

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

B E T W E E N:

**CHOICE PROPERTIES LIMITED PARTNERSHIP, by its
general partner CHOICE PROPERTIES GP INC.**

Applicant

- and -

**PENADY (BARRIE) LTD. , PRC BARRIE CORP.
and MADY (BARRIE) INC.**

Respondents

**APPLICATION UNDER SECTION 243 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
(Motion for Approval of Stalking Horse Agreement and Sale Procedure
returnable June 2, 2020)**

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in its capacity as Court-appointed Receiver

PART I - INTRODUCTION

1. This Factum is filed by the Receiver RSM Canada Limited (the “**Receiver**”) in connection with its motion returnable on June 2, 2020 (the “**SISP Motion**”), seeking an Order:

- (a) approving the First Report of the Receiver dated May 12, 2020 (the “**First Report**”), the Supplemental Report to the First Report of the Receiver dated May 26, 2020 (the “**Supplementary First Report**”), and the actions and activities of the Receiver described therein;
- (b) authorizing the Receiver to enter into an asset purchase agreement by way of credit bid (the “**Stalking Horse Agreement**”) with the Applicant Choice Properties Limited Partnership (“**CHP**”) as purchaser, in the form attached as Appendix “F” to the First Report, for the sale of all of the right, title and interest of Penady (Barrie) Ltd. (“**Penady**”, or “**PBL**”), PRC Barrie Corp. (“**PRC**”) and Mady (Barrie) Inc. (“**MBI**”) (collectively, the “**Debtors**”) in and to the Subject Assets (as defined in the Stalking Horse Agreement), and approving the Expense Reimbursement (as defined in the Stalking Horse Agreement);
- (c) approving the sale procedure (the “**Sale Procedure**”), substantially in the form attached as Appendix “G” to the First Report;
- (d) authorizing the Receiver to enter into the listing agreement with Avison Young Commercial Real Estate (Ontario) Inc. (“**AY**”), in the form attached as Appendix “H” and Confidential Appendix “B” to the First Report (the “**RSM-AY Listing Agreement**”), for the sale of the Barrie Property (as defined below);

- (e) approving and accepting the Receiver's Interim Statement of Receipts and Disbursements for the period from March 27, 2020, to April 30, 2020, as set out in Appendix "K" to the First Report; and
- (f) until the completion of the sale of the Subject Assets, or until further Order of this Honourable Court, sealing Confidential Appendices "A" and "B" to the First Report (the property management agreement for the Barrie Property, and the unredacted RSM-AY Listing Agreement), and Confidential Appendices "AA" and "BB" to the Supplementary First Report (the Receiver's engagement letter to Cushman & Wakefield ULC ("CW") in respect of the appraisal of the Barrie Property, and the CW appraisal of the Barrie Property dated March 25, 2020 (the "CW Appraisal"))).

2. This is not a default or an enforcement proceeding related to the COVID-19 pandemic. It is a retail-related default, where enforcement and the original hearing date (March 10, 2020) pre-dated the declaration of the COVID-19 pandemic in Canada (the hearing that resulted in the Appointment Order on March 25, 2020, followed the declaration of the COVID-19 pandemic). The amount currently owing by Penady to CHP is over \$70 million at an interest rate of 9% per annum (over \$525,000 in accrued interest per month, or \$120,000 per week).

3. The evidence before the Court demonstrates that the Sale Procedure timeline proposed by the Receiver and its real estate broker AY is more generous than the timeline the respondents had proposed in their "expedited" sale process of the Barrie Property by way of a listing agreement Penady had entered into with AY on or about February 24, 2020. Furthermore, many of the Respondents' critiques of the Sale Procedure are inconsistent with their own "expedited" sale process. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

4. The Sale Procedure and the RSM-AY Listing Agreement provide for a fair and transparent marketing process that will allow the Receiver to maximize realizations from the Barrie Property by seeking superior offers for the Subject Assets. The Stalking Horse Agreement [REDACTED] and provides stability for the ongoing operations of the Barrie Property by giving assurance that there will be a new owner regardless of the outcome of the Sale Procedure. The Receiver intends to seek a vesting order to transfer title to the Barrie Property to (i) CHP if the Sale Procedure does not result in a bid that is sufficiently higher than the Stalking Horse Bid, or (ii) to the successful bidder if the Sale Procedure does result in a bid that is higher than the Stalking Horse Bid.

PART II - FACTS

Background

5. By Amended and Restated Order of the Ontario Superior Court of Justice (Commercial List) dated March 25, 2020 (the “**Appointment Order**”), RSM Canada Limited was appointed receiver and manager, without security, of all of the assets, undertakings and properties of Penady acquired for, or used in relation to a business carried on by it, including all proceeds thereof, and the interest of each of PRC and MBI in the Barrie Property and all assets, undertakings and properties related thereto (collectively, the “**Property**”).

Supplementary Motion Record of the Receiver dated May 29, 2020 (“**Receiver’s Supplementary Record**”), Supplementary First Report, Vol. 1, Tab 2, p. 9, para 1.

6. Penady is an Ontario corporation, and a subsidiary of PenEquity Realty Corporation (“**PenEquity**”), which is an Ontario-based real estate investment advisor that principally focuses on purchasing and developing real estate. Penady is the registered owner of commercial rental property located at the intersection of Cundles Road and Duckworth Avenue in the City of Barrie, which forms part of (but not all of) the North Barrie Crossing Shopping Centre (the “**Barrie Property**”). PRC and MBI are the beneficial owners (the “**Beneficial Owners**”) of the Barrie Property. Penady holds the Barrie Property as nominee and bare trustee for the sole use, benefit and advantage of the Beneficial Owners and for no other person or entity.

Motion Record of the Receiver dated May 20, 2020 (“**Receiver’s Record**”), First Report, Vol. 1, Tab 2, pp. 40-41, paras. 9-12.

7. Choice Properties GP Inc. (“**Choice GP**”) is the general partner of the Applicant CHP. Choice GP is a subsidiary of Choice Real Estate Investment Trust (“**CH REIT**”). CH REIT is a diversified real estate investment trust primarily focused on retail, industrial, office and residential assets. CHP is the senior secured lender to Penady. The security granted to CHP includes, *inter alia*, a limited recourse guarantee granted by PRC and MBI, limited to their beneficial interest in the Barrie Property.

Receiver’s Record, First Report, Vol. 1, Tab 2, pp. 41-42, paras. 13-15.

8. CHP advanced funding to Penady to assist with the development of the Barrie Property. As at March 9, 2020, Penady was indebted to CHP for \$68,190,424 (the “**Indebtedness**”). The Indebtedness includes CHP’s repayment of Penady’s indebtedness to Equitable Bank on or about March 5, 2020, (the “**EQ Debt**”), which previously held a first mortgage over the Barrie Property ranking in priority to that of CHP’s mortgage. CHP’s secured facility matured on January 31, 2020. As (i) the amounts owing by Penady to CHP were not repaid, (ii) Penady’s efforts to sell or refinance the Barrie Property over the past 12-16 months were not successful, and (iii) the unpaid realty taxes for the Barrie Property for 2018, 2019 and 2020 had accumulated to approximately \$2.2 million (included in this amount was \$1,948,598.36 in respect of arrears for 2018 and 2019 plus accrued interest and penalties to April 1, 2020, that the Receiver recently paid), CHP issued the herein Application for the Appointment of a Receiver.

Receiver’s Record, First Report, Vol. 1, Tab 2, pp. 42 and 46, paras 16-17, and 30-31.

9. PenEquity was acting as property manager for the Barrie Property prior to the Appointment Order. Due to PenEquity's familiarity with the Barrie Property, following its appointment, the Receiver entered into a property management agreement with PenEquity for it to continue to manage the Barrie Property.

Receiver's Record, First Report, Vol. 1, Tab 2, p. 43, paras 21-22, and Confidential Appendix 1, Vol. 2, Tab 1, p. 246.

10. As of March 25, 2020, there were 27 tenants at the Barrie Property and two vacant units. Due to operating restrictions and/or the reduction in business arising from the COVID-19 pandemic, 16 tenants temporarily suspended operations, and six tenants were offering limited services. To date, 21 tenants have requested some form of rent deferral or similar form of accommodation effective from the rental payment due on April 1, 2020. The Receiver reviewed with PenEquity the requests of the individual tenants to assist the Receiver in determining its position in response to the requests received. The Receiver also sought the input of CHP as it is a landlord of numerous properties and the primary secured creditor of Penady. PenEquity is in the process of dealing with each of the tenants taking into account the parameters agreed with the Receiver in relation to the requests of the individual tenants.

Receiver's Record, First Report, Vol. 1, Tab 2, pp. 46-47, paras 32-35.

11. Other than the Barrie Property and the related leases, the Receiver is not aware of any assets of value that would form part of the Subject Assets (the two letters of credit that are detailed in the First Report are excluded from the Stalking Horse Agreement).

Receiver's Record, First Report, Vol. 1, Tab 2, pp. 47-49 para 38-44.

The Sale Procedure and Stalking Horse Agreement

12. The Appointment Order authorizes the Receiver to market the Property (as defined therein) for sale, including advertising and soliciting offers in respect of the Barrie Property. The Receiver is now in a position to commence the marketing process for the Barrie Property, and is seeking the Court's approval of the Sale Procedure.

13. The Sale Procedure contemplates the marketing of the Barrie Property by AY. In order to set a floor price and ensure that only serious offers are received for the purchase of the Barrie Property, CHP has submitted a stalking horse credit bid offer (which if accepted will become the Stalking Horse Agreement.

Receiver's Record, First Report, Vol. 1, Tab 2, p. 49-50 , paras 45-47.

The Stalking Horse Agreement

14. The Stalking Horse Agreement is a "credit bid" (the "**Stalking Horse Bid**") by CHP, by which it would acquire the Subject Assets, being the right, title and interest of the Receiver and the Debtors in and to the tangible and intangible properties, assets, interests, rights and claims related to the Barrie Property and and/or the Business, wherever located, as of the Closing Date, including without limitation the following Subject Assets, if any, on an "as-is, where is" basis (capitalized terms used in this section of the Factum are as defined in the Stalking Horse Agreement):

- (i) the Property;
- (ii) the Leases;
- (iii) the Assumed Contracts;
- (iv) the Permitted Encumbrances;
- (v) the Chattels;

- (vi) the Accounts Receivable, which includes all accounts receivable of Penady, and the accounts receivable of PRC and MBI related to the Barrie Property, as well as any rents and other amounts owing to the Debtors (or any of them) under the Leases, including without limitation any amounts owing as a result of the deferral of rents and other amounts due to the Debtors (or any of them) thereunder; and
- (vii) all other personal property not contemplated by the foregoing, but excludes the right, title and interest of the Receiver and the Debtors in and to the Excluded Assets and the Excluded Contracts;

Receiver's Record, First Report, Vol. 1, Tab 2, pp. 50-51, paras 48, 49 and 51, and Appendix F, p. 125.

15. The purchase price in the Stalking Horse Agreement for the Subject Assets is \$50 million (the "**Stalking Horse Price**"), to be satisfied by providing a credit to Penady of \$50 million against Penady's obligations under its Credit Agreement with CHP dated December 24, 2014, less the amount of the Receiver's Certificate Obligations owing to CHP as of the closing date if any plus a Wind-Down Estimate (collectively, the "**Credit Agreement Bid Amount**").

Receiver's Record, First Report, Vol. 1, Tab 2, p.50, para. 50.

16. The Stalking Horse Bid includes the following additional material provisions:
- (i) all applicable taxes and registration fees, including land transfer taxes, are to be paid by CHP on the closing;
 - (ii) CHP will fund all accrued but unpaid fees and disbursements of the Receiver and its counsel subject to the Receiver's Charge as at the Closing Date. CHP will also fund the costs to wind down and complete the Receivership Proceeding after the Closing Date (the Wind-Down Amount, to be covered by the Wind-Down Estimate); and
 - (iii) any Secured Debt owing by Penady and the Beneficial Owners to CHP that is in excess of the Credit Agreement Bid Amount will remain owing by Penady and the Beneficial Owners to CHP from and after the Closing Date, with CHP reserving with respect thereto all of its rights, powers, and remedies under its loan documents and applicable law.

Receiver's Record, First Report, Vol. 1, Tab 2, pp. 50-52, para 51.

17. The Stalking Horse Agreement has no due diligence conditions and provides for an expense reimbursement of \$400,000 (the "**Expense Reimbursement**"), in the event CHP is not the Successful Bidder, to reimburse CHP for its expenditure of money and time in connection with the Stalking Horse Agreement. It is the Receiver's view that the Expense Reimbursement is a fair and reasonable amount. The Receiver supports the Expense Reimbursement because of the value the Stalking Horse Agreement brings to the Sale Procedure, including the enhanced certainty of a base bid.

Receiver's Record, First Report, Vol. 1, Tab 2, pp. 52 and 57, paras 52 and 66.

The Sale Procedure

18. In conjunction with the Stalking Horse Agreement, the Receiver seeks the Court's approval to implement a proposed 8 to 11 week marketing and sale process that will begin shortly after June 2, 2020, if the requested Order is made. If approved, it will set the parameters of the sale and marketing process pursuant to which the Receiver will seek offers superior to the Stalking Horse Agreement for the Barrie Property, and will set out the requirements for the submission of offers by interested parties (capitalized terms used in this section of the Factum are as defined in the Sale Procedure).

Receiver's Record, First Report, Vol. 1, Tab 2, p. 55, paras 57-58, and Appendix G, p. 169.

19. The Sale Procedure contemplates a two-phase process. In the first phase, Interested Parties that meet the preliminary participant requirements set out therein, being (i) an executed Confidentiality Agreement; and (ii) an executed Acknowledgement of Sale Procedure, will be provided with the Confidential Information Memorandum and will be given access to additional confidential information in the Confidential Data Room.

Receiver's Record, First Report, Vol. 1, Tab 2, pp. 55-56, para 59.

20. In order for the Receiver to determine whether an Interested Party is a Qualified Phase I Bidder, the Interested Party must provide, in form and substance satisfactory to the Receiver, the following information/documents on or before the Phase I Bid Deadline: (i) identification of the Phase I Bidder, (ii) a non-binding expression of interest, (iii) proof of corporate authority and (iv) proof of financial ability to perform the non-binding expression of interest.

Receiver's Record, First Report, Vol. 1, Tab 2, p. 56, para 60.

21. Phase I Bidders that are determined by the Receiver to be Qualified Phase I Bidders will be invited to participate in Phase II. For purposes of the Sale Procedure, the Stalking Horse Bidder, CHP, is deemed to be a Qualified Phase I Bidder and a Qualified Phase II Bidder.

Receiver's Record, First Report, Vol. 1, Tab 2, p. 56 para 61-62

22. A Phase I Bid, being a non-binding letter of intent attached as Schedule "C" to the Sale Procedure, must be submitted by the Phase I Bid Deadline of 10:00 a.m. (Eastern Time) on July 15, 2020 (which would now be July 29, 2020), and that a Phase II Bid, being a binding offer in the form of an executed mark-up of the Modified Stalking Horse Agreement attached as Schedule "B" to the Sale Procedure, must be submitted by the Phase II Bid Deadline of 10:00 a.m. (Eastern Time) on July 29, 2020 (which would now be August 13, 2020).

Receiver's Record, First Report, Vol. 1, Tab 2, p. 56, para 63.

23. The Sale Procedure also requires, for parties other than the Stalking Horse Bidder, the submission of a deposit of 3% of the proposed purchase price with the Phase 1 Bid, and 7% of the purchase price with a Phase II Bid.

Receiver's Record, First Report, Vol. 1, Tab 2, p. 56, para 64.

24. If the Receiver determines that there is no Qualified Phase I Bid other than the Stalking Horse Bid following the Phase I Bid Deadline, the Sale Procedure will be terminated. In that event, the Stalking Horse Bid will be declared the Successful Bid and the Receiver will seek Court approval of, and authority to consummate, the Stalking Horse Agreement and the transactions provided for therein, and obtain a vesting order to transfer title to the Barrie Property to CHP.

Receiver's Record, First Report, Vol. 1, Tab 2, p. 57, para 65

25. The minimum purchase price of any Phase II Bid must be the sum of the Stalking Horse Price (\$50 million) plus the Expense Reimbursement of \$400,000 (0.8% of the Stalking Horse Price), plus \$250,000. The additional amount of \$250,000 takes into account additional third party disbursements including interest on the Indebtedness (which accrues in an amount of over \$120,000.00 per week) and property taxes, as well the Receiver's fees resulting from the extension of the Sale Procedure.

Receiver's Record, First Report, Vol. 1, Tab 2, p. 57, para 66.

26. If one or more Qualified Phase II Bids (in addition to the Stalking Horse Bid) is received by the Phase II Bid Deadline, and the Receiver determines such Qualified Phase II Bid(s) to be sufficiently greater than the Stalking Horse Bid, the Receiver will conduct an auction amongst the Qualified Phase II Bidders (including the Stalking Horse Bidder), on terms to be determined by the Receiver in accordance with the Sale Procedure, to determine the Successful Bid and the Back-up Bid, and/or otherwise negotiate with the Qualified Phase II Bidders, on terms to be determined by the Receiver in accordance with the Sale Procedure, so as to determine the Successful Bid and the Back-up Bid, and obtain a vesting order to transfer title to the Barrie Property.

Receiver's Record, First Report, Vol. 1, Tab 2, p. 57, para 67.

27. If no Qualified Phase II Bid other than the Stalking Horse Bid is received by the Phase II Bid Deadline, then the Sale Procedure will be terminated and the Stalking Horse Bid will be declared the Successful Bid. In that event, the Receiver will seek Court approval of, and authority to consummate, the Stalking Horse Agreement and the transactions provided for therein, and obtain a vesting order to transfer title to the Barrie Property to CHP.

Receiver's Record, First Report, Vol. 1, Tab 2, p. 58, para 68.

28. Following the determination of the Successful Bid, the Receiver will seek Court approval of, and authority to consummate, the Successful Bid and the transactions provided for therein. The Sale Procedure will be posted to the Receiver's website. Any potential interested party that contacts the Receiver or AY will be invited to participate in the Sale Procedure.

Receiver's Record, First Report, Vol. 1, Tab 2, p. 58, para 69-70

29. In the Receiver's view, the Sale Procedure:

- (i) is consistent with market practice;
- (ii) provides a reasonable opportunity for competing bidders to submit offers superior to the Stalking Horse Agreement;
- (iii) enables the Receiver to maximize realizations from the Barrie Property;
and,
- (iv) is reasonable and appropriate in the circumstances.

Receiver's Record, First Report, Vol. 1, Tab 2, p. 58, para 71.

The CW Appraisal

30. Prior to the appointment of the Receiver, CHP had engaged CW to provide an appraisal of the Barrie Property. At the time of the Receiver's appointment, CW had not completed the appraisal. The Receiver contacted CW and by letter of engagement dated April 8, 2020, accepted by the Receiver on April 13, 2020, the Receiver engaged CW to prepare the appraisal of the Barrie Property for the Receiver (the "**CW Engagement Letter**").

Receiver's Supplementary Record, Supplementary First Report, Vol. 1, Tab 2, pp. 10-11, paras 6-7, and Vol 2., Confidential Appendix AA, p. 53.

31. On May 15, 2020, CW provided the CW appraisal dated March 25, 2020 to the Receiver, which the Receiver provided to counsel for CHP (for counsel eyes only) and counsel for the Respondents (including for disclosure to the Respondents if they would execute an NDA, but that offer was not accepted).

Receiver's Supplementary Record, Supplementary First Report, Vol. 1 Tab 2, p. 11, paras 8-9 and Vol. 2, Confidential Appendix BB, p. 60.

32. The CW Appraisal values the Barrie Property at [REDACTED]
[REDACTED]

Receiver's Supplementary Record, Supplementary First Report, Vol. 1 Tab 2, p. 11, paras 8-9 and Confidential Appendix BB, p. 60.

33. [REDACTED]
[REDACTED]
[REDACTED]

Avison Young Commercial Real Estate (Ontario) Inc.

34. Pursuant to the terms of the RSM-AY Listing Agreement, with the concurrence of CHP and subject to Court approval, the Receiver has engaged AY to act as listing agent in the Sale Procedure.

Receiver's Record, First Report, Vol. 1, Tab 2, p. 59, para 73, Appendix "H", p. 182, and Vol. 2, Confidential Appendix "2", p. 291.

35. AY is one of the world's largest commercial real estate services firms. Prior to the receivership, Penady had engaged AY to conduct an expedited marketing process for the sale of the Barrie Property. Based on AY's knowledge of the Barrie Property, and the work that it had done prior to the issuance of the Appointment Order, the Receiver did not seek listing proposals from other commercial realtors.

Receiver's Record, First Report, Vol. 1, Tab 2, p. 59, para 74.

36. The salient terms of the RSM-AY Listing Agreement are as follows:

- (i) the term of the agreement is for a period of six months following the date of execution of the RSM-AY Listing Agreement. If an offer is accepted during the period of the RSM-AY Listing Agreement but the due diligence or closing process has not yet been completed, then the term of the RSM-AY Listing Agreement will be extended to accommodate such offer; and
- (ii) AY will earn a commission based on the gross purchase price should a third party purchaser acquire the Barrie Property, or a fixed fee should the Stalking Horse Bidder, or a person related to it, acquire the Barrie Property.

Receiver's Record, First Report, Vol. 1, Tab 2, pp. 59-60, para 75.

37. The Receiver is of the view that the engagement of a commercial brokerage to market the Barrie Property in the implementation of the Sale Procedure is, in the circumstances of this receivership, beneficial to stakeholders of this receivership and to the efforts to maximize realizations from the Barrie Property. The Receiver is also of the view that the compensation to be paid to AY by the Receiver upon the sale of the Barrie Property is fair and reasonable, and also incentivizes AY to seek third-party bids higher than the Stalking Horse bid. AY has also already identified a number of interested parties.

Receiver's Record, First Report, Vol. 1, Tab 2, p. 61, para 77-78.

Comparison of Pen-AY and RSM-AY Sale Procedure Marketing and Sale Timelines

38. Penady retained AY for an expedited marketing and sale process for the Barrie Property using the same AY broker, Cameron Lewis (“**Lewis**”), as RSM retained for the Sale Procedure. However, Penady only went down this road after an agreement of purchase and sale it had been negotiating with a third-party purchaser (Edric Management & Consulting Corp.) since October 2018 failed to materialize (the “**Edric Transaction**”).

Respondents’ Motion Record dated May 22, 2020 (“**Respondents’ May Record**”), Affidavit of Neil Miller sworn March 20, 2020 (“**Miller March Affidavit**”), Tab 4, pp. 58-61, paras 16-24.

Receiver’s Record, First Report, Vol. 2, Tab 2, Confidential Appendix 1, p. 246.

39. Lewis is the Marketing Leader in the Toronto Investment Sales at AY, and he was retained by Penady on February 24, 2020, to market and sell the Barrie Property on “an expedited basis”. Lewis also swore an affidavit dated March 19, 2020, on behalf of the Respondents in response to the Receivership Application herein wherein he included as an exhibit his strategic advisory presentation that included his “recommended marketing strategy/disposition timeline” (“**Pen-AY Timeline**”).

Respondents’ Application Record dated March 20, 2020 (“**Respondents’ March Record**”), Affidavit of Lewis sworn March 19, 2020 (“**Lewis Affidavit**”), Tab 2, p. 243-244, paras 1-2, and Exhibit A, p. 256.

40. The timelines in the Sale Procedure are actually more generous than the timelines in the Pen-AY “expedited” sale process, as set out below:

	RSM Sale Procedure	Pen-AY Timeline
TOTAL WEEKS TO FINAL BID SELECTION (EXCLUDING RAMP-UP)	11	8
RAMP-UP	5 DAYS premarketing including review of documents, compiling of marketing material and preparation of data room	5 WEEKS premarketing including review of documents, compiling of marketing material and preparation of data room
TIME TO NON-BINDING LETTERS OF INTENT	WEEKS 1-7 (Phase 1 Bids)	WEEKS 1-5 (to Round 1 non-binding LOI deadline)
TIME TO SELECT WINNING BID	WEEKS 8-11 (evaluate LOI’s, shortlist, request Phase 2 Bids, receipt of Phase 2 bids at end of week 9, review of Phase 2 bids and auction in weeks 10 and 11)	WEEKS 6-7 (evaluate LOI’s and shortlist, Round 2 bids, winner selected, APS negotiated)
DUE DILIGENCE	WEEKS 1-9 (Data Room established in ramp-up and immediate access granted)	WEEKS 8-11 (due diligence begins, Data Room access, field purchaser questions, inspections/tenant interviews, conditions waived)
CLOSING	WEEKS 12-13 (application to the Court for approval of the sale of the Barrie Property); BY WEEK 17 Closing	WEEKS 17-20 (tenant estoppel process and closing)

Respondents’ March Record, Lewis Affidavit, Exhibit A, p. 256.

Receiver’s Record, First Report, Vol. 1, Tab 2, p. 60, para. 76.

PART III – ISSUE AND LAW

41. It submitted that the issue on the SISP Motion is whether the Court should approve the Stalking Horse Agreement and Sale Procedure (including the retainer of AY and the Expense Reimbursement).

42. Court-appointed receivers have the powers set out in the orders appointing them. It is usual for receivers to be granted the power to market the property of a debtor, which in the Receivership Order granted in this case authorizes the Receiver to "market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate."

Receiver's Record, First Report, Vol. 1, Appendix A, p.70, para 3(j).

43. The criteria to be applied when considering the approval of a sale by a Receiver are well established, and are summarized as follows:

- (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 workout of the process.

Royal Bank of Canada v. Soundair Corporation, 1991 CanLII 2727 (Ont. C.A.), Receiver's Brief of Authorities, Tab 1, at para 16.

44. The sale of the assets for the benefit of creditors is a principal objective of receivership proceedings, and stalking horse offers, combined with court-approved bidding procedures, are commonly used in insolvency scenarios to facilitate sales of businesses and assets. The Stalking Horse Offer is intended to establish a floor price and transactional structure for any potential

subsequent bids from interested parties. Brown J. (as he then was) adopted the following comments:

To be effective for such stakeholders, the credit bid had to be put forward in a process that would allow a sufficient opportunity for interested parties to come forward with a superior offer, recognizing that a timetable for the sale of a business in distress is a fast track ride that requires interested parties to move quickly or miss the opportunity. The court has to balance the need to move quickly, to address the real or perceived deterioration of value of the business during a sale process or the limited availability of restructuring financing, with a realistic timetable that encourages and does not chill the auction process.

CCM Master Qualified Fund Ltd v. blutip Power Technologies (“CCM Master”), 2012 ONSC 1750 (Ont. S.C.J. – Commercial List), Receiver’s Brief of Authorities, Tab 2, at paras. 7-8.

45. Houlden and Morawetz, in their analysis of sales and auction processes in receiverships, explain as follows:

The Ontario Superior Court of Justice approved a sales/auction process ... Justice Brown held that the reasonableness and adequacy of a sales process proposed by a receiver must be assessed in light of factors that the Ontario Court of Appeal identified in *Royal Bank v. Soundair Corp.* (1991), 1991 CarswellOnt 205, 4 O.R. (3d) 1, 7 C.B.R. (3d) 1 (Ont. C.A.), specifically, when reviewing a sales and marketing process proposed by a receiver, a court should assess: the fairness, transparency and integrity of the proposed process; the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale. The use of stalking horse bids to set a baseline for the bidding process, including credit bid stalking horses, has been recognized by Canadian courts as a reasonable element of a sales process. The court must balance the need to move quickly to address the real or perceived deterioration of value of the business during a sale process or the limited availability of restructuring financing, with a realistic timetable that encourages and does not chill the auction process. In light of the financial circumstances of the debtor and the lack of funding available to support operations during a sales process, Brown J. accepted the receiver's recommendation that a quick sales process was required in order to optimize the prospects of securing the best price for the assets. The court approved the stalking horse agreement for the purposes requested by the receiver.

Houlden, Lloyd W. et al, The 2018-2019 Annotated Bankruptcy and Insolvency Act (Toronto: Carswell, 2018), L20, citing *CCM Master, Receiver's Brief of Authorities*, Tab 3, p. 1171.

46. As noted in the passage above, the use of stalking horse bids to set a baseline for the bidding process, including stalking horse credit bids, has been recognized by Canadian Courts as a reasonable element of a sales process, and so it is in the case at bar. [REDACTED]

[REDACTED] had been attempting (unsuccessfully) to sell the Barrie Property since late 2018, and then entered into its own expedited sale process with AY with a timeline not as generous as that of the Sale Procedure. The Sale Procedure and the RSM-AY Listing Agreement provides interested parties with a fair and transparent process by which they may make a superior offer to purchase the Barrie Property, and optimizes the prospects of achieving the best possible price for the Barrie Property. Given the pre-existing Pen-AY listing for the Barrie Property, the duration of the process contemplated by the Sale Procedure is more than appropriate, and provides interested parties with a reasonable period in which to conduct due diligence.

Expense Reimbursement

47. In *CCM Master*, Mr. Justice Brown (as he then was) approved a stalking horse agreement which contained an expense reimbursement provision in the event that the stalking horse bidder was not the successful bidder of approximately 2 percent of the purchase price.

CCM Master, Receiver's Brief of Authorities, Tab 2, at paras 13-15.

48. It is respectfully submitted that the proposed Expense Reimbursement of \$400,000.00 (0.8% of the Purchase Price) is reasonable and warranted in the circumstances.

The Responding Material on the SISP Motion

The Neil Miller Affidavit

49. Neil Miller, the Senior Vice President of Business Development with PenEquity, swore an affidavit dated May 22, 2020, in response to the SISP Motion, in which he has made several baseless, frivolous, scandalous and vexatious allegations against the Receiver and its integrity in respect of the Sale Procedure (see paras 4(i)¹, 5², 8³ and 10⁴). He leaves no doubt about the intended meaning of these allegations when he concludes his affidavit by stating that “the Sale Procedure is stacked up in CHP’s favour to ensure it gets the Barrie Property”.

Respondents’ May Record, Affidavit of Neil Miller sworn May 22, 2020 (“**Miller May Affidavit**”), Tab 1, pp. 6-7 para 8, 10, 11.

50. To the extent that Neil Miller attempts to undermine the Sale Procedure by comparing it to a sales process CHP has initiated on another property in which it holds a 70% ownership stake (the Brampton Property), CHP has delivered the affidavit of David Muallim sworn May 25, 2020 (the “**Muallim Affidavit**”), to provide the necessary context around the decisions made by CHP in respect of the sale of the Brampton Property. The Muallim Affidavit illustrates how the Miller comparison is “apples versus oranges”.

Respondents’ May Record, Miller May Affidavit, Tab 1, pp. 4-7, paras 7-9.

Affidavit of David Muallim sworn May 25, 2020.

¹ “the Receiver has not defined the parameters and conduct of the auction, should one be necessary, including whether any bidder (including CHP) would have knowledge of the bids made by a competing bidder”

² “the Sale Procedure seems more likely to discourage third party bidders from participating in the Sale Procedure and to result in an unchallenged acquisition by CHP”

³ “As a result, I verily believe that the Sale Procedure, as proposed by the Receiver but developed in consultation with CHP, is more likely to land the Barrie Property in CHP’s hands than it is to generate any competitive bids for the Barrie Property”

⁴ “It is my belief that the Sale Procedure is prepared in a manner that would generate no realistic interest from others, and even prospective purchasers would be reluctant to participate in the Sale Procedure as proposed against CHP”

Josh Thiessen Affidavit

51. The Respondents appear to be putting forward Josh Thiessen (“**Thiessen**”), Vice President in Client Management at MarshallZehr mortgage brokerage as an expert on the issue of the Sale Procedure, by way of his affidavit sworn May 22, 2020. However, nowhere in his affidavit does Thiessen set out an iota of experience in sale procedures in distress situations, let alone in insolvency proceedings (receivership, CCAA, bankruptcy). In fact, based on the contents of his affidavit, it appears that Thiessen is oblivious to the fact that this is a distressed asset receivership sale or that the AY-Pen expedited sale process was not even as generous as the RSM-AY Sale Procedure.

Respondents’ May Record, Affidavit of Josh Thiessen sworn May 22, 2020, Tab 2 p.24.

52. Furthermore, to the extent he is proffered as an expert witness, Thiessen does not even attempt to comply with the requirements under Rule 53 of the *Rules of Civil Procedure* regarding the content of expert reports, or provide the required acknowledgement that he understands his duty to be fair, objective and non-partisan. Rule 53.03(3) provides as follows:

EXPERT WITNESSES

Experts’ Reports

53.03 (1) A party who intends to call an expert witness at trial shall, not less than 90 days before the pre-trial conference scheduled under subrule 50.02 (1) or (2), serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1).

(2) A party who intends to call an expert witness at trial to respond to the expert witness of another party shall, not less than 60 days before the pre-trial conference, serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1).

(2.1) A report provided for the purposes of subrule (1) or (2) shall contain the following information:

1. The expert’s name, address and area of expertise.

2. The expert's qualifications and employment and educational experiences in his or her area of expertise.
3. The instructions provided to the expert in relation to the proceeding.
4. The nature of the opinion being sought and each issue in the proceeding to which the opinion relates.
5. The expert's opinion respecting each issue and, where there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range.
6. The expert's reasons for his or her opinion, including,
 - i. a description of the factual assumptions on which the opinion is based,
 - ii. a description of any research conducted by the expert that led him or her to form the opinion, and
 - iii. a list of every document, if any, relied on by the expert in forming the opinion.
7. An acknowledgement of expert's duty (Form 53) signed by the expert.

53. With respect to Thiessen's duty to be fair, objective and non-partisan, the Receiver notes that MarshallZehr had a financial interest in the Edric Transaction as it was financing at least a tranche of that purchase. Furthermore, the Receiver notes that MarshsallZehr has a PPSA registration against the respondent MBI that appears to be in respect of a GSA.

Receiver's Supplementary Record, Supplementary First Report, Vol. 1, Appendix AA, p. 16.

Receiver's Record, First Report, Vol. 1, Tab 2, pp. 61-62, para 80.

Respondents' Allegations of Deficiencies in the Sale Procedure

54. The due diligence timeline in the Sale Procedure is more generous than in the Pen-AY expedited sale process. The Data Room access is provided up front. The expenses that any potential purchaser other than CHP is going to incur in the Sale Procedure, are the same as those that the potential purchaser would have incurred in the Pen-AY expedited sale process, without

reimbursement. There is nothing out of the ordinary in an “as is, where is” sale in a receivership, nor an offer not being contingent on financing.

55. As for the absence of a current environmental report and building condition assessment, the Receiver notes no such current documents were to be part of the Pen-AY expedited sale process. However, there is a 2018 Phase 1 Environmental that is part of the Data Room in the Sale Procedure, and the Barrie Property is a relatively new-build structure (2016) and fully operational. Moreover, as noted in the Muallim Affidavit, building condition assessments are “typically not included in data rooms for dispositions of properties of this vintage”. That being said, there is nothing preventing the Respondents or any potential purchaser from arranging for a current Phase 1 Environmental and/or a BCA at their own expense.

Respondents’ May Record, Miller May Affidavit, Tab 1, para 8, and Thiessen Affidavit, Tab 2, paras 4(c)(v), 7, 8 and 10;

Receiver’s Supplementary Record, Supplementary First Report, Vol. 1, Tab 2, pp. 12-13, paras 12-13, and Respondents’ March Record, Lewis Affidavit, Tab 2, Exhibit A.

Muallim Affidavit, para. 14

56. The extent of the lease deferrals requested by tenants (25 out of 27 tenants according to the Miller May affidavit) is not a basis to extend the Sale Procedure. The Receiver, through its property manager PenEquity, has only entered into a few lease deferral agreements with tenants, and these requested deferrals are actually a reason to expedite the Sale Procedure, so to allow a new owner to be the one to negotiate as soon as possible the rent deferrals and abatements with the tenants it is inheriting for the long term.

57. As for any other concerns identified by the Respondents, Term 18 of the Sale Procedure explicitly maintains the Receiver's ability to modify or amend the Sale Procedure if necessary, as follows:

18. Modifications and Reservations

This Sale Procedure may be modified or amended by the Receiver, provided that if such modification or amendment materially deviates from this Sale Procedure, such modification or amendment may only be made by order of the Court.

Receiver's Supplementary Record, Supplementary First Report, Vol. 1, Tab 2, pp.13-14, para 17.

58. Therefore, to the extent an offer is made conditional on tenant estoppel certificates, financing or anything else, and that offer meaningfully exceeds the Stalking Horse Bid, the Receiver maintains the ability to weigh a higher offer against the condition(s), and if necessary seek advice and direction from the Court to amend the Sale Procedure in respect of that offer.

59. In summary, when combining the facts that (i) the Receiver's Sale Procedure has a more generous timeline than the expedited marketing and sale process Penady entered into with AY on February 24, 2020, (ii) virtually every argument the Respondents raise with the Sale Procedure is inconsistent with, and also a critique of, Penady's own recent expedited marketing and sale process, (iii) CHP has made a stalking horse offer [REDACTED]

[REDACTED]

(iv) the RSM-AY Listing Agreement is structured to incentivize AY to seek third-party offers, (v) the Receiver retains the ability to modify or amend the Sale Procedure if necessary, and (vi) interest is accruing on the CHP Indebtedness at over \$120,000.00 per week, the Respondents' motivation appears to simply be to delay the sale process indefinitely.

PART IV - ORDER REQUESTED

58. For the reasons set out above, the Receiver respectfully requests, among other things, the following relief:

- (i) authorizing the Receiver to conduct the Sale Procedure;
- (ii) authorizing the Receiver to enter into the RSM-AY Listing Agreement;
- (iii) authorizing the Receiver to enter into the Stalking Horse Agreement, including approval of the Expense Reimbursement;
- (iv) approving the First Report and the Supplementary First Report, the Receiver's conduct and activities described therein and the R&D; and
- (v) sealing the Confidential Appendices to the First Report and the Supplementary First Report.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 29th day of May, 2020.


Eric Golden/Chad Kopach

SCHEDULE "A"

LIST OF AUTHORITIES

Royal Bank of Canada v. Soundair Corporation, 1991 CanLII 2727 (Ont. C.A.)

CCM Master Qualified Fund Ltd v. blutip Power Technologies, 2012 ONSC 1750 (CanLII)

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

Rule 53.03(3) Rules of Civil Procedure

EXPERT WITNESSES

Experts' Reports

53.03 (1) A party who intends to call an expert witness at trial shall, not less than 90 days before the pre-trial conference scheduled under subrule 50.02 (1) or (2), serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1).

(2) A party who intends to call an expert witness at trial to respond to the expert witness of another party shall, not less than 60 days before the pre-trial conference, serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1).

(2.1) A report provided for the purposes of subrule (1) or (2) shall contain the following information:

1. The expert's name, address and area of expertise.
2. The expert's qualifications and employment and educational experiences in his or her area of expertise.
3. The instructions provided to the expert in relation to the proceeding.
4. The nature of the opinion being sought and each issue in the proceeding to which the opinion relates.
5. The expert's opinion respecting each issue and, where there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range.
6. The expert's reasons for his or her opinion, including,
 - i. a description of the factual assumptions on which the opinion is based,
 - ii. a description of any research conducted by the expert that led him or her to form the opinion, and
 - iii. a list of every document, if any, relied on by the expert in forming the opinion.
7. An acknowledgement of expert's duty (Form 53) signed by the expert.

CHOICE PROPERTIES LIMITED PARTNERSHIP -and- **PENADY (BARRIE) LTD. ET AL**
Applicant Respondents

ONTARIO
SUPERIOR COURT OF JUSTICE
[COMMERCIAL LIST]
Proceeding commenced at Toronto

FACTUM OF THE RECEIVER
(Motion for Approval of Stalking Horse Agreement
and Sale Procedure returnable June 2, 2020)

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