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COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE

Edmonton

PLAINTIFF

**THREE M MORTGAGES INC. AND AVATEX  
LAND CORPORATION**

DEFENDANTS

**TODD OEMING, TODD OEMING AS THE  
PERSONAL REPRESENTATIVE OF THE  
ESTATE OF ALBERT OEMING AND THE  
ESTATE OF ALBERT OEMING**

DOCUMENT

**BENCH BRIEF OF BDO CANADA LIMITED  
COURT APPOINTED RECEIVER OF WILD  
SPLENDOR DEVELOPMENT INC. IN  
SUPPORT OF AN APPLICATION FOR A SALE  
APPROVAL AND VESTING ORDER AND  
SEALING ORDER**

ADDRESS FOR SERVICE AND  
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## I. INTRODUCTION

1. This brief of law is submitted on behalf of BDO Canada Limited (the "**Receiver**") in its capacity of the court-appointed Receiver and Manager of Wild Splendor Development Inc. (the "**Debtor**") in support of its application (the "**Application**") for, among other things, an Order approving and ratifying the contract between the Receiver and Shelby Fehr (the "**Purchaser**") for the sale of the Lands (defined below).
2. The Application has been brought in accordance with paragraphs 3(i), (j), and (k) of the Order of the Honourable Associate Chief Justice K.G. Nielsen of the Court of Queen's Bench of Alberta granted June 4, 2019 (the "**Receivership Order**"), which authorized the Receiver to, among other things, execute, assign, issue and endorse documents of whatever nature in respect of any of the Property (as defined in the Receivership Order) for any purpose pursuant to the Receivership Order and market any or all of the Property, sell the Property or any parts thereof, and apply for any vesting order necessary to convey the Property or any parts thereof, free and clear of any liens of encumbrances.<sup>1</sup>
3. The Receiver has carried out an extensive and thorough sale process to generate interest and solicit bids for the sales of the Lands. As set out below, the Receiver has met the test for this Honourable Court to grant the Order ratifying the sale of the Lands.
4. In addition, the Receiver seeks an Order sealing the Confidential Supplement (the "**Confidential Supplement**") to the Second Report of the Receiver dated February 13, 2020 (the "**Second Report**").
5. The Receiver submits that the relief sought is reasonable and appropriate in the circumstances and at this stage of these proceedings.

## II. BACKGROUND

6. A detailed background of the Debtor and the Receiver's activities leading up to the Application is more fully described in the First Report of the Receiver, filed, and the Second Report. A brief overview is set out herein.

### A. The Debtor

7. The Debtor was engaged in the business of developing land to sell as bare land condos for commercial/recreational development.<sup>2</sup>

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<sup>1</sup> *Receivership Order*, granted by the Honourable Associate Chief Justice K.G. Nielsen on June 4, 2019, at para 3 [*Receivership Order*] [TAB 1].

<sup>2</sup> Second Report at para 7.

## B. Indebtedness

8. On June 4, 2019, the Plaintiffs applied to appoint a receiver over the current and future land, undertakings and properties of the Debtor.
9. The Plaintiffs obtained a Judgment against the Defendants and for the purposes of repaying the Defendants and satisfying the Judgment the Receiver is to sell the Lands.<sup>3</sup>

## C. The Marketing of the Lands

10. The Debtor owns lands legally described as Plan 1220280, Block 1, Lots 1-3 (inclusive) and municipally described as 51419 Range Road 223, Strathcona County, Alberta (the "**Lands**").
11. The Receiver commissioned a property appraisal of the Lands.<sup>4</sup>
12. On September 10, 2019, the Receiver sent a letter to 8 realtors requesting a proposal for the listing of the Lands.<sup>5</sup> The Receiver received multiple responses to its request for proposals, four responses as of September 20, 2019.<sup>6</sup> The Receiver engaged Avison Young and the Lands were listed at \$1,950,000.00.
13. On February 7, 2020, an offer to purchase for the Lands (the "**Sale Agreement**") was presented to the Receiver from the Purchaser. The Receiver accepted the Sale Agreement, subject to the approval of this Honourable Court.
14. The Receiver is recommending acceptance of the Sale Agreement as being in the best interest of the creditors of the Debtor.
15. The Plaintiffs have advised the Receiver that they each support acceptance of the Sale Agreement.

## III. ISSUES

16. The issues to be determined by this Honourable Court are whether it is appropriate and reasonable in the circumstances to:
  - (a) approve and ratify the Receiver's acceptance of the Sale Agreement; and
  - (b) grant a sealing order with respect to the Confidential Supplement.

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<sup>3</sup> *Ibid* at paras 14 and 16.

<sup>4</sup> *Ibid* at para 22

<sup>5</sup> The First Report of the Receiver, filed September 30, 2019 at para 25.

<sup>6</sup> *Ibid* at para 26.

## IV. ARGUMENT

### A. Approval and Ratification of Sale Agreement

17. The criteria to be applied when considering the approval of a sale recommended by a receiver were first set out by the Ontario Court of Appeal in *Royal Bank v Soundair Corp.* When considering whether a proposal accepted by a receiver should be approved and ratified by the Court, the Court is to consider and determine:
  - (a) whether the receiver made 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 were obtained; and
  - (d) whether there has been unfairness in the working out of the process.<sup>7</sup>
18. The Alberta Courts have adopted these criteria and have applied them in receivership proceedings on numerous occasions.<sup>8</sup>
19. It has been further acknowledged that the Court must place a great deal of confidence in the actions taken and in the opinions formed by a receiver, and should assume that a receiver is acting properly unless the contrary is clearly shown.<sup>9</sup>

#### *i. Sufficient Effort*

20. The Receiver submits that it has made sufficient effort to market the Lands.
21. The Receiver commissioned a property appraisal of the Lands and requested listing proposals for the Lands. The Receiver received four responses to its request for proposals.
22. After considering all proposals to list the Lands, the Receiver engaged Avison Young. The Lands were listed publicly at a list price of \$1,950,000.00.
23. With respect to the marketing efforts of Avison Young, Avison Young advises:

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<sup>7</sup> *Royal Bank v Soundair Corp.* (1991), 1991 CarswellOnt 205, 7 CBR (3d) 1, 83 OLR (4<sup>th</sup>) 76 at para 16 [Soundair] [TAB 2]; *Pricewaterhousecoopers Inc. v 1905393 Alberta Ltd.*, 2019 ABCA 433 at paras 10-12 [TAB 3].

<sup>8</sup> *Computershare Trust Company of Canada v Venti Investment Corporation*, 2011 ABQB 726 at para 3 [TAB 4].

<sup>9</sup> *Soundair supra*, at para 14 [TAB 2].

- (a) Avison directly contacted 407 individual prospective buyers and brokers with respect to the Lands;
- (b) Avison was contacted by telephone by 15 interested parties;
- (c) Avison toured the Lands with 3 interested parties;
- (d) Avison placed "for sale" signage upon the Lands with exposure to Highway 14; and
- (e) The Lands were listed for sale on Avison's website.<sup>10</sup>

24. The Receiver submits that the marketing efforts it has undertaken are "sufficient" as contemplated in the *Soundair* criteria.

*ii. Interest of All Parties*

25. Courts have acknowledged that a Receiver's primary concern should be to protect the interest of the debtor's creditors.<sup>11</sup>

26. In considering the "interest of all parties", Courts have recognized that a receiver's duty to act in the interests of the general body of creditors does not necessarily mean that the majority rules. Rather, the receiver must consider the interest of all creditors and then act for the benefit of the general body.<sup>12</sup>

27. The Plaintiffs support the Receiver's acceptance of the Sale Agreement.

28. The Receiver is of the opinion that the Sale Agreement provides a fair and reasonable recovery to the benefit of all of the creditors and is in line with the fair market value of the Lands.

29. In these circumstances, it is commercially reasonable and in the best interest of the Debtor's stakeholders that the Sale Agreement receive court-approval.

*iii. The Efficacy and Integrity of the Process*

30. When dealing with property, the Court should assume that a receiver has acted properly unless the contrary is clearly demonstrated.<sup>13</sup>

31. The Receiver submits that the listing and sale of the Lands was conducted in a fair and transparent manner.

32. The Receiver commissioned an appraisal of the Lands, requested listing proposals for the Lands from various realtors, and publically listed the Lands with Avison Young.

<sup>10</sup> Second Report at para 25.

<sup>11</sup> *Cobrico Developments Inc. v Tucker Industries Inc.*, 2000 ABQB 766 at paras 22 and 27 [TAB 5].

<sup>12</sup> *Alberta Treasury Branches v Elaborate Homes Ltd.*, 2014 ABQB 350 [*Elaborate Homes*] at para 61 [TAB 6] citing *Scanwood Canada Ltd., Re*, 2011 NSSC 189, 305 NSR (2d) 34.

<sup>13</sup> *Crown Trust Co. et al Rosenberg et al* (1986), 60 OR (2d) 87 (Ont HC) at paras 66-70 and 77 [TAB 7].

33. The Receiver submits that the listing and sale of the Lands was conducted with both efficacy and integrity.

*iv. Unfairness in the Process*

34. The Receiver submits that it acted reasonably, prudently, fairly, and not arbitrarily in conducting the listing and sale of the Lands. The Receiver accepted the Sale Agreement in good faith with a view to maximizing the recovery for all of the creditors of the Debtor.
35. Based on the forgoing, the Receiver submits that the *Soundair* criteria have been satisfied by the Receiver and that the Receiver has acted in a commercially reasonable manner in accepting the Sale Agreement.
36. It is therefore respectfully submitted that the Court should grant an Order approving and ratifying the Receiver's acceptance of the Sale Agreement.

**B. Sealing Order**

37. In addition to an Order approving and ratifying the Sale Agreement, the Receiver seeks a sealing order with respect to the Confidential Supplement of the Second Report.
38. The Court's authority to grant sealing orders is contemplated under Rule 6.28 and Division 4 of Part 6 of the *Alberta Rules of Court*.<sup>14</sup>
39. The seminal case of *Sierra Club of Canada v Canada (Minister of Finance)* provides the guiding principles in granting sealing orders and publications bans. Justice Iacobucci for the Court accepted that a confidentiality or sealing order could be granted when:
- (a) such an order is necessary in order 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) the salutary effects of the confidentiality order outweigh its deleterious effects, including the effects on the right to free expression, which includes public interest in open and accessible court proceedings.<sup>15</sup>
40. In the insolvency context, it is common when lands are being sold pursuant to a court process to seal various bids and other commercially sensitive material, such as valuations, in case a further bidding process is required should the transaction being approved falls through.<sup>16</sup>

<sup>14</sup> *Alberta Rules of Court*, AR 124/2010, Division 4 of Part 6 including Rule 6.28 [TAB 8].

<sup>15</sup> *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 at para 45 [TAB 9].

<sup>16</sup> *Look Communications Inc v Look Mobile Corp.* 2009 CarswellOnt 7952 (Ont SCJ [Commercial List] at para 17 [TAB 10].

41. The Ontario courts have further noted that sealing orders in this context are normally granted to maintain fair play so that competitors and potential purchasers do not obtain an unfair advantage by obtaining such information while others have to rely on their own resources.<sup>17</sup>
42. In *Alberta Treasury Branches v Elaborate Homes Ltd.*, Justice K.G. Nielsen (as he then was) accepted the reasons and rationale of the Ontario Courts and acknowledged that it is common practice in the insolvency context that information relating to the sale of the Lands of an insolvent corporation be kept confidential until after the sale is completed pursuant to a court order.<sup>18</sup>
43. The Receiver submits that in these circumstances it is necessary to seal the Confidential Supplement to prevent a real and substantial risk of harm to commercial interest. The Confidential Supplement contains the offers submitted to the Receiver. If such information was to be made public the sale of the Lands, for which considerable effort and funds have been expended, could be compromised to the detriment of the Debtor and the Debtor's creditors.
44. Release of the information prior to the conclusion of the sale of the Lands may cause irreparable harm to the fairness of any further sales process of the Lands. This would negatively impact the stakeholders of the Debtor, who have an interest in ensuring the highest value possible is received for the Lands.
45. The Receiver further submits that salutary effects of a sealing of the Confidential Supplement outweigh any deleterious effects that may be caused by the sealing.
46. The sealing of the Confidential Supplement is essential to the Receiver satisfying the *Soundair* principles as required by this Court, and therefore it is both reasonable and appropriate for the Court to seal the Confidential Supplement on the Court Record.

## V. RELIEF CLAIMED

48. Based upon the materials filed and the foregoing submission, the Receiver respectfully requests:
  - (a) An Order approving and ratifying the Receiver's acceptance of the Sales Agreement;
  - (b) An Order sealing the Confidential Supplement of the Second Report on the Court record until the sale of the Lands has closed; and

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<sup>17</sup> 887574 *Ontario Inc v Pizza Pizza Ltd*, 1994 CarswellOnt 1214, [1994] OJ No 3112 at para 6 [TAB 11].

<sup>18</sup> *Elaborate Homes supra.* at para 54 [TAB 6].



(c) Such further or other relief as may be requested of the Court by the Receiver.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 14<sup>th</sup> DAY OF FEBRUARY, 2020

**DENTONS CANADA LLP**

Per: 

Tom Gusa

Legal Counsel for the Applicant, BDO  
Canada Limited in its capacity as Court-  
appointed Receiver of Wild Splendor  
Development Inc. and not in its personal  
capacity.