

***ONTARIO***

**SUPERIOR COURT OF JUSTICE**

BETWEEN:

ALLY AWADH

Applicant

-and-

LAKE TRADING WELLAND INC.

Respondent

**FACTUM OF THE PLAINTIFF  
(Approval of SISP)**

November 7, 2024

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**TO:**

**THE SERVICE LIST**

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Court File No. CV-24-00014901-0000

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**PART I – OVERVIEW**

1. msi Spergel inc. ("**Spergel**"), in its capacity as the Court-appointed receiver and manager (in such capacity, the "**Receiver**") of all the assets, undertakings, and property of Lake Trading Welland Inc. (the "**Debtor**") is returning a motion for, amongst other things:

- a. an approving the proposed sale and investment solicitation process (the "**Sales Process**") in respect of the sale of the Debtor's real property located at 90 Lincoln Street, Welland, Ontario (the "**Real Property**");
- b. authorizing and directing the Receiver to implement the Sales Process pursuant to the terms thereof; and
- c. approving an agreement of purchase and sale dated October 21, 2024 (the "**Stalking Horse APS**") between the Receiver and Suthaharan Gunasegaram (for a company to be incorporated), as purchaser, solely for the purpose of constituting the "stalking horse bid" in the Sale Process.

2. Spergel was appointed as Receiver of the Debtor pursuant to the order of Justice Gambacorta dated May 24, 2024 (the “**Receivership Order**”). Since its appointment, the Receiver has assessed the assets of the Debtor and has concluded that a sale of the Real Property, which is essentially the only asset of the Debtor, is the best way to maximize value for the creditors and stakeholders of the Debtor.

3. To those ends, the Receiver has negotiated the Stalking Horse APS to set the floor for the value of the sale of the Real Property. The proposed Sales Process aims to market the Real Property to interested parties and solicit superior bids. If there are no Superior Bids, the Receiver will seek this court’s approval to close on the terms of the Stalking Horse APS.

4. The Receiver submits that the Sales Process and Stalking Horse APS represent the best opportunity to identify a sale for the Debtor’s assets and the best potential to maximize value for the benefit of stakeholders. The proposed draft order should be approved.

## **PART II – FACTS**

5. The Debtor is a Canadian-owned, private corporation which carried on business as a Pioneer branded gas bar and convenience store. The Debtor’s primary asset consists of the Real Property which includes the gas station. The gas station stopped operating in 2022.

**First Report of the Receiver, dated November 5, 2024 (the “First Report”) at para. 1(b)**

6. The Debtor was put into receivership on May 24, 2024, pursuant to the application of Ally Awadh, a secured creditor of the Debtor.

**First Report, at para. 1(c).**

**Order of the Honourable Justice Gambacorta dated May 24, 2024, First Report, Appendix 1**

**Endorsement of the Honourable Justice Gambacorta dated May 24, 2024, First Report, Appendix 2**

7. Upon its appointment, the Receiver discharged its normal obligations of information-seeking and preservation of the Debtor's assets. These included securing possession of the Real Property and attended to all necessary repairs to ensure its future marketability.

**First Report, at para. 10.**

### **Stalking Horse Agreement of Purchase and Sale**

8. The Receiver has determined that the sale of the Real Property is the best way to maximize value of the Debtor for creditors and stakeholders. As a result, it has negotiated the Stalking Horse APS and seeks to use that agreement as the keystone to the proposed Sales Process.

**First Report, at para. 20.**

**Stalking Horse APS, First Report, Appendix 4.**

9. The key terms and conditions of the Stalking Horse APS are:

- (a) Purchaser: Suthaharan Gunasegaram (for a company to be incorporated);
- (b) Purchased Assets: the Real Property;
- (c) Excluded Assets: the Seller shall not sell to the Purchaser and the Purchaser shall not purchase from the Seller any assets other than the Purchased Assets;
- (d) Purchase Price: \$5.7 million, to be satisfied by way of \$100,000 cash and a vendor-take-back mortgage of \$5.6 million;
- (e) Material Conditions: the Stalking Horse APS is subject to standard conditions, as well as a condition that a fuel supply agreement in favour of Parkland Fuel Corporation registered against the Real Property be vested off title;
- (f) Closing Date: immediately after the expiry of the appeal period for the anticipated approval and vesting order;

**First Report, at para. 24.**

**Stalking Horse APS, First Report, Appendix 4.**

**Parkland Fuel Corporation**

10. Parkland Fuel Corporation was the fuel supplier to the Debtor's gas station operations. As part of its dealings with the Debtor, it entered into a fuel supply agreement. Part of this agreement consisted of an advance of a forgivable loan of \$250,000 towards the cost of completing dealer improvements to the gas station. Parkland's forgivable loan is secured by a first charge on the Real Property and has been amortized during the years that the gas station was in operation. The current unamortized portion of the loan is \$101,724.

**First Report, at para. 12.**

11. The Receiver expects that, as is evidenced by the condition in the Stalking Horse APS, all potential purchasers of the Real Property will require the vesting off of the Parkland fuel supply agreement charge. The Receiver intends to address this issue at a further motion for the approval of the successful bid in these proceedings.

12. Importantly, however, the Receiver notes that it has received a third party deposit of \$150,000, so that if the Stalking Horse APS is the successful bidder for the Real Property, the Receiver has sufficient cash on hand to pay Parkland's charge, if it is a priority payable.

**First Report, at para. 24(a)(i).**

**Proposed Sales Process**

13. The Sales Process, if approved, contemplates that the Receiver will:
- a. prepare appropriate marketing materials including a teaser, form of confidentiality agreement and confidential information memorandum – notifying prospective

purchasers of the existence of the Sale Process and inviting them to express their interest in making an offer in respect of the Real Property;

- b. bidders will be given an opportunity to conduct diligence and submit bids on or January 3, 2025;
- c. any bids must adhere to the criteria set out in the Sale Process including, without limitation, a purchase price of at least \$100,000 higher than the Stalking Horse Bid of \$5.7 million and a 5% deposit; and
- d. if there are superior bids to the Stalking Horse APS, the Receiver shall notify each of the bidders who submitted a superior bid and the stalking horse bidder that one or more superior bids were received and shall invite each of them to submit a final offer which shall meet all of the bid criteria of a Superior Bid by 5:00pm (Eastern Time) on the January 6, 2024.

**First Report, at para. 18.**

**Terms of the Sales Process, First Report, Appendix 3**

14. The Sale Process is designed to ensure that the marketing process is fair and reasonable, and prospective interested parties have the ability to make an offer to purchase the Property.

**First Report, at para. 16.**

15. The Receiver has also engaged the services of Colliers International Realty Advisors Inc. and Avison Young Commercial Real Estate Services LP to assist in determining the value of the Real Property. Colliers conducted a full narrative appraisal, and Avison Young provided an opinion of value. While confidential, and subject to being sealed, both suggest that the Stalking Horse APS and any superior bids will represent fair value to creditors and stakeholders of the bidder.

**First Report, at para. 14.**

**Appraisal of Colliers, First Report, Confidential Appendix 1.**

**Opinion of Value of Avison Young, First Report, Confidential Appendix 2.**

### **PART III – ISSUES AND THE LAW**

16. There before this court for determination are
  - a. That the Sales Process should be approved;
  - b. That the Stalking Horse APS should be approved for the purpose of serving as a stalking horse under the Sales Process;
  - c. That the Receiver's, and its counsel's, fees should be approved; and
  - d. That Confidential Appendices A and B to the First Report should be sealed.

#### **The Sales Process Should be Approved**

17. The Sales Process was developed by the Receiver and contemplates a comprehensive, fair, and transparent process for selling the Real Property. The Receiver understands that the Applicant supports the proposed Sale Process.

18. Although the decision to approve a sale process is distinct from the approval of a proposed sale transaction, courts have held that the reasonableness and adequacy of any sale process proposed by a court-appointed receiver are to be assessed in light of the factors that a court will take into account when considering the approval of a proposed sale. The Court of Appeal summarized those factors in *Soundair* 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 to be obtained; and
- d. whether there has been unfairness in the working out of the process.



*Choice Properties Limited Partnership v Penady (Barrie) Ltd*, 2020 ONSC 3517 [at para 15](#) [Choice Properties];

*CCM Master Qualified Fund v blutip Power Technologies*, 2012 ONSC 1750 [at para 6](#) [CCM Master];

*Royal Bank of Canada v Soundair Corp* (1991), 4 OR (3d) 1 (CA) at p 9 [Soundair].

19. In addition to considering the *Soundair* factors, the Court must also assess: (a) the fairness, transparency and integrity of the proposed process; (b) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and (c) whether the sale process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale. In considering sale process matters, substantial deference should be given to the business judgement and recommendations of a receiver as an officer of the Court with significant expertise in insolvency proceedings.

*Ontario Securities Commission v Bridging Finance Inc*, 2021 ONSC 5338 [at paras 7–8](#);

*Choice Properties* [at para 16](#);

*CCM Master* [at para 6](#);

*Marchant Realty Partners Inc v 2407553 Ontario Inc*, 2021 ONCA 375 [at paras 10, 15 and 19](#).

20. As noted above, the Sales Process was developed in order to maximize value for creditors and stakeholders of the Debtor. The Receiver determined that the sale of the Real Property was the best way to do so. Further, by negotiating the Stalking Horse APS, the Receiver has set a floor for value that will return fair value.

21. However, it is only by exposing the Real Property to the market that the Receiver can ensure that there are no superior bids to the Stalking Horse APS. The Sales Process is designed to ensure that the Real Property is adequately exposed to the market. The Receiver recommends that the Sales Process be approved, and that the Stalking Horse APS be approved as a stalking horse in the Sales Process.

### **Approval of the Receiver's, and its Counsel's, Fees**

22. Pursuant to the Receivership Order, the Receiver and its legal counsel are entitled to be paid their reasonable fees and disbursements and are required to pass their accounts from time to time.

23. In *Confectionately Yours Inc. (Re)*, the Court summarized the requirements for the substance or content of the accounts:

- a. the accounts must disclose in detail the name of each person who rendered services, the dates on which the services were rendered, the time expended each day, the rate charged, and the total charges for each of the categories of services rendered;
- b. the accounts should be in a form that can be easily understood by those affected by the receivership so that such person can determine the amount of time spent by the receiver's employees (and others the receiver may have hired) with respect to the various discrete aspects of the receivership; and
- c. the receiver's accounts and solicitor's accounts should be verified by affidavit.

*Confectionately Yours Inc. (Re)*, [2002 CanLII 45049](#) (ON CA) [at paras. 37-38](#). [Confectionately Yours]

24. The accounts of the Receiver and its counsel meet each of these requirements.

25. The general standard of review for the accounts of a court-appointed receiver is "whether the amount claimed for remuneration and the disbursements incurred in carrying out the receivership are fair and reasonable."

*Confectionately Yours*, [at para. 42](#).

26. The Court is to consider all of the relevant factors in a holistic manner and need not examine “dockets, hours, explanations, or disbursements line by line.” The focus on such a review should be the fair and reasonable assessment of what was accomplished, not the time it took.

*Bank of Nova Scotia v Diemer*, [2014 ONSC 365 at para. 19](#);

*Bank of Nova Scotia v Diemer*, [2014 ONCA 851 at para. 45](#).

27. The Ontario Court of Appeal has endorsed a non-exhaustive list of factors to be considered in determining whether a receiver’s fees are fair and reasonable, including:

- a. the nature and extent of the value of the assets handled;
- b. the complications and difficulties encountered;
- c. the degree of assistance provided by the company, its officers, or its employees;
- d. the time spent;
- e. the receiver’s knowledge, experience, and skill;
- f. the diligence and thoroughness displayed by the receiver;
- g. the responsibilities assumed;
- h. results of the receiver’s efforts; and
- i. the cost of comparable services.

*Federal Business Development Bank v Belyea and Fowler*, [1983 CanLII 4086 \(NB CA\) at para. 9](#);

*Bank of Nova Scotia v Diemer*, [2014 ONCA 851 at para. 33](#);

*Confectionately Yours* at [paras. 45-46](#).

28. Spergel is a specialized licensed insolvency trustee and has staffed this matter with insolvency specialists at various levels of seniority. Likewise, Goldman Sloan is a sophisticated full-service law firm, which has staffed this matter with insolvency experts. The hourly rates are consistent with the rates charged by comparable firms practicing in the area of insolvency in the

Toronto market and the Receiver is of the view the fees and disbursements are reasonable and appropriate in the circumstances.

29. Accordingly, the Receiver respectfully requests approval of its fees and the fees of its legal counsel as set out in the respective fee affidavits in the First Report.

**The Confidential Appendix to the Report Should be Sealed**

30. The Monitor requests an order sealing the Confidential Appendices to the First Report pending the closing of the Sales Process.

31. The *Courts of Justice Act* grants this court the discretion to order that any document filed in a civil proceeding be treated as confidential and sealed and not form part of the public record.

[Courts of Justice Act, R.S.O., 1990 c. C. 43, s. 137\(2\).](#)

32. The test to determine if a sealing order should be granted is set out in *Sierra Club* as recast in *Sherman Estate*:

- a. court openness poses a serious risk to an important public interest;
- b. the order sought is necessary to prevent this serious 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.

*Sierra Club of Canada v. Canada (Minister of Finance)*, [2002 SCC 41 \(CanLII\)](#), at [para. 53](#). [Sierra Club]

*Sherman Estate v. Donovan*, [2021 SCC 25](#) at paras. [38](#) and [43](#) [Sherman Estate]

33. The courts in *Sierra Club* and *Sherman Estate* explicitly recognized that commercial interests such as preserving confidential information or avoiding a breach of a confidentiality agreement are an “important public interest” for purposes of this test.

**Sierra Club, at [para. 55](#).**

**Sherman Estate, at [paras. 41-43](#).**

34. The Confidential Appendices contains highly sensitive commercial information including estimates of value for the Real Property, which, if made public, would detrimentally affect the price that could be obtained on a subsequent sale of the Real Property should the transaction proposed by the Sales Process not close.

35. Courts have recognized that disclosure of this type of information in the context of a sales process could be harmful to stakeholders by undermining the integrity of the sales process.

***Re SkyPower Corp.*, 2009 CarswellOnt 9415, at para. 14 (Sup. Ct. J. [Commercial List]).**

36. The disclosure of the Confidential Appendices prior to the closing of the Sales Process would pose a serious risk to creditors and stakeholders in the event the transaction contemplated by the Sales Process does not close. Specifically, disclosure could jeopardize dealings with any future prospective purchasers of the Real Property. There is no other reasonable alternative to preventing this information from becoming publicly available, and the sealing request may be removed upon further order of the Court or on completion of the Sales process. All other material terms of the Sales Process are disclosed in the First Report. Therefore, the salutary effects of maintaining the confidential nature of the Confidential Appendices until the closing of the transaction contemplated by the Sales Process greatly outweighs the deleterious effects.

**PART IV – ORDER SOUGHT**

37. The Receiver seeks an order:

- a. if necessary, abridging the time for service and filing of this notice of motion and motion record;
- b. approving the Sale Process for the sale of the Real Property;
- c. approving the Stalking Horse APS between the Receiver and Suthaharan Gunasegaram (for a company to be incorporated), as purchaser, solely for the purpose of constituting the “stalking horse bid” in the Sale Process;
- d. sealing the Confidential Appendices to the First Report of the Receiver; and
- e. approving the fees and disbursements of the Receiver and its counsel;

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 7<sup>th</sup> day of November, 2024



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Robert J. Drake

Lawyers for Receiver, msi Spergel Inc.

**SCHEDULE A  
LIST OF AUTHORITIES**

1. *Choice Properties Limited Partnership v Penady (Barrie) Ltd*, [2020 ONSC 3517](#)
2. *CCM Master Qualified Fund v blutip Power Technologies*, [2012 ONSC 1750](#)
3. *Royal Bank of Canada v Soundair Corp* (1991), [4 OR \(3d\) 1 \(CA\)](#)
4. *Ontario Securities Commission v Bridging Finance Inc*, [2021 ONSC 5338](#)
5. *Marchant Realty Partners Inc v 2407553 Ontario Inc*, [2021 ONCA 375](#)
6. *Confectionately Yours Inc. (Re)*, [2002 CanLII 45049](#) (ON CA)
7. *Bank of Nova Scotia v Diemer*, [2014 ONSC 365](#)
8. *Bank of Nova Scotia v Diemer*, [2014 ONCA 851](#)
9. *Federal Business Development Bank v Belyea and Fowler*, [1983 CanLII 4086 \(NB CA\)](#)
10. *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002 SCC 41 \(CanLII\)](#)
11. *Sherman Estate v. Donovan*, [2021 SCC 25](#)
12. *Re SkyPower Corp.*, 2009 CarswellOnt 9415, at para. 14 (Sup. Ct. J. [Commercial List]).

**SCHEDULE B**  
**TEXT OF STATUTES, REGULATIONS & BY-LAWS**

**Courts of Justice Act**

R.S.O. 1990, CHAPTER C.43

Documents public

**137** (1) On payment of the prescribed fee, a person is entitled to see any document filed in a civil proceeding in a court, unless an Act or an order of the court provides otherwise.

Sealing documents

(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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Applicant

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Respondent

Court File No. CV-24-00014901-0000

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**SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Welland, Ontario

**FACTUM OF THE RECEIVER**  
**(Approval of SISP)**

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