

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

*IN THE MATTER OF Section 101 of the Courts of Justice Act, R.S.O. 1990 c.C.43, as amended,  
and in the matter of Section 243(1) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as  
amended*

**B E T W E E N:**

**NATIONAL BANK OF CANADA**

Applicant

- and -

**NIMBUS ENVIRONMENTAL SOLUTIONS INC., OAKDALE ENTERPRISES INC.,  
NIMBUS WATER SYSTEMS INC., 365 PRO INSTALLATIONS INC.,  
2242462 ONTARIO LIMITED AND WATER FILTER CART INC.**

Respondents

**FACTUM OF 2752837 ONTARIO INC.**

November 11, 2021

**CHAITONS LLP**  
5000 Yonge Street, 10th Floor  
Toronto, Ontario M2N 7E9

**Harvey Chaiton** (LSO #21952F)  
Tel: (416) 218-1129  
E-mail: harvey@chaitons.com

**Lawyers for 2752837 Ontario Inc.  
(Stalking Horse Purchaser)**

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

*IN THE MATTER OF Section 101 of the Courts of Justice Act, R.S.O. 1990 c.C.43, as amended,  
and in the matter of Section 243(1) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as  
amended*

**B E T W E E N:**

**NATIONAL BANK OF CANADA**

Applicant

- and -

**NIMBUS ENVIRONMENTAL SOLUTIONS INC., OAKDALE ENTERPRISES INC.,  
NIMBUS WATER SYSTEMS INC., 365 PRO INSTALLATIONS INC.,  
2242462 ONTARIO LIMITED AND WATER FILTER CART INC.**

Respondents

**FACTUM OF 2752837 ONTARIO INC.**

**PART I – OVERVIEW<sup>1</sup>**

1. The Receiver has brought a motion for an approval and vesting order with respect to the Stalking Horse Agreement. Peter Bozzo, a shareholder and director of the Respondents, opposes the motion and supports the position of Sincere, the proposed lender to Acquamia, a bitter bidder, in arguing that the Receiver acted unfairly and contrary to the terms of the SISF when it required Acquamia to provide the Deposit.

---

<sup>1</sup> Capitalized terms used in Part I have the meanings ascribed to such terms in the remainder of the factum.

2. Under the SISP, a Superior Bid submitted to the Receiver had to be from a Qualified Bidder. For Acquamia to be a Qualified Bidder, it had to demonstrate to the Receiver that it had the financial and other capabilities to consummate the transaction contemplated by its bid, which it failed to do.

3. In making the request for the Deposit, the Receiver exercised its business judgment in a reasonable manner and in accordance with the SISP. There is no basis shown to interfere with the Receiver's decision to require the Deposit, nor was there any unfairness by the Receiver in carrying out the SISP.

4. In the circumstances, the Stalking Horse Purchaser respectfully submits that the Court grant the Receiver's motion, with costs payable to the Receiver and the Stalking Horse Purchaser by Acquamia, Sincere and Mr. Bozzo on a joint and several basis.

## **PART II – FACTS**

5. On August 23, 2021, BDO Canada Limited was appointed by the Court as receiver (the "**Receiver**") of the property, assets and undertakings of the Respondents.

Motion Record of BDO Canada Limited, Tab 2, Second Report of the Receiver dated November 1, 2021 (the "**Second Report**"), para. 1.

6. Pursuant to the Order of Justice Cavanagh dated September 13, 2021 (the "**SISP Order**"), the Court approved the sale and investment solicitation process proposed by the Receiver and attached as Schedule "B" to the SISP Order (the "**SISP**"). The SISP Order was made on notice to the service list, including Mr. Bozzo, who was represented by counsel at the hearing.

Second Report, para 2; Supplemental Report of the Receiver dated November 11, 2021 ("**Supplemental Report**"), para. 3.

7. The Court authorized and directed the Receiver to carry out the SISP in accordance with its terms and the SISP Order. The Court also authorized and directed the Receiver to take such steps as it considered necessary or desirable in carrying out its obligations thereunder, subject to prior approval of the Court being obtained before completion of any transaction(s) under the SISP.

Order of Justice Cavanagh dated September 13, 2021 (the “**SISP Order**”), para. 8.

8. The SISP Order also approved the stalking horse asset purchase agreement dated September 6, 2021 (the “**Stalking Horse Agreement**”) between the Receiver and 2752837 Ontario Inc. (the “**Stalking Horse Purchaser**”).

SISP Order, para. 7.

9. The Stalking Horse Purchaser provided a deposit of \$650,000 to the Receiver, as required under the Stalking Horse Agreement. The deposit amount represents 5% of the purchase price.

Second Report, para. 14.

10. The Stalking Horse Agreement was deemed to be a Qualified Bid (as defined in the SISP).

Sale and Investment Solicitation Process (“**SISP**”), p. 6.

11. The purpose of the SISP was to “determine whether a better Transaction than the Stalking Horse Agreement [could] be obtained by the Receiver in a formal marketing process approved by the Court.”

SISP, p. 1.

12. A better transaction, or “Superior Offer”, than the Stalking Horse Agreement, would have to be, *inter alia*, “a credible, reasonably certain and financially viable offer made by a Qualified Bidder (as defined herein), the terms of which are more favourable and no more burdensome than the terms contained in the Stalking Horse Agreement.”

SISP, p. 1.

13. The SISP was to proceed in two phases. In Phase 1 of the SISP, parties that wished to participate were required to provide certain documents to the Receiver so that the Receiver could determine whether the party would be a “Qualified Bidder” under the SISP. Such documents included “financial disclosure and credit quality support or enhancement that allows the Receiver to make a reasonable determination as to the potential bidder’s financial and other capabilities to consummate a transaction that would constitute a Superior Offer.”

SISP, p. 3.

14. The determination as to whether a party was a Qualified Bidder was to be made by the Receiver, exercising its reasonable business judgment. The party was required to satisfy the Receiver that it had the “financial capability based on the availability of financing, experience and other considerations, to be able to consummate a sale or investment pursuant to the SISP.”

SISP, p. 3.

15. In Phase 2 of the SISP, Qualified Bidders were required to make formal binding offers (a “**Bid**”) by October 13, 2021 (the “**Bid Deadline**”). A Bid to purchase the assets of the Respondents had to, *inter alia*:

- (a) identify or contain “a specific indication of the financial capability of the Bidder and the expected structure and financing of the transaction”; and
- (b) include “a commitment by the Bidder to provide a non-refundable deposit in the amount of not less than 5% of the Purchase Price offered upon the Bidder being selected as the Successful Bidder”.

SISP, pp. 4 and 6.

16. Additionally, a Bid had to include “written evidence of a firm, irrevocable commitment for financing or other evidence of ability to consummate the proposed Transaction that would allow the Receiver to make a determination as to the Bidder’s financial and other capabilities to consummate the proposed Transaction.”

SISP, p. 5.

17. At the request of potential bidders, the Receiver extended the Bid Deadline from October 13 to October 15, 2021 (the “**Extended Bid Deadline**”). The Receiver received two (2) bids in addition to the Stalking Horse Agreement. One bid was made by Acquamia Inc. (“**Acquamia**”) to acquire the property and assets of the Respondents for \$18.1 million (the “**Acquamia Bid**”).<sup>2</sup>

Second Report, para. 21; Affidavit of Peter Bozzo sworn November 9, 2021, para. 2; Affidavit of Antonio Maineri, para. 2.

---

<sup>2</sup> The other bid did not constitute a Superior Bid under the SISP, was rejected by the Receiver, and is not relevant.

18. For the Acquamia Bid to constitute a Qualified Bid under the SISP, Acquamia had to be a Qualified Bidder, which was to be determined by the Receiver in accordance with the SISP.

Second Report, para. 21.

19. On October 12, 2021, Acquamia's counsel provided certain documentation to the Receiver in support of its acceptance as a Qualified Bidder. The documentation included a letter and term sheet from Colin James on behalf of Sincere Distribution Inc. ("**Sincere**") as evidence of financing. The letter indicated that Sincere was being funded by Carbon Development Inc. ("**Carbon**").

Supplemental Report, para. 5.

20. On October 13, 2021, the Receiver advised Mr. James that the documents provided did not represent a firm, irrevocable commitment for financing or other evidence of Acquamia's ability to consummate the proposed transaction.

Supplemental Report, para. 6.

21. On October 15, 2021, Mr. James provided additional documentation, which included a document from Royal Bank Pacific to Carbon which purposed to authenticate a bank draft in the amount of US\$30.0 million in favour of Sincere (the "**Bank Draft**").

Supplemental Report, para. 8.

22. Upon review and consideration of the documents provided, the Receiver advised Acquamia that it remained concerned about the negotiability of the Bank Draft. The Receiver was unable to obtain publicly available information in respect of Sincere, Carbon, and Royal Bank Pacific.

Second Report, para. 23; Supplemental Report, paras. 9-10

23. In the circumstances, the Receiver advised that, in order for Acquamia to be considered a Qualified Bidder, it would have to provide a deposit of \$905,000, or 5% of the bid amount (the “**Deposit**”), to demonstrate its ability to close.

Second Report, para. 23; Supplemental Report, paras 10.

24. The Receiver was in regular communication with counsel to Acquamia and Sincere regarding the status of the delivery of the Deposit and the Bank Draft. On October 24, 2021, the Receiver informed Acquamia’s counsel that if the Deposit was not provided by October 26, 2021, Acquamia would not be deemed a Qualified Bidder.

Supplemental Report, paras. 12-17.

25. On October 25, 2021, the Receiver was informed by Mr. James that Sincere had not received confirmation from Bank of Montreal that the Bank Draft was a negotiable instrument and that no assurances could be provided as to when that was likely to occur.

Supplemental Report, para. 18.

26. Acquamia failed to provide the Deposit by October 26, 2021 or indicate any timing as to when it would be provided. Neither the Receiver nor its counsel had any contact with Acquamia, Sincere or Carbon since October 26, 2021, until being served with their motion materials on November 9, 2021.

Second Report, para. 23; Supplemental Report, para. 19.

27. As a result, Acquamia was not considered by the Receiver to be a Qualified Bidder under the SISF, and the Acquamia Bid was not a Qualified Bid. The Receiver determined that the



Stalking Horse Agreement was the winning bid under the SISP, as it was the only bid that was a Qualified Bid.

Second Report, paras. 23-24.

### **PART III – ISSUES**

Should the Court approve the sale and vesting of the Purchased Assets (as defined in the Stalking Horse Agreement) in and to the Stalking Horse Purchaser?

### **PART IV – LAW AND ARGUMENT**

#### **Acquamia was Not Treated Unfairly**

28. In *Royal Bank v. Soundair Corp.* (“*Soundair*”), the Court of Appeal set out the following four factors that courts must consider when deciding whether to approve a sale by a Court-appointed receiver:

- (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.

*Royal Bank v. Soundair* (1991), 4 O.R. (3d) 1 (C.A.) [“*Soundair*”], para. 16.

29. In this motion, the parties opposing the sale to the Stalking Horse Purchaser argue that there has been unfairness in the working out of the sale process.

30. As noted by the Court of Appeal, courts rely upon the expertise of receivers. Courts must place a great deal of confidence in the actions taken and, in the opinions, formed by a receiver. Courts should assume that the receiver is acting properly unless the contrary is clearly shown. Courts should be reluctant to second-guess the considered business decisions made by its receiver.

*Soundair*, para. 14.

31. Since it is part of the very essence of a receiver's function to make business judgments based on the information then available to it, the Court should only reject the recommendation of a receiver based on such judgment in the most exceptional circumstance.

*9-Ball Interests Inc. v. Traditional Life Sciences Inc.*, 2012 ONSC 2788, para. 28;  
*Skyepharma PLC v. Hyal Pharmaceutical Corp.* (1999), 12 C.B.R. (4th) 87  
(S.C.J.) [*“Skyepharma SCJ”*], para. 3.

32. It is only justifiable for the Court to enter into the sale process where it is satisfied that a receiver has not properly conducted the sale which it has recommended to the Court.

*Soundair*, para. 31.

33. Provided a receiver has acted reasonably, prudently and not arbitrarily, a court should not review in every detail every element of the procedure by which the receiver made its decision. To do so would be futile and duplicative. It would emasculate the role of the receiver.

*Bank of Montreal v. Dedicated National Pharmacies Inc.*, 2011 ONSC 4634,  
para.43.

34. A receiver's conduct is to be reviewed in light of the objective information the receiver had at the time and not with the benefit of hindsight.

*Soundair*, para. 21; *Skyepharma SCJ*, para. 4.

35. The SISP was created to ensure that only bidders that had the ability to close a transaction would have their bids considered by the Receiver. Acquamia was not a Qualified Bidder under the SISP when it submitted the Acquamia Bid to the Receiver. The SISP required the Receiver to determine, exercising its reasonable business judgment, whether Acquamia had available financing to be able to close its proposed transaction.

36. The documentation and Bank Draft provided by Acquamia was not sufficient to demonstrate Acquamia's financial ability to consummate the transaction contemplated by the Acquamia Bid.

37. Without receipt of the Deposit, the Receiver had no credible evidence as to Acquamia's ability to close the Acquamia Bid if it was the winning bid under the SISP.

38. The interests of the Stalking Horse Purchaser must be taken into consideration, as "the interests of a person who has negotiated an agreement with a court-appointed receiver are very important." Prospective purchasers have to know that, if they are acting in good faith, bargain seriously with a receiver and enter into an agreement with it, a court will not lightly interfere with the commercial judgment of the receiver to sell the asset to them.

*Soundair*, paras. 40 and 46.

39. The Stalking Horse Purchaser had already posted its own 5% deposit with the Receiver. It would have been unfair and improper to require the Stalking Horse Purchaser to participate in an auction with a bidder that had not satisfied the Receiver that it had the necessary financial capacity as required under the SISP.

40. It would have also been unfair to the parties with an interest in the Respondents' property and assets if the Acquamia Bid was declared a Qualified Bid without Acquamia providing the Deposit to the Receiver. In such circumstances, the Receiver would have been required to expend time and money to conduct an auction where Acquamia, if it was the winning bidder, may not have been able to close the transaction.

**Acquamia is a Bitter Bidder and has No Standing**

41. The fundamental purpose of a sale approval motion is to consider the best interests of the parties with a direct interest in the proceeds of the sale, primarily the creditors. As set out by the Court of Appeal in *Skyepharm PLC v. Hyal Pharmaceutical Corp.* ("*Skyepharm*"), an unsuccessful purchaser has no interest in this issue, as it has no legal or proprietary right in the property being sold.

*Skyepharm PLC v. Hyal Pharmaceutical Corp.* (2000), 47 O.R. (3d) 234 (C.A.)  
[*"Skyepharm CA"*], paras. 25-26.

42. The Court of Appeal also noted that there is no right in a party who submits an offer to have the offer, even if the highest, accepted by either the receiver or the court.

*Skyepharm CA*, para. 25.

43. As the Court of Appeal warned, "the involvement of unsuccessful prospective purchasers could seriously distract from this fundamental purpose by including in the motion other issues with the potential for delay and additional expense".

*Skyepharm CA*, para. 26.

44. That is what has transpired here. Acquamia's opposition to the Receiver's motion is unwarranted, risks delaying the parties from closing, and has added unnecessary expense to the receivership proceeding.

**PART V – ORDERS SOUGHT**

45. The Stalking Horse Purchaser requests that the Court grant the orders sought by the Receiver, with costs payable to the Receiver and the Stalking Horse Purchaser by Acquamia, Sincere and Mr. Bozzo on a joint and several basis.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

November 11, 2021



---

Harvey Chaiton

**CHAITONS LLP**  
5000 Yonge Street, 10<sup>th</sup> floor  
Toronto, ON M2N 7E9

**Harvey Chaiton** (LSO #21952F)  
Tel: (416) 218-1129  
E-mail: harvey@chaitons.com

**Lawyers for 2752837 Ontario Inc.**  
**(Stalking Horse Purchaser)**

**SCHEDULE "A"**  
**STATUTORY PROVISIONS**

**Nil**

**SCHEDULE “B”  
AUTHORITIES**

1. *Royal Bank v. Soundair* (1991), 4 O.R. (3d) 1 (C.A.)
2. *9-Ball Interests Inc. v. Traditional Life Sciences Inc.*, 2012 ONSC 2788
3. *Skyepharma PLC v. Hyal Pharmaceutical Corp.* (1999), 12 C.B.R. (4th) 87 (S.C.J.)
4. *Bank of Montreal v. Dedicated National Pharmacies Inc.*, 2011 ONSC 4634
5. *Skyepharma PLC v. Hyal Pharmaceutical Corp.* (2000), 47 O.R. (3d) 234 (C.A.)

NATIONAL BANK OF CANADA

-and-

NIMBUS ENVIRONMENTAL SOLUTIONS INC., *et al*

Applicant

Respondents

Court File No. CV-21-00667395-00CL

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

PROCEEDING COMMENCED AT  
TORONTO

**FACTUM OF 2752837 ONTARIO INC.**

**CHAITONS LLP**

5000 Yonge Street, 10th Floor  
Toronto, Ontario M2N 7E9

**Harvey Chaiton** (LSO #21952F)

Tel: (416) 218-1129

E-mail: [harvey@chaitons.com](mailto:harvey@chaitons.com)

**Lawyers for 2752837 Ontario Inc.  
(Stalking Horse Purchaser)**