

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

B E T W E E N:

**CANADIAN WESTERN BANK**

Applicant

and

**INDEX HOLDING GROUP INC., INDEX GROUP OF COMPANIES INC., INDEX INTERNATIONAL INC., INDEX FOODS INC., 2640179 ONTARIO INC., 11030434 CANADA LTD., 2700774 ONTARIO INC., 2700767 ONTARIO INC., 2683960 ONTARIO LTD., 11030418 CANADA INC., 2723710 ONTARIO INC., 2718366 ONTARIO INC., 2737332 ONTARIO INC., 2737334 ONTARIO INC., 2723714 ONTARIO INC., 2723716 ONTARIO INC., 2737338 ONTARIO INC., 2790760 ONTARIO INC., 2775290 ONTARIO INC., 2775296 ONTARIO INC., 421 WHARNCLIFFE LTD. and 425 WHARNCLIFFE ROAD INC.**

Respondents

**IN THE MATTER OF AN APPLICATION UNDER SECTION 243(1) OF THE  
*BANKRUPTCY AND INSOLVENCY ACT*, RSC 1985, c. B-3, AS AMENDED;  
AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, RSO 1990, c. C.43, AS  
AMENDED**

**FACTUM OF THE COURT-APPOINTED RECEIVER, MNP LTD.**

(Motion returnable by Zoom on July 24, 2023 at 11:00 a.m.)

July 20, 2023

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TO: **SERVICE LIST**

## TABLE OF CONTENTS

	PAGE
PART I - OVERVIEW .....	1
PART II - FACTS.....	2
A. The Appointment Order .....	2
B. Receiver’s Activities since May 23, 2023 .....	2
C. The Popeye’s Transaction .....	4
i. Sale Process .....	4
ii. The Popeye’s APA .....	5
PART III - ISSUES .....	6
PART IV - LAW AND ARGUMENT .....	6
A. The Popeye’s Transaction Should be Approved .....	6
i. Soundair Framework for Approval of Asset Sale by Receiver .....	6
ii. The Proposed Sale Satisfies the Soundair Test.....	6
B. The Sealing Order Should be Granted.....	7
C. The Second Report Should be Approved .....	8
PART V - ORDER REQUESTED .....	8
SCHEDULE “A” LIST OF AUTHORITIES .....	9
SCHEDULE “B” RELEVANT STATUTES .....	10

## PART I - OVERVIEW

1. The Court-appointed receiver and manager of the respondents, MNP Ltd. (in such capacities, the “**Receiver**”), moves for the following substantive relief:

- (a) approving the Second Report of the Receiver dated July 19, 2023 (the “**Second Report**”) and the activities and recommendations of the Receiver described therein;
- (b) approving the sale transaction (the “**Popeye’s Transaction**”) contemplated by the Offer to Purchase dated July 19, 2023 between the purchaser, Varun Kakkar (the “**Purchaser**”), and the Receiver (the “**Popeyes APA**”) as outlined in the Second Report;
- (c) authorizing the Receiver to carry out all activities required to complete the Popeye’s Transaction;
- (d) upon delivery of a certificate by the Receiver confirming the completion of the Popeye’s Transaction, vesting in the Purchaser, the right, title and interest of the Debtors (as defined below) in and to the Purchased Assets (as defined below), free and clear of all encumbrances, estates, rights, title, liens, interest and claims; and
- (e) sealing the confidential appendices to the Second Report (the “**Confidential Appendices**”).

2. The relief should be granted:

- (a) The Second Report and activities and recommendations of the Receiver described therein are appropriate and should be approved;
- (b) The Popeye’s APA, among other things, represents the highest and best offer received in the sale process (the “**Sale Process**”) implemented by the Receiver and satisfies the *Soundair* test; and
- (c) The Confidential Appendices consist of a summary of offers received by the Receiver and the Popeye’s APA. The sealing order sought is to be in effect pending the closing of the Popeye’s Transaction. It is proportionate and necessary to preserve the value of the assets being sold.

## PART II - FACTS

### A. The Appointment Order

3. By Order of Justice Penny dated May 8, 2023 (the “**Appointment Order**”), the Receiver was appointed as receiver of all of the respondents’ (collectively, the “**Debtors**”) assets, property, and undertakings (the “**Property**”). The Property includes certain franchised restaurant businesses operated by the Debtors pursuant to agreements with Popeye’s Louisiana Kitchen (“**Popeye’s**”), and Dencan Franchise Systems Limited Partnership and DFO LLC (together, “**Denny’s**”).<sup>1</sup>

4. The Appointment Order was obtained on the application of the Debtors’ first-ranking secured creditor, Canadian Western Bank (“**CWB**”). CWB is expected to suffer a significant shortfall in the recovery of the indebtedness owing to it by the Debtors.<sup>2</sup>

### B. Receiver’s Activities since May 23, 2023

5. The Receiver’s activities since May 23, 2023, the date of First Report, have concentrated on:<sup>3</sup>

- (a) confirming insurance coverage for the Debtors’ assets and restaurant operations;
- (b) communicating with all of the Debtors’ landlords with respect to HVAC and other site issues, rent payments and the Receiver’s proposed realization strategy;
- (c) contacting and corresponding with the Debtors’ food and other service providers to ensure continuation of supplies;
- (d) contracting with employees, ascertaining payroll arrears information, payment thereof or preparation of Wage Earner Protection Program filing information;

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<sup>1</sup> Appendix A, Second Report, Receiver’s Motion Record, Tab 2B, p. 29, Caselines Current E41.

<sup>2</sup> Second Report at para 3, Receiver’s Motion Record, Tab 2, p. 11, Caselines Current E23.

<sup>3</sup> Second Report at para 15, Receiver’s Motion Record, Tab 2, p. 16, Caselines Current E28.

- (e) arranging for the redirection of payments from Uber Eats, Door Dash and Skip the Dishes to the Receiver's accounts;
- (f) arranging for the release of amounts due to the Debtors from credit and debit card payment processors to the Debtors' accounts controlled by the Receiver;
- (g) arranging for close out of the Debtors known bank accounts and the transfer of funds to the Receiver's bank accounts;
- (h) arranging for the pick-up of vehicles leased or financed by the Debtors and driven by the Debtors' sole officer and director, Mr. Abdul Muqheet ("**Muqheet**");
- (i) arranging for the turnover of funds improperly collected by Muqheet;
- (j) ongoing management of the five ongoing restaurants and attending to required site repairs and maintenance and employment matters;
- (k) attending to various discussions with prospective purchasers regarding the Sale Process and responding to due diligence inquiries as well as conducting inspections of the Debtors' business locations;
- (l) filing Receivership Reports based on available information;
- (m) filing of the Receiver's monthly payroll remittance and HST reports with Canada Revenue Agency ("**CRA**");
- (n) responding to various CRA audit requests for the Debtors pre-receivership accounts; and
- (o) preparing the Second Report.

6. On May 29, 2023, the Receiver moved before this Court and obtained an order, among other things, approving the sale of property known municipally as 421 Wharncliffe Road South, London, Ontario (the "**421 Property**"), and vesting the right title and interest of the respondent 421 Wharncliffe Ltd. in and to the 421 Property in the purchaser (the "**Wharncliffe Transaction**").<sup>4</sup>

7. On June 13, 2023 the Receiver completed the Wharncliffe Transaction for gross proceeds of \$565,000. Outstanding property taxes of \$22,335.63 were paid to the City

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<sup>4</sup> Appendix C, Second Report, Receiver's Motion Record, Tab 2C, p. 62, Caselines Current E74.

of London and realty commission of \$37,290 was paid to Royal LePage Downsview Realty Inc. pursuant to the completion of that transaction.<sup>5</sup>

### **C. The Popeye's Transaction**

#### *i. Sale Process*

8. The Appointment Order, among other things, authorizes the Receiver to market and sell the Property.<sup>6</sup>

9. On May 23, 2023, the Receiver delivered its First Report to Court in which the Receiver outlined a proposed marketing and sale process in respect of the Property, including the franchise restaurant businesses operated by the Debtors.<sup>7</sup>

10. Any prospective purchaser of the Popeye's and Denny's franchise restaurants operated by the Respondents must be approved by the applicable franchisor. The franchisors informed the Receiver that unless a prospective purchaser is an existing approved franchisee or experienced franchise restaurant operator, the approval process would take approximately six to eight weeks, without any guaranteed results.<sup>8</sup>

11. The targeted sale process was designed to balance the need to minimize the ongoing costs of continued operations, while exposing the Property to the most likely acceptable purchasers, in order to maximize the recoveries for stakeholders.<sup>9</sup>

12. With CWB's support, the Receiver implemented the Sale Process outlined in its First Report, including distributing a teasor, entering into non-disclosure agreements,

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<sup>5</sup> Second Report at para 16, Receiver's Motion Record, Tab 2, p. 17, Caselines Current E29.

<sup>6</sup> Appendix A at para 3(j), Second Report, Receiver's Motion Record, Tab 2A, p. 32, Caselines Current E44.

<sup>7</sup> Second Report at para 8, Receiver's Motion Record, Tab 2, p. 12, Caselines Current E24.

<sup>8</sup> Second Report at para 48, Receiver's Motion Record, Tab 2, p. 22, Caselines Current E34.

<sup>9</sup> Second Report at para 49, Receiver's Motion Record, Tab 2, p. 23, Caselines Current E35.

establishing a data room, circulating a confidential information memorandum, publishing notice of the sale process in a nationally circulated food service trade journal and on the Receiver's website, and providing tours of the Debtors' operations.<sup>10</sup>

13. The Sale Process was reasonable in the circumstances, given the nature of the Debtors' businesses and assets as described above.

14. At the completion of the timeline contemplated by the Sale Process, the Purchaser was selected as the successful bidder of three operating Popeye's franchise restaurants and all assets of the Debtors relating to or used in connection with the operation of those Popeye's (collectively, the "**Purchased Assets**").<sup>11</sup>

*ii. The Popeye's APA*

15. The Popeye's Transaction represents the highest and best offer available for the Purchased Assets, and is supported by CWB.<sup>12</sup>

16. The Sale Process did not elicit an offer to purchase any of the Denny's franchise restaurants which was acceptable to the Receiver and CWB. With the support of CWB, the Receiver is continuing its marketing of the Denny's restaurants.<sup>13</sup>

17. The Confidential Appendices contain a summary of the offers and the Popeye's APA. Failing to seal the Confidential Appendices could negatively impact realization in the event the Popeye's Transaction does not close.

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<sup>10</sup> Second Report at para 50, Receiver's Motion Record, Tab 2, p. 23, Caselines Current E35.

<sup>11</sup> Confidential Appendix B, Receiver's Motion Record, p. 111; Second Report at para 52, Receiver's Motion Record, Tab 2, p. 24, Caselines Current E36.

<sup>12</sup> Second Report at para 57, Receiver's Motion Record, Tab 2, p. 25, Caselines Current E37.

<sup>13</sup> Second Report at para 56, Receiver's Motion Record, Tab 2, p. 24, Caselines E36.



### **PART III - ISSUES**

18. The Popeye's Transaction should be approved and the Receiver should be authorized to complete it in accordance with the approval and vesting order sought, the Confidential Appendices should be sealed, and the Second Report and the activities and recommendations of the Receiver therein should be approved,

### **PART IV - LAW AND ARGUMENT**

#### **A. The Popeye's Transaction Should be Approved**

##### *i. Soundair Framework for Approval of Asset Sale by Receiver*

19. In determining whether to approve a proposed sale of assets by a Court-appointed receiver, Ontario courts have consistently and uniformly applied the following principles set out by the Court of Appeal for Ontario in *Royal Bank v. Soundair*:

- (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 obtained; and
- (d) whether there has been unfairness in the working out of the process.

##### *ii. The Proposed Sale Satisfies the Soundair Test*

20. The Popeye's APA satisfies the Soundair test and the approval and vesting order should be granted:<sup>14</sup>

- (a) the Sale Process was conducted in accordance with the Appointment Order;
- (b) the most likely prospective purchasers were canvassed for approximately four (4) weeks using several marketing techniques, including direct solicitation to prospective purchasers and online advertisements;

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<sup>14</sup> Second Report at para 57, Receiver's Motion Record, Tab 2, p. 25, Caselines Current E37.

- (c) the Popeye's APA represents the highest and best offer received during the Sale Process with the highest likelihood of closing;
- (d) in the event the Popeye's Transaction is not completed, the Receiver will be required to consider offers that are not the highest or otherwise best bids submitted and will incur significant additional costs to continue the Popeye's operations;
- (e) absent the completion of the Popeye's Transaction, a protracted marketing period will continue to be necessary. The ongoing professional fees would likely further erode the proceeds available for distribution with no certainty that a superior transaction could be completed;
- (f) completion of the Popeye's Transaction would provide continued employment for the operating Popeye's current employees; and,
- (g) CWB has advised that it supports the completion of Popeye's Transaction notwithstanding that the proceeds of realization from all the Debtors' assets are anticipated to be significantly less than the amounts owing to it from the Debtors.

21. Overall, the Popeye's APS represents the best and highest offer for the Property and the Sale Process was fair and reasonable. The Receiver made sufficient effort to obtain the best price and has not acted improvidently. The Receiver's rationale for its acceptance of the Popeye's APA reflects sound business judgment. As such, the requested relief falls within "the general principle that the court will be loathe to interfere with the business judgment of a Receiver and refuse to approve a transaction recommended by the Receiver acting properly in the fulfillment of its obligations as an officer of the court."<sup>15</sup>

## **B. The Sealing Order Should be Granted**

22. The Receiver seeks a limited sealing order of the results of the offers made under the Sale Process and the Popeye's APA. Preservation of the confidentiality of offer information is recognized as meeting the requirements of the test for sealing court

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<sup>15</sup> *Soundair* at para 16.

documents in *Sherman Estate*.<sup>16</sup> Failing to seal the offers and the Popeye's APA could negatively impact realizations in the event the Popeye's Transaction does not close. It is in the public interest that the ability of the Receiver to maximize value be preserved until the Popeye's Transaction has closed.<sup>17</sup>


**C. The Second Report Should be Approved**

23. The Second Report should be approved. The activities and recommendations set out therein are appropriate. There are good policy and practical reasons for the Court to approve the activities of a Receiver.<sup>18</sup> The requested order contains the usual qualifier that "only the Receiver, in its personal capacity and only with respect to its own personal liability, shall be entitled to rely upon or utilize in any way the approval of the Second Report."

**PART V - ORDER REQUESTED**

24. The Receiver respectfully requests an order issue in the form attached as Tab 3 to the Receiver's motion record.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 20<sup>th</sup> day of July, 2023.

Per:   
\_\_\_\_\_  
**John D. Leslie and Lisa S. Corne**

<sup>16</sup> *Sherman Estate v. Donovan*, 2021 SCC 25 at para 85.

<sup>17</sup> *Acerus Pharmaceuticals Corporation (Re)*, 2023 ONSC 3314 at para 39.

<sup>18</sup> *Triple-I Capital Partners Limited v 12411300 Canada Inc.*, 2023 ONSC 3400 at paras 65-67, citing Regional Senior Justice G.B. Morawetz (as he then was) in *Target Canada Co. (Re)*, 2015 ONSC 7574 at paras 12 and 23.

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

1. *Royal Bank of Canada v Soundair Corp.*, 1991 CanLII 2727 (ON CA)
2. *Acerus Pharmaceuticals Corporation (Re)*, 2023 ONSC 3314
3. *Sherman Estate v Donovan*, 2021 SCC 25
4. *Triple-I Capital Partners Limited v 12411300 Canada Inc.*, 2023 ONSC 3400
5. *Target Canada Co. (Re)*, 2015 ONSC 7574

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

CANADIAN WESTERN BANK  
Applicant

-and- INDEX HOLDING GROUP INC. et al.  
Respondents

Court File No. CV-23-00698447-00CL

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PROCEEDING COMMENCED AT  
TORONTO

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