

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

CWB MAXIUM FINANCIAL INC.

APPLICANT

- and -

**MEDICAL ARTS DISPENSARY OF OTTAWA (2003) LTD., TOTAL HEALTH
PHARMACY INC., GHADA SANDRA MOHSEN GERGES AND SHERIF GERGES**

RESPONDENTS

**FACTUM OF THE RECEIVER
(Motion returnable August 29, 2024)**

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

Harvey Chaiton (LSO #21592F)
Tel: (416) 218-1129
Email: harvey@chaitons.com

Laura Culleton (LSO #82428R)
Tel: (416) 218-1128
Email: laurac@chaitons.com

**Lawyers for MNP Ltd., in its capacity as
Court-Appointed Receiver**

TO: THE SERVICE LIST

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FACTUM OF THE RECEIVER

PART I – OVERVIEW

1. This factum is submitted by MNP Ltd. (“**MNP**”), in its capacity as court-appointed receiver (the “**Receiver**”) over all of the assets, property and undertaking of Medical Arts Dispensary of Ottawa (2003) Ltd. (“**Medical Arts**” or the “**Company**”), for orders:

- (a) approving the Asset Purchase Agreement dated July 19, 2024 (the “**Purchase Agreement**”) executed by Joseph Saad and Maged Daoud, in trust for a corporation to be incorporated, as purchaser (the “**Purchaser**”) and the Receiver as vendor, pursuant to which the Purchaser will acquire certain assets (the “**Purchased Assets**”) and authorizing the Receiver to take all steps necessary to complete the transaction for

the purchase and sale of the Purchased Assets (as defined in the Purchase Agreement) as contemplated therein (the “**Transaction**”);

- (b) vesting title in the Purchased Assets to the Purchaser free and clear of all claims and encumbrances upon closing of the Transaction;
 - (c) approving the sealing of confidential appendices “1” and “2” to the First Report of the Receiver dated August 22, 2024;
 - (d) approving the First Report and the Receiver’s activities described therein;
 - (e) approving the Receiver’s Interim Statement of Receipts and Disbursements;
 - (f) approving the fees and disbursements of the Receiver and its counsel, Chaitons LLP;
and
 - (g) such other relief as the Court deems just.
2. Capitalized terms not defined herein have the meaning defined in the First Report.

PART II – FACTS

Receivership Proceeding

3. Pursuant to an order (the “**Appointment Order**”) of the Ontario Superior Court of Justice (the “**Court**”) dated April 19, 2024 (the “**Receivership Date**”) upon application by CWB, MNP was appointed Receiver over all of the assets, property and undertaking of Medical Arts.¹

Background

4. Medical Arts is a company incorporated under the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16 carries on business as a pharmacy (the “**Business**”) from a rented premises located at 2865 Riverside Drive, Ottawa, ON (the “**Premises**”). Medical Arts provides clinical and medical dispensing services for long term care and retirement residences. As of the Receivership Date (defined below), Medical Arts was servicing one long term care home and one retirement residence, both located in Ottawa (the “**Service Contracts**”).²

Sale Process

5. Pursuant to paragraph 3.j) of the Receivership Order, the Receiver was empowered and authorized to, among other things, market any and all of the Assets.³

6. In designing an appropriate sale process, the Receiver considered the following:⁴

- (a) the time required to market Medical Arts’ assets to maximize recovery;

¹ First Report of the Receiver dated August 22, 2024 (the “**First Report**”) at para. 1, MR Tab 2; Appendix “A” to the First Report.

² First Report at para. 3, MR Tab 2.

³ First Report at para. 18, MR Tab 2.

⁴ First Report at para. 19, MR Tab 2.

- (b) Medical Arts' clients need for a replacement service provider on a timely basis;
 - (c) the small pool of potential buyers able to provide the top-quality healthcare that Medical Arts' clients expect under the Service Contracts; and
 - (d) the inherent risks associated with continuing the Business due to its nature, which may include the requirement for additional capital to sustain the Business.
7. The key activities of the Receiver during the Sale Process include:⁵
- (a) preparing a teaser letter (the “**Teaser**”) describing the opportunity, outlining the Sale Process, and inviting recipients of the Teaser to express their interest pursuant to the terms of the Sale Process;
 - (b) preparing a list of twelve (12) potential interested parties (each a “Potential Bidder”);
 - (c) drafting a non-disclosure and confidentiality agreement (an “**NDA**”) for execution by interested potential purchasers
 - (d) gathering, creating and reviewing all due diligence materials that it determined to be relevant to interested parties and established a secure, electronic data room (the “**Data Room**”), which was maintained and administered by the Receiver throughout the Sale Process;
 - (e) sending the Teaser and NDA to all Potential Bidders on June 4, 2024 and to any other parties who responded to the Receiver and were determined to be qualified Potential Bidders;

⁵ First Report at para. 21, MR, Tab 2; Appendix “B” to the First Report.

- (f) in addition to distributing the Teaser to the Potential Bidders, the Receiver:
 - (i) shared the Teaser with 34 lawyers from 9 different law firms and 27 accountants across eight accounting firms, all serving clients in the health care industry, to facilitate distribution of the opportunity to their clients;
 - (ii) posted the opportunity on its website and on LinkedIn;
 - (iii) distributed the opportunity internally among the MNP's partnership group; and
 - (iv) published notice of the opportunity on June 5, 2024 in Canadian Health Care Magazine's online newsletter directed to 45,718 doctors, healthcare managers and Pharmacy practitioners, respectively (the "**Advertisement**");
- (g) providing all Potential Bidders who had executed the NDA with access to the Data Room, which provided information and documents related to the Assets and the Business; and
- (h) reminding Potential Bidders on July 3, 2024 that the deadline to submit their bids by July 9, 2024, and reached out to check if they had any further questions

Results of the Sale Process

8. The Sale Process led to twelve (12) parties executing an NDA and the presentation of five (5) offers (the "**Offers**").⁶

⁶ First Report at para. 22, MR Tab 2.

9. The Receiver evaluated the Offers based on the purchase price, the terms and conditions, the familiarity with the Company’s Business and clients, and the Purchaser’s ability to close the Transaction and selected the Purchaser as the successful bidder.⁷

10. The Receiver entered into exclusive negotiations with the Purchaser which led to the execution of the Purchase Agreement on July 19, 2024.⁸

11. Key aspects of the Purchase Agreement are summarized in the following table (capitalized terms have the meanings ascribed to them in the Purchase Agreement):⁹

Purchase Price	A base price plus (i) the value of the Merchantable Inventory (at cost) at the Closing Date; and the Assumed Liabilities, plus taxes
Assets	The Company’s right, title and interest, if any, in: <ul style="list-style-type: none"> • Merchantable Inventory (as defined in the Purchase Agreement) • Subject to applicable laws, the Patient Records • Fixed Assets • Leasehold Improvements • Intellectual Property • The Purchased Contracts • Books and Records relating to the Purchased Assets; and • Goodwill and intangible assets associated with the Business and Purchased Assets
Excluded Assets	<ul style="list-style-type: none"> • Cash and cash equivalents • Accounts receivable (including all amounts due under the Ontario Drug Benefit Program) • Prepaid expenses • Insurance policies • Long term investments of the Business • Contracts that are not Purchased Contracts
Conditions	The conditions to closing include: <ul style="list-style-type: none"> • the Purchaser obtaining accreditation from the OCP; • the Purchaser obtaining a provider number from the Ontario Drug Benefit Plan (“ODB”) • Approval of the Court and the issuance of a vesting order
Closing Date	Eleven (11) days, or such shorter period as the Purchaser may determine by notice in writing to the Receiver, after the date upon which the conditions are satisfied or waived

⁷ First Report at para. 23, MR Tab 2.

⁸ First Report at para. 24, MR Tab 2; Appendix “C” to the First Report. A copy of the unredacted Purchase Agreement is attached as Confidential Appendix “2” to the Confidential Appendix Brief.

⁹ First Report at para. 25, MR Tab 2.

Outside Date	September 15, 2024, or such later date and time as the parties agree in writing
Purchased Contracts	Premises Lease, and potentially, certain equipment leases should the Purchaser elect to acquire the equipment lease(s) prior to Closing
Cure Costs	Purchaser is responsible for and shall pay any cure costs
OCP and ODB	Purchaser covenants, within 5 business days after the execution of the Purchase Agreement to apply to the OCP and ODB for the accreditation and provider number, respectively. The Receiver has confirmed with the OCP that it received the Purchaser's application.

12. The Receiver recommends the Court approve the Transaction as outlined in the Purchase Agreement for the following reasons:¹⁰

- (a) it is the result of a competitive and fair sale process conducted by the Receiver;
- (b) the Transaction will maximize the recovery for Medical Arts' creditors and stakeholders, and will preserve the continuity of the Business;
- (c) it is commercially reasonable and in the best interests of Medical Arts' estate; and; and
- (d) the Transaction is supported by the major stakeholders of the Debtors, including CWB.

Sealing of the Confidential Appendices

13. The Receiver is of the view that Confidential Appendices 1 and 2 should be filed with the Court on a confidential basis and sealed until the completion of the Transaction. Confidential Appendices 1 and 2 include commercially sensitive information, including offers received for Medical Arts' assets, and could prejudice the realization of maximum value from the sale of the Purchased Assets in the event the Transaction does not close. The Receiver does not believe that any party will be prejudiced if the information is sealed at this time. Accordingly, the Receiver believes the proposed sealing order is appropriate.¹¹

¹⁰ First Report at para. 26, MR Tab 2.

¹¹ First Report at para. 27, MR Tab 2.

Secured Creditors

Receiver's Borrowings

14. The Receivership Order permitted the Receiver to borrow for receivership activities to a maximum of \$125,000 at any given time and granted a charge to secure the borrowed funds, inclusive of interest and other fees.¹²

15. On May 2, 2024, the Receiver borrowed \$52,000 from CWB, which was subject to an interest rate of three (3) percent over the prevailing prime commercial lending rate.¹³

Canada Revenue Agency

16. At the Receivership Date, Medical Arts was in non-compliance with CRA in filing various HST returns from August 2023 (the “**Outstanding Returns**”) to the Receivership Date.¹⁴

17. Based on information from CRA, at the Date of Appointment, Medical Arts was indebted to CRA as follows:¹⁵

- (a) 2023 Unremitted employee source deductions in the amount of \$28,344.11; and
- (b) 2024 Unremitted employee source deductions in the amount of \$14,503.49.

18. The Receiver filed the Outstanding Returns, which have been assessed and resulted in a refund claim of \$45,537.35. CRA is in the process of applying the refund claim against the unpaid source deductions claim.¹⁶

¹² First Report at para. 29, MR Tab 2.

¹³ First Report at para. 30, MR Tab 2.

¹⁴ First Report at para. 31, MR Tab 2.

¹⁵ First Report at para. 32, MR Tab 2.

¹⁶ First Report at para. 33, MR Tab 2.

19. The Receiver anticipates that once the HST refund is factored in, the CRA will not hold a priority claim. However, the Receiver plans to set aside a portion of the proceeds from the Transaction to cover any potential priority claims by CRA.¹⁷

CWB

20. CWB claims to be owed \$1,947,830 plus interest and costs.¹⁸

21. The Receiver is in the process of obtaining an independent legal opinion from Chaitons LLP, subject to typical assumptions and qualifications, to determine the validity and enforceability of CWB's security.¹⁹

McKesson

22. McKesson is a pharmaceutical distributor that claims to be owed \$80,801.68 by Medical Arts.²⁰

23. The Receiver is in the process of obtaining an independent legal opinion from Chaitons LLP, subject to typical assumptions and qualifications, to determine the validity and enforceability of McKesson's security.²¹

Intercompany Receivables

24. As previously mentioned, the Purchase Agreement does not include accounts receivable. The financial records of Medical Arts show a related company debt totaling \$2,254,271.²²

¹⁷ First Report at para. 34, MR, Tab 2.

¹⁸ First Report at para. 35, MR Tab 2.

¹⁹ First Report at para. 36, MR Tab 2.

²⁰ First Report at para. 37, MR Tab 2.

²¹ First Report at para. 38, MR Tab 2.

²² First Report at para. 39, MR Tab 2.

25. The Receiver has repeatedly sought additional details about the receivable from the related company by reaching out to Mr. Gerges and the bookkeepers of Medical Arts. However, a sufficient response has yet to be received. Therefore, the Receiver is unable to proceed with the collection of this debt.²³

26. The Receiver requires that Mr. Gerges comply with the Receiver's request to submit complete financial reporting for the related parties. This information includes accountant prepared financial statements, corporate income tax returns for every company with outstanding debts to Medical Arts.²⁴

Interim Statement of Receipts and Disbursements

27. The Receiver's Interim Statement of Receipts and Disbursements for the period ending August 19, 2024, reflects receipts over disbursements of \$55,950 excluding the deposit pursuant to the Purchase Agreement.²⁵

Activities of the Receiver to Date

28. Paragraphs 11 and 16 of the First Report include a detailed summary of the Receiver's activities since the date of the Receiver's Appointment.²⁶

Fees of the Receiver and its Legal Counsel

29. Pursuant to Paragraph 20 of the Appointment Order, the Receiver and counsel to the Receiver shall be paid their reasonable professional fees in each case at their standard rates and charges and the Receiver and counsel to the Receiver have been granted a first charge on the Property in priority

²³ First Report at para. 40, MR Tab 2.

²⁴ First Report at para. 41, MR Tab 2.

²⁵ First Report at paras. 42-43, MR Tab 2; Appendix "D" to the First Report.

²⁶ First Report at paras. 11 and 16, MR Tab 2.

to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any person as security for payment of the professional fees (the “**Receiver’s Charge**”).²⁷

30. Pursuant to Paragraphs 21 and 22 of the Appointment Order, the Receiver and Chaitons LLP shall pass their legal accounts as referred to this Court and is at liberty, from time to time, to apply reasonable amounts, out of the monies in its hands, against the professional fees, incurred at the normal rates and charges of the Receiver or its counsel, and such amounts shall constitute advances against its professional fees when and as approved by the Court.²⁸

31. The Receiver has provided services and incurred disbursements during the period from April 19, 2024, to August 19, 2024 as set out in the Affidavit of John Haralovich sworn on August 20, 2024 (the “**Title Affidavit**”).²⁹

32. During the period from April 20, 2024 to July 31, 2024, Chaitons expended a total of 27.60 hours in connection with this matter, giving rise to fees and disbursements totaling \$25,358.40 (comprised of fees of \$22,302.50, of disbursements of \$146.60, and \$2,909.30 of HST), as more particularly set out in the Affidavit of David Im sworn August 20, 2024 (the “**Im Affidavit**”).³⁰

PART III – ISSUES

33. The Receiver’s motion raises the following main legal issues:

- (a) Should the Court approve the Transaction?
- (b) Is it appropriate for the Court to seal the Confidential Appendices pending closing of the Transaction?

²⁷ First Report at para. 44, MR Tab 2.

²⁸ First Report at para. 45, MR Tab 2.

²⁹ First Report at para. 46, MR Tab 2; Appendix “E” to the First Report.

³⁰ First Report at para. 47, MR Tab 2; Appendix “F” to the First Report.

PART IV – LAW AND ARGUMENT**The Transaction should be approved**

34. The following criteria are to be considered by the Court when asked to approve a sale of assets in a receivership context:

- (a) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;
- (b) the interests of the 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.³¹

35. The *Soundair* test is readily met on the facts of this case.

36. The steps taken to market and sell the Assets, as detailed above, included direct contact with a broad range of prospective buyers, advertising the Assets for sale, distributing a Teaser, providing access to a confidential data room, and negotiating with offerors.³²

37. It is respectfully submitted that the Court should approve the Purchase Agreement for the following reasons:³³

- (a) it is the result of a competitive and fair sale process conducted by the Receiver;

³¹ [*Royal Bank of Canada v. Soundair Corp.* \(1991\), 4 OR \(3d\) 1 \(ONCA\)](#) at para. 16 [“*Soundair*”].

³² First Report at para. 18, MR Tab 2.

³³ First Report at para. 20, MR Tab 2.

- (b) the Transaction will maximize the recovery for Medical Arts' creditors and stakeholders, and will preserve the continuity of the Business;
- (c) it is commercially reasonable and in the best interests of Medical Arts' estate; and; and
- (a) the Transaction is supported by the major stakeholders of the Debtors, including CWB.

The sealing order should be granted

38. The Receiver seeks an order sealing the Confidential Appendices.

39. The Supreme Court of Canada has held that a sealing order may be granted:

- (a) where it is necessary 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) where the salutary effects of the confidentiality outweigh its deleterious effects, including the effects on the right to free expression, which includes public interest in open and accessible court proceedings.³⁴

40. This Court has applied the *Sierra* test in court-supervised sale proceedings to ensure that competitors or potential bidders do not gain an advantage if the sale transaction does not close. In *GE Canada Real Estate Financing Business Property Co. v. 1262354 Ontario Inc.*, this Court held that the “integrity of the sales process necessitates keeping all bids confidential until a final sale of the assets has taken place.”³⁵

³⁴ [*Sierra Club of Canada v. Canada \(Minister of Finance\)*, 2002 SCC 41](#) at para. 45 [“*Sierra*”].

³⁵ [*GE Canada Real Estate Financing Business Property Co. v. 1262354 Ontario Inc.*, 2014 ONSC 1173](#) at para. 34 [“*GE Canada*”].

41. In *Sherman Estate v. Donovan*, the Supreme Court of Canada held that a person asking a court to exercise discretion in limiting the ‘open court’ presumption must establish that:³⁶

- (a) court openness poses a serious risk to public interest;
- (b) the order sought is necessary to prevent the 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.

42. The Confidential Appendices to the First Report contain confidential and commercially sensitive information related to the Sale Process and the Transaction, including information regarding the bids received through the Sale Process, which if disclosed would be harmful and materially prejudicial to the receivership estate and stakeholders of the 1000 Station in the event the 1000 Transaction does not close as anticipated.

43. Sealing the information in the Confidential Appendices pending completion of the 1000 Transaction is necessary and appropriate to protect the integrity of the Sale Process.

The activities of the Receiver should be approved

44. The Court has the inherent jurisdiction to review and approve the activities of a court-appointed receiver as set out in the receiver’s reports.³⁷

45. It is common practice for court officers to bring motions to seek approval of their reports and the activities set out therein. Court approval, among other things, allows the court officer to bring its activities before the court and presents an opportunity to address concerns of stakeholders, while

³⁶ [Sherman Estate v. Donovan, 2021 SCC 25](#) at para. 38.

³⁷ [Bank of America Canada v. Willann Investments Ltd., 1996 CanLII 2782 \(ONCA\)](#).

enabling the Court to satisfy itself that the court officer's activities have been conducted in a prudent and diligent matter.³⁸

46. The activities of the Receiver described in the First Report were all necessary and undertaken in good faith pursuant to the Receiver's duties and powers set out in the Appointment Order.

47. The Receiver therefore respectfully submits that the First Report and the activities described therein should be approved.

Mr. Gerges should be ordered to provide information regarding the intercompany receivable

48. Pursuant to paragraph 5 of the Appointment Order, all persons with books and records in their possession shall provide said books and records and information of any kind related to the business or affairs of Medical Arts to the Receiver.

49. The financial records of Medical Arts show, among other things, a related company receivable totaling \$2,254,271.³⁹

50. The Receiver has repeatedly sought additional details about the receivable from the related company by reaching out to Mr. Gerges and the bookkeepers of Medical Arts. However, a sufficient response has yet to be received.⁴⁰

51. The Receiver requires that Mr. Gerges comply with the Receiver's request to submit complete financial reporting for the related parties. This information includes accountant prepared financial

³⁸ [Target Canada Co. \(Re\)](#), 2015 ONSC 7574 at paras 2 and 23; [Triple-I Capital Partners Limited v 12411300 Canada Inc.](#), 2023 ONSC 3400 at paras 65-66

³⁹ First Report at para. 39, MR, Tab 2.

⁴⁰ First Report at para. 40, MR, Tab 2.

statements and corporate income tax returns for every company for which Mr. Gerges is an officer or director with outstanding debts to Medical Arts.⁴¹

The fees of the Receiver and its legal counsel should be approved

52. The Receiver is seeking approval of the professional fees and disbursements incurred by it and its legal counsel as described in the fee affidavits attached to the First Report.

53. The Appointment Order at paragraphs 19 and 20 provides that the Receiver and its counsel shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges unless otherwise ordered by the Court on the passing of accounts.

54. The fees and disbursements are fair and reasonable and have been properly incurred. The hourly rates charged by the Receiver and its counsel are consistent with comparable firms practicing in the area of insolvency in the Ottawa market.

55. The Receiver respectfully submits that it is appropriate to approve the fees and disbursements of the Receiver and its counsel in the circumstances.

PART V – RELIEF SOUGHT

56. For the reasons set out above, the Receiver respectfully recommends and requests that the Court grant the orders sought on this motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22nd day of August, 2024.



CHAITONS LLP
Lawyers for the Receiver, MNP Ltd.

⁴¹ First report at para. 41, MR, Tab 2.

SCHEDULE “A”

LIST OF AUTHORITIES

1. [Royal Bank of Canada v. Soundair Corp. \(1991\), 4 OR \(3d\) 1 \(ONCA\)](#)
2. [Bank of America Canada v. Willann Investments Ltd., 1996 CanLII 2782 \(ONCA\)](#)
3. [Target Canada Co. \(Re\), 2015 ONSC 7574](#)
4. [Triple-I Capital Partners Limited v 12411300 Canada Inc., 2023 ONSC 3400](#)
5. [Sierra Club of Canada v. Canada \(Minister of Finance\), 2002 SCC 41](#)
6. [GE Canada Real Estate Financing Business Property Co. v. 1262354 Ontario Inc., 2014 ONSC 1173](#)
7. [Sherman Estate v. Donovan, 2021 SCC 25](#)

SCHEDULE "B"

RELEVANT STATUTES

N/A.

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Court File No. CV-24-00095422-0000

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FACTUM OF THE RECEIVER

CHAITONS LLP

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

Harvey Chaiton

Tel: (416) 218-1161

Email: harvey@chaitons.com

Laura Culleton

Tel: (416) 218-1128

Email: laurac@chaitons.com

**Lawyers for MNP Ltd., in its capacity as
Court-Appointed Receiver**