

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

**BETWEEN:**

**MARSHALLZEHR GROUP INC.**

Applicant

- and -

**2174542 ONTARIO INC., SAFE HARBOUR HOMES INC. and  
SAFE HARBOUR DEVELOPMENTS INC.**

Respondents

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  
(Motion returnable October 17, 2024)**

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in its capacity as Court-Appointed  
Receiver**

**TO: THE SERVICE LIST**

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**FACTUM OF THE RECEIVER**

**PART I – OVERVIEW**

1. TDB Restructuring Limited (“**TDB**”), in its capacity as court-appointed receiver (the “**Receiver**”) without security, of the assets, undertakings, and properties of 2174542 Ontario Inc. (“**217**”), Safe Harbour Homes Inc. (“**Homes**”) and Safe Harbour Developments Inc. (collectively the “**Debtors**”), seeks an order:

- (a) validating the service of the Receiver’s Notice of Motion and the Receiver’s motion materials;
- (b) approving the marketing and sale process (the “**Sale Process**”) for the real property consisting of approximately 60 parcels of land located at Television Road and Old Norwood Road in the Township of Otonabee-South Monaghan (the “**Real Property**”), including the engagement of CBRE Limited (“**CBRE**”) as the listing broker, as

described in the First Report of the Receiver dated October 10, 2024 (the “**First Report**”);

- (c) authorizing and directing the Receiver to enter into the listing agreement with CBRE;
  - (d) approving the Receiver’s activities as described in the First Report;
  - (e) sealing Confidential Appendix “1” to the First Report;
  - (f) approving the fees and disbursements of the Receiver and its counsel, Chaitons LLP (“**Chaitons**”); and
  - (g) such further and other relief that the Receiver may request and this Honourable court may consider just.
2. Capitalized terms not defined in this Factum have the meaning defined in the First Report.

## **PART II – FACTS**

### **Background**

3. The Debtors are companies incorporated pursuant to the law of the Province of Ontario.<sup>1</sup>

4. 217 is the registered owner of the Real Property. The Real Property was in the process of being developed into a residential community consisting of townhouses, single family homes, commercial/retail office space, self-storage units and a retirement home.<sup>2</sup>

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<sup>1</sup> First Report of the Receiver dated October 10, 2024 (the “**First Report**”) at para. 8, Motion Record of the Receiver dated October 11, 2024 (“**MR**”), Tab 2.

<sup>2</sup> First Report at para. 9, MR, Tab 2.

5. The Real Property was being developed into a community which would include the following: i) 103 townhomes and single detached homes; ii) office and retail commercial space; iii) a self-storage facility; and iv) retirement residences. The residential lots have been subdivided and a portion of the residential lots have been serviced.<sup>3</sup>

6. Pursuant to an order (the “**Appointment Order**”) of the Ontario Superior Court of Justice (Commercial List) (the “**Court**”) made on May 31, 2024 (the “**Receivership Date**”), TDB was appointed Receiver of the Debtors.<sup>4</sup>

### **Request for Proposals from Real Estate Brokers**

7. The Appointment Order at paragraph 2. j) authorizes the Receiver to market the Real Property for sale, including advertising and soliciting offers in respect of the Real Property.<sup>5</sup>

8. To assist in assembling the information required to develop a process to market and sell the Real Property, the Receiver requested and received listing proposals from three leading real estate brokerages, including CBRE Limited, Colliers Inc. and Cushman & Wakefield ULC.<sup>6</sup>

9. All three real estate brokers submitted proposals.<sup>7</sup>

10. The Receiver has selected CBRE to act as listing agent for the Real Property, subject only to Court approval.<sup>8</sup>

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<sup>3</sup> First Report at para. 10, MR, Tab 2.

<sup>4</sup> First Report at para. 1, MR, Tab 2; Appendix “A” to the First Report.

<sup>5</sup> First Report at para. 30, MR, Tab 2; Appendix “A” to the First Report, MR, Tab 2A.

<sup>6</sup> First Report at para. 31, MR, Tab 2.

<sup>7</sup> First Report at para. 33, MR, Tab 2.

<sup>8</sup> First Report at para. 34, MR, Tab 2.

11. The Receiver recommends that the Court approve the Receiver retaining CBRE as listing agent for the Real Property for the following reasons:<sup>9</sup>

- (a) the Applicant, as the largest secured creditor, supports the retention of CBRE;
- (b) the CBRE team managing the mandate has experience selling real estate in the Peterborough area where the Real Property is located;
- (c) the Receiver has previously retained the CBRE team that will be responsible for this mandate on other similar mandates where the CBRE team achieved strong results; and
- (d) CBRE's proposed commission rate is reasonable based on the Receiver's experience selling real estate. CBRE's commission rate is acceptable to the Applicant.

### Sale Process

12. The recommended process pursuant to which the Real Property is to be marketed for sale by the Receiver (the "**Sale Process**") is summarized below:<sup>10</sup>

<b>Summary of Proposed Marketing Process</b>	
<p><b>Pre-Marketing</b></p> <p><i>Pre-marketing due diligence</i></p> <ul style="list-style-type: none"> <li>• Draft marketing brochure and submit to Receiver for review</li> <li>• Draft due diligence package and submit to Receiver for review</li> </ul> <p><i>Finalize marketing material</i></p> <ul style="list-style-type: none"> <li>• Draft detailed marketing brochure</li> <li>• Finalization of marketing package</li> <li>• Finalization of due diligence package</li> </ul>	2 Weeks

<sup>9</sup> First Report at section 6.3, MR, Tab 2; Appendix "B" to the First Report, MR, Tab 2B.

<sup>10</sup> First Report at para. 36, MR, Tab 2.

<p><b>Marketing</b></p> <p><i>Marketing process</i></p> <ul style="list-style-type: none"> <li>• Install signage on the Real Property</li> <li>• Distribution of marketing brochure and confidentiality agreement</li> <li>• Launch national marketing campaign without a bid deadline, the minimum marketing period will be 4-6 weeks</li> <li>• Offer submission</li> <li>• Ongoing correspondence with interested parties</li> </ul>	6 Weeks
<p><b>Negotiation/Closing</b></p> <p><i>Negotiating / due diligence</i></p> <ul style="list-style-type: none"> <li>• Review and summarize all offers</li> <li>• Submission of final and best offers</li> <li>• Negotiate APS and execute deal</li> <li>• Closely monitor due diligence process</li> </ul> <p><i>Closing (including Court approval of proposed sale, etc.)</i></p>	11 Weeks

13. The following are additional terms of the proposed Sale Process:<sup>11</sup>

- (a) the Real Property will be marketed on an “as is, where is” basis;
- (b) the Real Property will be listed as “unpriced”;
- (c) the Real Property will be listed on the multiple listing service (commonly known as MLS);
- (d) the Receiver will have the right to sell any portion of the Real Property, either *en bloc* or by lot at its discretion;
- (e) the Receiver will prepare a form of an agreement of purchase and sale for use by prospective purchasers;

<sup>11</sup> First Report at para. 37, MR, Tab 2.

- (f) any sales over the amount permitted in the Appointment Order will be subject to Court approval; and
- (g) the Receiver will have the right to reject any and all offers, including the highest offer.

### **Activities of the Receiver**

14. The activities of the Receiver since the issuance of the Appointment Order are described in the First Report at paragraphs 13-28.<sup>12</sup>

### **Sealing Order**

15. The Receiver requests that the summary of listing proposals attached as Confidential Appendix “1” to the First Report, be filed with the Court on a sealed basis pending completion of a sale of the Real Property. The summary of listing proposals includes valuations from each real estate brokerage listed above which, if disclosed, could negatively impact the value of a transaction for the sale of the Real Property.

16. The Receiver is not aware of any party that will be prejudiced if the information contained in the Receiver’s Confidential Appendix “1” is sealed.

### **Fees and Disbursements**

17. The Receiver has provided services and incurred disbursements during the period of May 29, 2024, to September 30, 2024 as set out in the Affidavit of Bryan Tannenbaum sworn October 9, 2024 (the “**Tannenbaum Affidavit**”), totaling \$125,660.35 (\$111,206.61 in fees and disbursements, plus HST of \$14,453.75).<sup>13</sup>

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<sup>12</sup> First Report at paras. 13-28, MR, Tab 2.

<sup>13</sup> First Report at para. 45, MR, Tab 2; Appendix “D” to the First Report, MR, Tab 2D.

18. During the period from June 3, 2024, to and including August 31, 2024, Chaitons expended a total of 14.60 hours in connection with this matter, giving rise to fees and disbursements totaling \$8,579.97 (\$7,603.25 in fees and disbursements, plus HST of \$976.72), as more particularly set out in the Affidavit of David Im sworn October 4, 2024 (the “**Im Affidavit**”).<sup>14</sup>

19. The Receiver is of the view that the fees and disbursements set out in the Im Affidavit, are reasonable in the circumstances.

### **PART III – ISSUES**

20. The issues to be determined on this motion are:

- (a) whether the Sale Process should be approved;
- (b) whether the Receiver’s activities as described in the First Report should be approved;
- (c) whether a sealing order should be granted over Confidential Appendix “1”; and
- (d) whether the fees and disbursements of the Receiver and Chaitons should be approved.

### **PART IV – LAW AND ARGUMENT**

#### **The Sale Process Should be Approved by the Court**

21. This Court has jurisdiction to approve the Sale Process pursuant to section 243(1)(c) of the BIA.<sup>15</sup>

22. Paragraph 2 of the Appointment Order authorizes, among other things, the Receiver to<sup>16</sup>:

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<sup>14</sup> First Report at para. 46, MR, Tab 2; Appendix “E” to the First Report, MR, Tab 2E.

<sup>15</sup> [Bankruptcy and Insolvency Act, RSC 1985, c B-3, section 243\(1\)\(c\).](#)

<sup>16</sup> Appendix “A” to the First Report, MR, Tab 2A.



- (a) market any or all of the Real Property, including advertising and soliciting offers in respect of the Real Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate; and
- (b) engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Receiver's powers and duties.

23. In the case of *Royal Bank of Canada v. Soundair Corp.*, the Ontario Court of Appeal held that a court was to consider the following factors when deciding whether to approve the sale of property subject to a receivership:<sup>17</sup>

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

24. In *CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.*, the Court held that the criteria identified in *Soundair* also inform the determination of whether to approve a court-appointed receiver's proposed sale process. Specifically, the court is to assess:<sup>18</sup>

- (a) the fairness, transparency and integrity of the proposed process;

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<sup>17</sup> [Royal Bank of Canada v. Soundair Corp. \(1991\), 4 OR \(3d\) 1 \(ONCA\)](#) at para. 16 [“*Soundair*”].

<sup>18</sup> [CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd., 2012 ONSC 1750](#) at para. 6.

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

25. The Receiver recommends that the Court approve the Sale Process and the Listing Agreement between the Receiver and CBRE for the following reasons:<sup>19</sup>

- (a) CBRE is a leading commercial real estate brokerage firm, with recent relevant sales experience of development sites, including in the Peterborough area;
- (b) CBRE's team managing the mandate has extensive experience buying, selling, underwriting and managing projects involving undeveloped land, both within and outside of formal restructuring proceedings;
- (c) CBRE's commission rate proposed is comparable to fee arrangements in formal restructuring proceedings of a similar scale and the Receiver is of view that the commission rate is reasonable as it is in line with market standards for engagements of a similar nature;
- (d) the Sale Process is designed to be a fair, open and transparent process intended to canvass the market broadly on an orderly basis in order to obtain the highest and best price;
- (e) the Sale Process is also designed to be flexible in that the lots can be sold either *en bloc* or by lot; and

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<sup>19</sup> First Report at section 6.3, MR, Tab 2.

- (f) the Applicant supports the engagement of CBRE and the Sale Process.

### **The Activities of the Receiver Should be Approved by the Court**

26. The Court has the inherent jurisdiction to review and approve the activities of a court-appointed receiver as set out in the receiver's reports.<sup>20</sup>

27. It is common practice for court officers to bring motions to seek approval of their reports and the activities set out therein. Court approval, among other things, allows the court officer to bring its activities before the court and presents an opportunity to address concerns of stakeholders, while enabling the Court to satisfy itself that the court officer's activities have been conducted in a prudent and diligent matter.<sup>21</sup>

28. The activities of the Receiver described in the First Report were all necessary and undertaken in good faith pursuant to the Receiver's duties and powers set out in the Appointment Order.

29. The Receiver therefore respectfully submits that the First Report and the activities described therein should be approved at this time.

### **Sealing Order**

30. The Receiver seeks a sealing order over Confidential Appendix "1" to the First Report.

31. The Supreme Court of Canada has held that a sealing order may be granted:<sup>22</sup>

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<sup>20</sup> [Bank of America Canada v. Willann Investments Ltd.](#), 1996 CanLII 2782 (ONCA).

<sup>21</sup> [Target Canada Co. \(Re\)](#), 2015 ONSC 7574 at paras 2 and 23; [Triple-I Capital Partners Limited v 12411300 Canada Inc.](#), 2023 ONSC 3400 at paras 65-66.

<sup>22</sup> [Sierra Club of Canada v. Canada \(Minister of Finance\)](#), 2002 SCC 41 at para. 45 ["Sierra"].

- (a) where it is necessary to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
- (b) where the salutary effects of the confidentiality outweigh its deleterious effects, including the effects on the right to free expression, which includes public interest in open and accessible court proceedings.

32. This Court has applied the Sierra test in court-supervised sale proceedings to ensure that competitors or potential bidders do not gain an advantage if the sale transaction does not close. In *GE Canada Real Estate Financing Business Property Co. v. 1262354 Ontario Inc.*, this Court held that the “integrity of the sales process necessitates keeping all bids confidential until a final sale of the assets has taken place.”<sup>23</sup>

33. In *Sherman Estate v. Donovan*, the Supreme Court of Canada held that a person asking a court to exercise discretion in limiting the ‘open court’ presumption must establish that:<sup>24</sup>

- (a) court openness poses a serious risk to public interest;
- (b) the order sought is necessary to prevent the risk to the identified interest because reasonably alternative measures will not prevent this risk; and
- (c) as a matter of proportionality, the benefits of the order outweigh its negative effects.

34. Confidential Appendix “1” contains confidential and commercially sensitive information relating to the respective valuations of each real estate brokerage that submitted a listing proposal. If

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<sup>23</sup> [GE Canada Real Estate Financing Business Property Co. v. 1262354 Ontario Inc.](#), 2014 ONSC 1173 at para. 34 [“*GE Canada*”]

<sup>24</sup> [Sherman Estate v. Donovan](#), 2021 SCC 25 at para. 38.

this information was disclosed, it would be harmful and materially prejudicial to the receivership estate.

### **The Fees and Disbursements of the Receiver and Chaitons Should be Approved**

35. The Receiver is seeking approval of the professional fees and disbursements incurred by it and its legal counsel as described in the Tannenbaum Affidavit, and the Im Affidavit attached to the First Report.

36. The Appointment Order at paragraphs 17 to 19 provide that the Receiver and its counsel shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges unless otherwise ordered by the Court on the passing of accounts.<sup>25</sup>

37. The fees and disbursements are fair and reasonable and have been properly incurred. The hourly rates charged by the Receiver and its counsel are consistent with comparable firms practicing in the area of insolvency in the Toronto market.

38. The Receiver respectfully submits that it is appropriate to approve the fees and disbursements of the Receiver and its counsel in the circumstances.


### **PART V – RELIEF SOUGHT**

39. The Receiver respectfully recommends and requests that the Court grant the relief sought on this motion.

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<sup>25</sup> Appendix “A” to the First Report; MR, Tab 2A.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 15<sup>th</sup> day of October, 2024.



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**CHAITONS LLP**

*Lawyers for the Receiver, TDB Restructuring  
Limited*

## SCHEDULE “A”

### LIST OF AUTHORITIES

1. [\*Royal Bank of Canada v. Soundair Corp.\* \(1991\), 4 OR \(3d\) 1 \(ONCA\)](#)
2. [\*CCM Master Qualified Fund v blutip Power Technologies\*, 2012 ONSC 1750](#)
3. [\*Bank of America Canada v. Willann Investments Ltd.\*, 1996 CanLII 2782 \(ONCA\)](#)
4. [\*Target Canada Co. \(Re\)\*, 2015 ONSC 7574](#)
5. [\*Triple-I Capital Partners Limited v 12411300 Canada Inc.\*, 2023 ONSC 3400](#)
6. [\*Sierra Club of Canada v. Canada \(Minister of Finance\)\*, 2002 SCC 41](#)
7. [\*GE Canada Real Estate Financing Business Property Co. v. 1262354 Ontario Inc.\*, 2014 ONSC 1173](#)
8. [\*Sherman Estate v. Donovan\*, 2021 SCC 25](#)

**SCHEDULE “B”**  
**STATUTORY AUTHORITIES**

**PART XI**

**Secured Creditors and Receivers**

**Court may appoint receiver**

**243 (1)** Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

- (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
- (b) exercise any control that the court considers advisable over that property and over the insolvent person’s or bankrupt’s business; or
- (c) take any other action that the court considers advisable.



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Court File No. CV-24-00716277-00CL

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