

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

**BETWEEN:**

**CENTURION MORTGAGE CAPITAL CORPORATION**

Applicant

- and -

**TERRASAN 327 ROYAL YORK RD. LIMITED**

Respondent

**FACTUM OF THE RECEIVER, BDO CANADA LIMITED  
(Motion returnable August 25, 2017)**

August 22, 2017

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**TO: SERVICE LIST**

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**PART I – OVERVIEW**

1. BDO Canada Limited (“**BDO**”), in its capacity as the Court-appointed receiver and manager (the “**Receiver**”) of the assets, undertakings and properties (the “**Assets**”) of Terrasan 327 Royal York Rd. Limited (“**Terrasan**”) seeks an order (the “**Approval and Vesting Order**”), *inter alia*: (a) approving the sale transaction (the “**Transaction**”) contemplated by an Asset Purchase Agreement dated July 28, 2017 (the “**2402871 APA**”) between the Receiver and 2402871 Ontario Inc. (the “**Purchaser**”) and appended to the Second Report of the Receiver dated August 16, 2017 (the “**Second Report**”), and (b) vesting in and to the Purchaser Terrasan’s right, title and interest, if any, in and to the assets described in the 2402871 APA (the “**Purchased Assets**”).

2. The Receiver is also seeking an order sealing from the public record: (a) **Confidential Appendix “A”** to the Second Report, which consists of a summary of bids received in the sale process (the “**Bid Summary**”), and (b) **Confidential Appendix “B”** to the Second Report, which consists of an unredacted copy of the 2402871 APA (collectively, the “**Confidential Appendices**”), until further Court Order.

3. This factum is filed in support of the Receiver’s motion.

## **PART II – THE FACTS**

### **(A) Overview**

4. Terrasan is the registered owner of lands and premises located at 327 Royal York Road, Toronto, Ontario (the “**Property**”) and its principal asset is a partially constructed residential condominium development known as “On the Go Mimico” (the “**Project**”), which is located on the Property.

5. The primary lender to Terrasan was Centurion Mortgage Capital Corporation (“**Centurion**”). Pursuant to the terms of a Commitment Letter dated March 23, 2016 (the “**Loan Agreement**”), Centurion agreed to loan the principal sum of \$21,800,000.00 to Terrasan in the form of a demand, non-revolving credit facility (the “**Loan**”) to finance the construction of the Project. Centurion is currently owed in excess of \$11,747,220.99 in connection with the Loan.<sup>1</sup>

6. To secure the repayment of amounts under the Loan Agreement, Terrasan agreed to provide Centurion with security including, *inter alia*, a general security agreement dated March

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<sup>1</sup> Affidavit of Ryan Buzzell sworn January 27, 2017 at para. 6, Application Record of the Applicant dated January 27, 2017, Tab 2 [*Buzzell Affidavit*].

30, 2016 (in respect of which a financing statement was registered pursuant to the *Personal Property Security Act* (Ontario) on March 30, 2017), a second charge/mortgage in the principal amount of \$21,800,000.00 registered on title to the Property on April 14, 2016 as instrument number AT4192730, and a general notice of assignment of rents registered on title to the Property on April 4, 2016 as instrument number AT4192731.<sup>2</sup>

7. Centurion paid out the first registered mortgage on January 3, 2017, and it was discharged from title to the Property.<sup>3</sup>

8. On December 19, 2016 Centurion demanded repayment of the Loan and served a Notice of Intention to Enforce Security pursuant to section 244 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the “**BIA**”).<sup>4</sup>

9. On February 24, 2017, Centurion applied for, and the Court granted, an order appointing BDO as Receiver over the Assets (the “**Receivership Order**”).

10. Pursuant to paragraph 4 of the Receivership Order, Terrasan was provided until March 24, 2017 to payout all amounts outstanding to Centurion. Upon delivery of such repayment and upon payment of the Receiver’s fees (the “**Required Payment**”), the Receivership Order would be discharged. In the interim period, the Receivership Order directed that the Receiver shall not market or solicit offers, or negotiate terms and conditions in respect of the Property.<sup>5</sup> The Receivership Order did, however, authorize the Receiver to take necessary steps to perform due

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<sup>2</sup> Buzzell Affidavit, para. 7.

<sup>3</sup> First Report to the Court of the Receiver, dated March 27, 2017, para. 13 [*First Report*].

<sup>4</sup> Buzzell Affidavit, paras. 15 & 16

<sup>5</sup> Receivership Order, para 5.

diligence on the Property, gather relevant documentation for a sale process, and prepare and develop sale process material.<sup>6</sup>

11. Immediately following BDO's appointment, the Receiver took possession of, and has taken steps to preserve, the Property.<sup>7</sup> The Project has ceased development activities, with the exception of services required to safely maintain the construction site and preserve and protect the value of the construction completed to date until a sale of the Project is completed.<sup>8</sup>

12. Terrasan did not deliver the Required Payment by the March 24, 2017 deadline.<sup>9</sup>

**(B) The Sales Process**

13. On April 3, 2017, this Honourable Court granted an order approving a sale process (the "**Sale Process Order**") for the purpose of soliciting interest in and opportunities for a sale of the Assets (the "**Sale Process**").

14. In connection with the Sale Process, the Receiver initially contacted 298 prospective purchasers and subsequently advertised the Sale Process in national news outlets consecutively over a four-week period.<sup>10</sup> The Receiver received 91 executed non-disclosure agreements from prospective purchasers, who met the criteria to be deemed a "**Phase 1 Qualified Bidder**" pursuant to the Sales Process.<sup>11</sup>

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<sup>6</sup> Receivership Order, para 5.

<sup>7</sup> First Report, para. 18.

<sup>8</sup> First Report, para. 26.

<sup>9</sup> First Report, para. 30.

<sup>10</sup> Second Report, paras. 15(a) & 15(d).

<sup>11</sup> Second Report, paras. 15(e) & 15(f).

15. The Receiver received 11 non-binding offers to purchase the Assets in “Phase 1” of the Sale Process.<sup>12</sup>

16. On or prior to the Binding APA Deadline (as defined in the Sale Process), five binding offers to purchase the Assets were submitted by bidders qualified in “Phase 2” of the Sale Process (collectively, the “**Binding Offers**”), which are summarized in the Bid Summary.<sup>13</sup>

17. The Receiver has implemented the Sale Process in accordance with the Sale Process Order.<sup>14</sup>

(c) **2402871 APA**

18. The Receiver evaluated the Binding Offers in accordance with the Sale Process and determined that it would seek Court approval of the 2402871 APA.<sup>15</sup>

19. The Receiver is of the view that the Transaction is beneficial to Terrasan’s creditors as a whole, as it maximizes the pool of funds available for distribution to the secured creditors.<sup>16</sup>

20. Centurion and the Guarantee Company of North America (“GCNA”), Terrasan’s largest secured creditors, support the Transaction.<sup>17</sup>

21. The Receiver respectfully submits that:

- i. it has conducted the Sale Process in accordance with the Sale Process Order;

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<sup>12</sup> Second Report, para. 16.

<sup>13</sup> Second Report, paras. 19 & 20; Confidential Appendix “A” to the Second Report, para. 6..

<sup>14</sup> Second Report, paras. 15-25.

<sup>15</sup> Second Report paras. 21 & 22.

<sup>16</sup> Second Report, para. 38 & 39(a).

<sup>17</sup> Second Report, para. 23 & 39(c).

- ii. the Assets were sufficiently canvassed in the market and the Receiver implemented the Sales Process in a fair, transparent, necessarily expedient and commercially reasonable manner, consistent with the Receivership Order and the Sale Process Order;
- iii. the 2402871 APA represents the highest and best bid for the Purchased Assets;  
and
- iv. the 2402871 APA should be approved by the Court.

22. In the event the Court does not grant the Approval and Vesting Order or the Transaction does not close, the Receiver is of the view that efforts to re-market the Assets would be severely impaired if the Confidential Appendices were made public at this time.<sup>18</sup>

23. The Receiver believes that it is appropriate for the Confidential Appendices to remain confidential until further Court order.<sup>19</sup>

### **PART III – ISSUES**

24. There are two main issues before this Honourable Court:

- (a) whether to approve the 2402871 APA and grant the Approval and Vesting Order;  
and
- (b) whether to seal the Confidential Appendices from the public record until further order of the Court.

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<sup>18</sup> Second Report, para. 40.

<sup>19</sup> Second Report, para. 40.

25. The Receiver respectfully requests that this Honourable Court approve the 2402871 APA, grant the Approval and Vesting Order, and issue a sealing order in respect of the Confidential Appendices.

#### **PART IV – THE LAW AND ARGUMENT**

##### **(A) The 2402871 APA and Transaction Should Be Approved**

26. Pursuant to the Receivership Order, the Court determined that the Receiver was:

- (a) appointed in respect of the Assets; and
- (b) authorized and empowered to, among other things:
  - (i) market any or all of the Assets, including advertising and soliciting offers in respect of the Assets or any part or parts thereof, and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate;
  - (ii) apply for any vesting order or other orders necessary to convey the Assets or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Assets; and
  - (iii) implement the Sale Process.

27. The Sale Process Order also directed and authorized the Receiver to take the necessary steps to implement the Sale Process.



28. Pursuant to Section 100 of the CJA, this Honourable Court may by order vest in any person an interest in real or personal property that the Court has authority to order be disposed of, encumbered or conveyed.<sup>20</sup>

29. The following principles are to be considered when determining whether to approve a sale transaction in the context of a receivership (collectively, the “**Soundair Principles**”):

- (a) whether the receiver made a sufficient effort to obtain the best price and has not acted improvidently;
- (b) the interests of all parties;
- (c) the efficacy and integrity of the process by which the offers are obtained; and
- (d) whether the working out of the process was unfair.<sup>21</sup>

30. Underlying these considerations are the principles which apply when reviewing a sale by a court-appointed receiver. The Court will place a great deal of confidence in the actions taken and in the opinions formed by the receiver.<sup>22</sup> It should assume that the receiver is acting properly, unless the contrary is clearly shown.<sup>23</sup> The court should be reluctant to second guess the considered business decisions made by its receiver.<sup>24</sup>

31. A Court is to grant deference to the recommendation of a receiver to sell a debtor’s assets and, provided the receiver has acted reasonably, prudently and not arbitrarily, a Court should not

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<sup>20</sup> *Courts of Justice Act*, R.S.O. 1990, c. C-43, s.100.

<sup>21</sup> *Royal Bank of Canada v. Soundair Corp.*, 1991 CarswellOnt 205 (C.A.), para. 16, Receiver’s Brief of Authorities, Tab 1 [*Soundair*].

<sup>22</sup> *Soundair*, para. 14.

<sup>23</sup> *Soundair*, para. 14.

<sup>24</sup> *Soundair*, para. 14; *Regal Constellation Hotel Ltd.*, 2004 CarswellOnt 2653 (C.A.), para. 23, Receiver’s Brief of Authorities, Tab 2, [*Regal Constellation*].

sit as in an appeal from a receiver's decision.<sup>25</sup> Only in exceptional circumstances will a Court intervene and proceed contrary to the recommendation of its officer, the receiver.<sup>26</sup>

32. The evidence set out by the Receiver in the Second Report demonstrates that each of the Soundair Principles has been satisfied.

**(a) *The Receiver made a Sufficient Effort to Obtain the Best Price and Has Not Acted Improvidently***

33. From April to July 2017, the Receiver implemented an extensive marketing process with a view to obtaining the best price for the Assets.

34. 298 potential bidders were contacted or notified by the Receiver.<sup>27</sup> 91 potential purchasers executed confidentiality agreements, were provided with access to the virtual data room set up by the Receiver, and undertook varying levels of due diligence.<sup>28</sup>

35. In the Receiver's view, the Sale Process, as implemented by the Receiver, adequately canvassed the market for prospective purchasers for the Assets.<sup>29</sup>

36. All parties interested in making an offer in respect of the Assets were given a reasonable opportunity to review the Sale Process and the Assets, conduct due diligence and make an offer.<sup>30</sup> Moreover, all reasonable requests for information made by potential bidders were satisfied.<sup>31</sup>

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<sup>25</sup> *Skyepharm PLC v. Hyal Pharmaceutical Corp.*, 1999 CarswellOnt 3641, para. 7, 12 C.B.R. (4<sup>th</sup>) 87 (S.C.K. [Commercial List]), affirmed (2000), 47 OR. (3d) 234 (C.A.), Receiver's Book of Authorities, Tab 3 [*Skyepharm*].

<sup>26</sup> *Soundair*, para. 21; *Skyepharm*, para. 7.

<sup>27</sup> Second Report, para. 15(a).

<sup>28</sup> Second Report, paras. 15 (e), 15(f), 15(h), 15(i) & 15(k).

<sup>29</sup> Second Report, paras. 33 & 50.

<sup>30</sup> Second Report, para. 50.

<sup>31</sup> Second Report, para. 35.

37. Further marketing efforts are unlikely to result in the identification of a superior transaction and any delay to attempt to do so could jeopardize the Transaction.<sup>32</sup>

38. The Receiver has acted reasonably and not improvidently. The Receiver's efforts resulted in the submission of the 2402871 APA which, in the Receiver's view, represents the best and highest offer for the Assets.<sup>33</sup>

**(b) *The Transaction is in the Interests of All Parties***

39. The 2402871 APA and the Transaction is in the best interests of all parties with a real economic interest in these proceedings.

40. Although the Receiver owes a duty to all stakeholders, its primary task is to maximize the return for the creditors.<sup>34</sup>

41. Terrasan's largest secured creditors, Centurion and GCNA, support the approval of the Transaction.<sup>35</sup>

42. The support of a secured creditor with an economic interest in the proceeds of a sale transaction is an important factor in determining whether a sale transaction should be approved. Where it is clear the highest price attainable will not result in recovery for the other creditors or shareholders, the wishes of the interested creditors (i.e., those who are "in-the-money") should be very seriously considered by the receiver.<sup>36</sup>

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<sup>32</sup> Second Report, para. 50.

<sup>33</sup> Second Report, para. 37.

<sup>34</sup> *Soundair*, para. 39; *National Trust Company v. 1117387 Ontario Inc.*, 2010 ONCA 340, 2010 CarswellOnt 2869, para. 77; Receiver's Brief of Authorities, Tab 4 [*National Trust*]; *Skyepharma*, para 6.

<sup>35</sup> Second Report, para. 23.

<sup>36</sup> *Soundair*, para. 73; *National Trust*, paras. 77 & 79.

43. The Transaction is also in the best interests of the Purchaser. Where a purchaser has bargained at some length and at considerable expense with a receiver, the interests of the purchaser should be taken into account.<sup>37</sup> The Purchaser has spent considerable time and resources conducting due diligence and negotiating the 2402871 APA. If the Transaction is not approved, the Purchaser will have expended such resources for nothing.

**(c) *The Efficacy and Integrity of the Process***

44. Significant interest was expressed in the Assets as evidenced from the number of prospective purchasers that investigated the opportunity to purchase the Assets and the number of non-binding offers and binding offers received. To the best of the Receiver's knowledge, all reasonable requests for information made by prospective purchasers were satisfied.<sup>38</sup>

45. Any reopening of the sale process to permit other bidders to submit offers now would jeopardize the efficiency and integrity of the Sale Process.<sup>39</sup>

46. Purchasers should know that, if they act in good faith, bargain seriously and enter into an agreement with a receiver, the Court will not lightly interfere with the commercial judgement of the receiver.<sup>40</sup>

47. The Receiver administered the Sale Process in accordance with the Sale Process Order.<sup>41</sup>

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<sup>37</sup> *Soundair*, para. 40.

<sup>38</sup> Second Report, paras. 35.

<sup>39</sup> *Soundair*, para. 43.

<sup>40</sup> *Soundair*, para. 46.

<sup>41</sup> Second Report, paras. 15-25.

**(d) The Process was Fair**

48. The process undertaken by the Receiver was fair and reasonable, and was conducted in a transparent and open manner.

49. All other prospective bidders for the Assets have had ample opportunity to submit offers or proposals in respect of the Assets.

50. Accordingly, the Receiver recommends that this Honourable Court approve the 2402871 APA and the Transaction.

**(B) Sealing Order**

51. Section 137(2) of the CJA provides as follows with respect to the issuance of a sealing order:

137(2) A court may order any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.<sup>42</sup>

52. The Supreme Court of Canada in *Sierra Club of Canada v. Canada (Minister of Finance)* adopted the following test to determine when a sealing order should be made:

(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, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including

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<sup>42</sup> *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 137(2).

the effects on the right to free expression which, in this context, includes the public interest in open and accessible court proceedings.<sup>43</sup>

53. In the insolvency context, it is standard practice for the Court to seal those portions of a report from a court-appointed officer, including a receiver, filed in support of a motion to approve a sale of assets which disclose, among other things, the purchase price and other commercially sensitive information.<sup>44</sup>

54. The Bid Summary and the unredacted 2402871 APA, each attached as Confidential Appendices to the Second Report, contain sensitive commercial information, including the purchase price set forth in the 2402871 APA. If the Transaction does not close, the disclosure of the Confidential Appendices would significantly weaken the Receiver's ability to bargain with other third parties who may later express an interest in purchasing the Assets.

55. Disclosure of this type of information in the context of a sale process could be harmful to stakeholders by undermining the integrity of the sale process.<sup>45</sup>

56. The salutary effects of maintaining the confidential nature of the Confidential Appendices greatly outweigh the deleterious effects.

57. It is therefore submitted that this Honourable Court ought to issue the requested sealing order.

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<sup>43</sup> *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522, para. 53, Receiver's Brief of Authorities, Tab 5.

<sup>44</sup> *GE Canada Real Estate Financing Business Property Company v. 1262354 Ontario Inc.*, 2014 ONSC 1173, 2014 CarswellOnt 2113, para. 32, Receiver's Brief of Authorities, Tab 6 [*GE Canada*].

<sup>45</sup> *Re Skypower Corp.*, 2009 CarswellOnt 9415 (S.C.J. [Commercial List]), para. 14, Receiver's Brief of Authorities, Tab 7; *GE Canada*, paras. 33-34.

**PART V – ORDERS SOUGHT**

58. For the reasons set forth herein and in the Second Report, the Receiver respectfully requests an Order in the form contained in the Receiver's Motion Record.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

August 22, 2017



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**DENTONS CANADA LLP**

Lawyers for BDO Canada Limited in its capacity as  
Court-appointed Receiver

**SCHEDULE "A"**  
**LIST OF AUTHORITIES**

1. *Royal Bank of Canada v. Soundair Corp.*, 1991 CarswellOnt 205, 4 O.R. (3d) 1 (C.A.).
2. *Regal Constellation Hotel Ltd., Re*, 2004 CarswellOnt 2653, 50 C.B.R. (4th) 258 (C.A.).
3. *Skyepharma PLC v. Hyal Pharmaceutical Corp.*, 1999 CarswellOnt 3641, 12 CBR (4th) 87(Ont. S.C.J. [Commercial List]), affirmed (2000), 47 OR 93d 234 (Ont. C.A.), 1999 CarswellOnt 3641.
4. *National Trust Company v. 1117387 Ontario Inc.*, 2010 ONCA 340, 2010 Carswell Ont 2869.
5. *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522.
6. *GE Canada Real Estate Financing Business Property Company v. 1262354 Ontario Inc.*, 2014 ONSC 1173, 2014 CarswellOnt 2113.
7. *SkyPower Corp., Re*, 2009 CarswellOnt 9415 (S.C. J. [Commercial List]).



**SCHEDULE "B"**  
**RELEVANT STATUTES**

***Courts of Justice Act, R.S.O. 1990, c. C.43, s. 100.***

100. A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed

***Courts of Justice Act, R.S.O. 1990, c. C.43, s. 137(2).***

137(2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

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PROCEEDING COMMENCED AT TORONTO

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LIMITED**

**(Motion returnable August 25, 2017)**

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