net proceeds of sale:

- (a) the fees and disbursements of the Receiver and its counsel;
- (b) the commission payable to C&W due upon the successful sale of the Property;
- (c) the advance totaling \$15,000 under Receiver Certificate No. 1 plus interest to Vector;

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<sup>16</sup> First Report, Receiver's MR, Tab 2, paras. 37-42.

<sup>17</sup> First Report, Receiver's MR, Tab 2, para. 42.

<sup>18</sup> First Report, Receiver's MR, Tab 2, para. 49.

- (d) property taxes of \$7,016.41 (based on the balance owing as at November 24, 2020) plus any accrued interest or penalties thereon; and
- (e) an amount to Vector, not to exceed the total amount of indebtedness owing to Vector inclusive of any interest, fees, and penalties.<sup>19</sup>

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

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

- (a) should the Court approve the APS?
- (b) is it appropriate for the Court to seal Confidential Appendix "D" to the Receiver's First Report pending the closing of the Transaction contemplated by the APS?

#### ***A. The Court Should Approve the APS***

26. The factors to be considered by this Court in its assessment of the approval of a sale by a receiver are well established. 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>20</sup>

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<sup>19</sup> First Report, Receiver's MR, Tab 2, para. 53.

27. Having regard to the foregoing, the Receiver submits that this Court should approve the APS and the related relief sought by the Receiver in order to give effect to the Transaction contemplated by the APS. In particular, the Receiver notes the following:

- (a) the Property was publicly listed for sale;<sup>21</sup>
- (b) the Property was exposed to the market for a sufficient period of time in the sale process conducted by the Receiver and C&W;<sup>22</sup>
- (c) the marketing process undertaken by the Receiver was appropriate for the type of property in question, and provided sufficient market exposure for the Property;<sup>23</sup>
- (d) the Property was marketed by C&W,<sup>24</sup> an experienced commercial real estate brokerage;
- (e) the sale process led to multiple offers, and culminated with the APS with the Purchaser;<sup>25</sup>
- (f) sufficient efforts were made to obtain the best price for the Property, and the marketing process was conducted fairly;<sup>26</sup> and
- (g) the APS has the support of Vector.<sup>27</sup>

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<sup>20</sup> *Royal Bank v. Soundair Corp.*, [1991 CanLII 2727 \(ONCA\)](#) at para 16.

<sup>21</sup> First Report, Receiver's MR, Tab 2, para. 44.

<sup>22</sup> First Report, Receiver's MR, Tab 2, para. 44.

<sup>23</sup> First Report, Receiver's MR, Tab 2, para. 44.

<sup>24</sup> First Report, Receiver's MR, Tab 2, para. 28.

<sup>25</sup> First Report, Receiver's MR, Tab 2, paras. 30-36.

<sup>26</sup> First Report, Receiver's MR, Tab 2, para. 46.

28. These factors are consistent with a properly run sales process pursuant to *Soundair*.

29. Further, following the properly run sale process, due diligence by multiple prospective purchasers, and extensive negotiation, the Receiver is of the view that the APS represents the most advantageous offer for the creditors of the Debtors, and recommends approval of the APS. In making this recommendation, the Receiver has considered a number of factors, including the Purchaser's ability to close the Transaction.

30. As the Ontario Court of Appeal agreed with and adopted 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>28</sup>

31. In the present case, there are no exceptional circumstances which would warrant a rejection of the Receiver's recommendation.

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<sup>27</sup> First Report, Receiver's MR, Tab 2, para. 35.

<sup>28</sup> *Soundair* at para 21.

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

32. As noted above, the Receiver seeks an Order sealing Confidential Appendix “D” to the Receiver’s First Report pending the closing of the Transaction contemplated by the APS.

33. The limited circumstances in which this Court should seal part of a record before it were described by the Supreme Court of Canada in the case of *SierraClub of Canada v. Canada (Minister of Finance)*.<sup>29</sup>

34. In that case, that court observed that a confidentiality order should be granted in only two circumstances:

- (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.

35. In the context of court-supervised sale proceedings, this Court has routinely applied *SierraClub* 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 valuations of the assets under sale, the details of the bids received by the court-

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<sup>29</sup> *SierraClub of Canada v. Canada (Minister of Finance)*, [2002 SCC 41 \(CanLII\)](#) at para. 45 [“*SierraClub*”].

appointed officer and the purchase price contained in the offer for which court approval is sought”.<sup>30</sup>

36. Sealing these materials is necessary to protect the integrity and fairness of the sales 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 Property if the contemplated Transaction does not close.<sup>31</sup>

**PART V. ORDER REQUESTED**

37. Further to the foregoing, the Receiver respectfully requests orders substantially in the form attached as Appendices “A” and “B” to the Notice of Motion.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

January 12, 2021



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Jeffrey Larry/Elizabeth Rathbone

**Paliare Roland Rosenberg Rothstein LLP**

Lawyers for RSM Canada Limited

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<sup>30</sup> *GE Canada Real Estate Financing Business Property Co. v. 1262354 Ontario Inc.*, [2014 ONSC 1173 \(CanLII\)](#) at para. 32 [*GE Canada*].

<sup>31</sup> *GE Canada* at paras. 32-34.

## SCHEDULE “A” – LIST OF AUTHORITIES

1. *Royal Bank v. Soundair Corp.*, [1991 CanLII 2727 \(ONCA\)](#)
2. *SierraClub of Canada v. Canada (Minister of Finance)*, [2002 SCC 41 \(CanLII\)](#)
3. *GE Canada Real Estate Financing Business Property Co. v. 1262354 Ontario Inc.*, [2014 ONSC 1173 \(CanLII\)](#)

VECTOR FINANCIAL SERVICES LIMITED

**Applicant**

**-and-**

Court File No. CV-20-00637687-00CL

HIGHYON DEVELOPMENT NO. 118 LP and  
HIGHYON GP NO. 118 CORP

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PROCEEDING COMMENCED AT  
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