

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

BETWEEN:

**CANADIAN IMPERIAL BANK OF COMMERCE**

Applicant

and

**NAUSS PLUMBING & HEATING INC.**

Respondent

**FACTUM OF THE RECEIVER  
(Motion Returnable February 26, 2021)**

**PART I – OVERVIEW**

1. Pursuant to an Order (the “**Appointment Order**”) of the Honourable Justice Hennessy made on November 13, 2020, under the *Bankruptcy and Insolvency Act* (the “**BIA**”) and the *Courts of Justice Act*, MNP Ltd. was appointed as receiver and receiver and manager (in such capacities, the “**Receiver**”) of the property, assets and undertaking of Nauss Plumbing & Heating Ltd. (the “**Debtor**”).
2. The main assets of the Debtor include four (4) parcels of land in and around Sudbury, Ontario.

3. This factum is filed by the Receiver in connection with its motion returnable February 26, 2021, for an Order seeking, among other things,
  - a) approval of the sale of one (1) of the Debtor's properties, the Lasalle Property (defined below), pursuant to an agreement of purchase and sale (the "**Lasalle Sale Agreement**") dated as of January 15, 2021, between the Receiver and Barker Bros Inc., as the purchaser (the "**Purchaser**");
  - b) Vesting in the Purchaser's nominee, the Debtor's right, title and interest in and to the Property, free and clear of any claims and encumbrances;
  - c) Sealing certain documents in connection with the sale and the Receiver's other sales activities;
  - d) Approving of a return of deposit in connection with a sale not completed;
  - e) Approving the activities, decisions, and conduct of the Receiver as set out in the First Report of the Receiver dated February 19, 2021 (the "**First Report**"); and
  - f) approving the fees and disbursements of the Receiver and the counsel to the Receiver to date as set out in the First Report.
4. For the reasons set out herein and in the First Report, the Receiver recommends and requests that this Honourable Court grant the relief, as set out in the Receiver's Notice of Motion and draft Orders.

## **PART II – THE FACTS**

5. Nauss is a private Ontario corporation that operated its businesses from four (4) locations that it holds title to in and around Sudbury, Ontario:
  - a) plumbing and heating contracting from 2590 Lasalle Boulevard, Sudbury, Ontario (the "**Lasalle Property**");

- b) plumbing and heating contracting also known as Garnet Plumbing from 551 Centre Street, Espanola, Ontario (the “**Espanola Property**”);
- c) a spring water bottling facility operating as Jennica Springs from its location at 1330 North Road, Markstay, Ontario (the “**Jennica Springs Property**”); and
- d) and a storage facility for boats, all terrain vehicles, recreational and other vehicles from a former hockey arena located at 7 Millichamp Street, Markstay, Ontario (the “**Arena Property**”).

First Report of the Receiver, paragraph 2.

**Receiver’s Initial Sales Efforts**

- 6. As part of the Receiver’s sales efforts, the Receiver obtained listing proposals from two (2) well know commercial realtors in the Sudbury region. A summary of the listing proposals is attached as **Confidential Appendix “1”**.

First Report of the Receiver, paragraph 27.

- 7. Following consultations with CIBC, on or about November 25, 2020, the Receiver entered into Listing Agreements with Remax. The Listing Agreements continue until February 28, 2021 and include up to a 4.5% commission to be shared between the listing and buyer’s brokers. The Listing Prices are set out below:

<b>Property</b>	<b>Listing Price</b>
Lasalle	\$ 499,900
Espanola	\$ 399,900
Jennica Springs	\$ 299,900
Arena	\$ 999,900
	<b>\$ 2,199,600</b>

First Report of the Receiver, paragraph 28.

### **Sale of the Lasalle Property**

8. Three (3) competitive offers were received for the Lasalle Property by December 8, 2020 as summarized in **Confidential Appendix “2”**.

First Report of the Receiver, paragraph 29.

9. On December 10, 2020, the Receiver sent each of the prospective purchasers that had submitted an offer to provide their final and best offer by December 16, 2020.

First Report of the Receiver, paragraph 30.

10. The Receiver, in consultation with the Applicant, ultimately accepted the revised offer of Barker Bros Inc. and negotiated the Lasalle Sale Agreement dated January 15, 2021, a copy of which is attached as **Confidential Appendix “3”** (the “**Sale Transaction**”). The Lasalle Sale Agreement includes the following material terms:

- a) **Purchase price:** the final purchase price in the Lasalle Sale Agreement attached as **Confidential Appendix “3”** and subject to closing adjustments for standard closing adjustments for a real property sale;
- b) **Conditions upon:**
  - i. the Purchaser’s inspection and investigation of the property and its title by February 5, 2021, that was subsequently waived on February 4, 2021;
  - ii. the Court’s approval of the Lasalle Sale Agreement and issuance of a vesting order substantially in the form attached to the Lasalle Sale Agreement; and
  - iii. the closing of the contemplated transaction by March 1, 2021.
- c) **Representations and Warranties:** consistent with the standard terms of an insolvency transaction, i.e. on an “as is, where is” bases, with limited representations and warranties.

First Report of the Receiver, paragraph 31.

### **Lasalle Sale Agreement Recommendation**

11. The Receiver recommends that the Court approve the Lasalle Sale Agreement and authorize the Receiver to complete the Sale Transaction and vesting title to the Lasalle Property in the Purchaser's nominee for the following reasons:

- a) the Receiver was authorized to market this Property by the Appointment Order;
- b) the market was widely canvassed by Remax;
- c) the Purchase Price is significantly higher than the listing price/selling price suggested in both Listing Proposals;
- d) the Sale Transaction represents the highest and best offer with the highest likelihood of closing; and
- e) the Applicant has advised that it supports the Sale Transaction.

First Report of the Receiver, paragraph 32.

12. In the Receiver's opinion, the Sale Transaction represents the best and highest offer for the Property and the sale process and listing of this Property was fair and reasonable. The Receiver made sufficient effort to obtain the best price and has not acted improvidently. Accordingly, the Receiver respectfully requests that the Court approve the Sale Transaction, grant an order vesting the right, title and interest in the Lasalle Property to the Purchaser's nominee and authorize the Receiver to take all steps necessary to complete the Sale Transaction.

First Report of the Receiver, paragraph 33.

### **Sealing of the Confidential Appendices**

13. The Receiver is of the view that **Confidential Appendices "2" and "3"** should remain sealed until the earlier of 60 days following the closing of the Sale Transaction or further order of the Court, as the information contained therein is commercially sensitive and could prejudice the sale of the Lasalle Property in the event the Sale Transaction does not close.

First Report of the Receiver, paragraph 44.

14. The Receiver is of the view that **Confidential Appendices “1” and “4”** should remain sealed until further order of the Court, as the information contained therein is commercially sensitive and relates to the as of yet unsold properties, as well as the Lasalle Property.

First Report of the Receiver, paragraph 45.

15. The Receiver does not believe that any party will suffer any material prejudice if the Confidential Appendices are sealed in this manner.

First Report of the Receiver, paragraph 46.

### **Return of Deposit**

16. On November 3, 2020, the Company entered into a conditional Asset Purchase Agreements with 11993330 Canada Inc. (“**119 Canada**”) for the Jennica Springs and Arena Properties as well as the Jennica Springs assets and business on a going-concern basis. The contemplated transactions were subject to various conditions and were scheduled to close on or about the November 18, 2020. A copy of these agreements is attached as **Confidential Appendix “4”**.

First Report of the Receiver, paragraph 36.

17. Following its appointment, the Receiver, contacted 119 Canada and its counsel, to confirm whether they wished to complete the transaction. Following multiple discussions, 119 Canada withdrew its offer.

First Report of the Receiver, paragraph 37.

18. On December 22, 2020, 119 Canada’s deposits paid to the Company’s pre-receivership counsel, totaling \$82,000 was remitted to the Receiver. Accordingly, the Receiver with the consent of CIBC, recommends that the Court authorize the Receiver to return the \$82,000 deposit to 119 Canada.

First Report of the Receiver, paragraph 38.

**Approval of the Accounts of the Receiver and Counsel to Date**

19. The Receiver's accounts total \$116,090.34 comprising \$97,602.50 for fees, \$5,132.31 for disbursements and HST of \$13,355.53 for the period September 4, 2020 to February 10, 2021.

First Report of the Receiver, paragraph 48, and Appendix "J".

20. The accounts of the Receiver's Counsel, Audax, total \$8,981.73 in fees and disbursements and \$1,161.49 in HST for a total of \$10,143.22 for the period of November 16, 2020 to January 28, 2021.

First Report of the Receiver, paragraph 49 and Appendix "K".

21. The average hourly rates for the Receiver and Audax for the referenced billing periods were \$342.65 and approximately \$460.00, respectively.

First Report of the Receiver, paragraph 50.

22. The Receiver is of the view that the hourly rates charged by Audax are consistent with the rates charged by corporate law firms practicing in the area of insolvency in the region and that the fees charged are reasonable and appropriate in the circumstances.

First Report of the Receiver, paragraph 51.

**PART III - THE ISSUES**

23. The issues before this Court, and addressed below, are:
- a) Should this Court should approve the Sale Transaction and grant a vesting order?
  - b) Should this Court seal the confidential appendices on the terms requested?

- c) Should this Court approve the fees and disbursements of the Receiver and its counsel that were incurred in connection with the administration of the receivership?

#### PART IV - LAW AND ARGUMENT

##### *This Court should approve the Transaction and Grant a vesting order*

24. Section 243 of the BIA provides jurisdiction to the Court to authorize the receiver to enter into an agreement to sell property and in furtherance of the power, to grant an order vesting the purchased property in the purchaser.

*Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508, para 85, Receiver's Book of Authorities, Tab 1.

25. In addition, receivers have the powers set out in the orders appointing them. The Appointment Order in these proceedings provides for the power of the Receiver to sell the property of the Debtor.

Appointment Order, Section 3 (j).

26. Section 100 of the *Courts of Justice Act* (Ontario) also provides the Court with the power to vest in any person an interest in real or personal property that the Court has authority to order be conveyed.

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

27. It is settled law that where a Court is asked to approve a transaction in a receivership context, the Court is to consider the following principles (collectively, the "***Soundair Principles***"):



- a) whether the party made a sufficient effort to obtain the best price and to not act improvidently;
- b) the interests of all parties;
- c) the efficacy and integrity of the process by which the party obtainer offers; and
- d) whether the working out of the process was unfair.

*Royal Bank of Canada v. Soundair Corp.*, (1991), 4.O.R. (3d) 1 (C.A.), Receiver's Book of Authorities, Tab 2.

*Skyepharma PLC v. Hyal Pharmaceutical Corp.* (1999), 12, C.B. R. (4<sup>th</sup>) 87 (Ont. S.C.J., appeal quashed, (2000), 47 O.R. (3d) 234(C.A.)), Receiver's Book of Authorities, Tab 3.

28. Absent clear evidence that a proposed sale is improvident or that there was an abuse of process, a Court is to grant deference to the recommendation of a receiver to sell a debtor's assets.

*Royal Bank of Canada v. Soundair Corp.*, (1991), 4.O.R. (3d) 1 (C.A.), Receiver's Book of Authorities, Tab 2, Paras. 14 and 21.

*Skyepharma PLC v. Hyal Pharmaceutical Corp.* (1999), 12, C.B. R. (4<sup>th</sup>) 87 (Ont. S.C.J., appeal quashed, (2000), 47 O.R. (3d) 234(C.A.)), Receiver's Book of Authorities, Tab 3, Paras. 3 and 4.

29. This Court should approve the Sale Transaction, the Lasalle Sale Agreement and grant a vesting order based on the application of the *Soundair* Principles to the present case:

- a) ***Sufficient effort as made to obtain the best price.*** The Receiver's view is that the price achieved is fair and reasonable given the current circumstances and the time on the market. In the circumstances, any further marketing efforts are unlikely to result in a superior purchase price or produce a material net greater benefit to the

estate.

- b) ***Interests of all parties have be served.*** The Sale Transaction provides for the best outcome in the circumstances, for all parties with an economic interest in these proceedings.
  - c) ***The process was fair and run with integrity.*** The Lasalle Property was marketed in a public and a commercially reasonable manner. The Lasalle Sale Agreement was negotiated in good faith and is the best and highest price under the circumstances.
30. Based on the foregoing, it is respectfully submitted that the Sale Transaction satisfies the *Soundair* Principles and it is appropriate in the circumstances for the Sale Transaction to be approved by this Honourable Court.

***This Court should seal the confidential appendices on the terms requested.***

31. The Receiver request that the Confidential Appendices be sealed until further order of this Court.
32. Pursuant to section 137(2) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, this Court has the discretion to order that any document filed in a civil proceeding be treated as confidential sealed and not form part of the public record.

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

33. The Supreme Court of Canada in *Sierra Club of Canada v. Canada (Minister of Finance)*, held that a sealing order may be granted when:

- a) An order is needed to prevent serious risk to an important interest, because reasonable alternative measures will not prevent the risk; and
- b) The salutary effect of the order outweighs its deleterious effects, including the effects on the right to free expression, which includes public interest in open and accessible court proceedings.

*Sierra Club of Canada v. Canada (Minister of Finance), [2002]*  
2 S.C.R. 522, Receiver's Brief of Authorities, Tab 7, Para. 53.

- 34. Sealing the confidential documents on the terms requested is necessary to preserve the integrity of the sales process in these proceedings and any subsequent attempts of market and sell the Lasalle Property (in the event that the Sale Transaction does not close) and with respect to the sale of the other Properties and to avoid any prejudice that might be caused by publicly disclosing confidential and commercially-sensitive information contained therein. There is no other reasonable alternative to prevent this information from becoming publicly disclosed.
- 35. The Receiver is not aware of any party that will be prejudiced if the information is sealed as requested.

***This Court should approve the fees and disbursements***

- 36. Pursuant to the Appointment Order, the fees and disbursements of the Receiver and its legal counsel are authorized to be paid on a periodic basis subject to any final approval as ordered by the Court.

Appointment Order, Sections 19 and 20.
- 37. The Receiver is seeking approval of the Court for the fees and disbursements of the Receiver and its legal counsel.
- 38. The accounts meet the technical requirements established by prior case law:

- a) the accounts disclose the name of each person who rendered services, the rate charges and the total charges for each of the categories of services rendered.
- b) the accounts are in a form that can be easily understood by those affected by the receivership or by the judicial officer required to assess the accounts; and
- c) both the Receiver's and its counsel's accounts were verified by an affidavit.

*Confectionately Yours Inc., Re*, 2002 CarswellOnt 3002 (C.A.),  
Receiver's Brief of Authorities, Tab 8 , at paras. 37-38.

39. A Receiver is entitled to be paid its fees and disbursements, along with those of its counsel, where the amount charged is fair and reasonable in the circumstances.

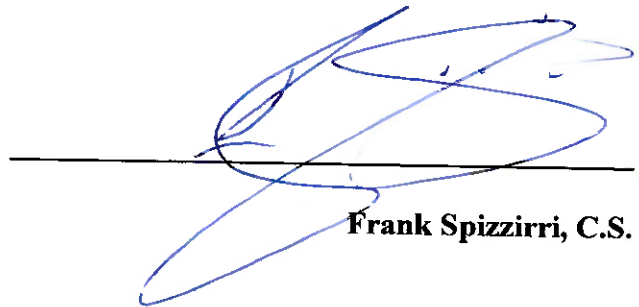
40. Courts will consider the following factors in making a determination to approve fees : (a) the nature, extent and value of the assets handled; (b) the complications and difficulties encountered; (c) the degree of assistance provided by the company; (d) the receiver's knowledge, expertise and skill, (e) the diligence displayed, (f) the responsibilities assumes; (g) the results of the Receiver's efforts and (h) the cost of the comparable services when performed in a prudent and economical manner.

*Confectionately Yours Inc., Re*, 2002 CarswellOnt 3002 (C.A.),  
Receiver's Brief of Authorities, Tab 8 , at para. 42.

41. The hourly rates of the Receiver and its counsel were reasonable in light of the services required and the circumstances of the receivership process. With respect to legal services, the services were carried out by lawyers with the appropriate level of experience and expertise.

**PART V – ORDER SOUGHT**

42. For the reasons set forth herein and in the First Report, the Receiver respectfully requests that granting of the Orders substantially in the forms contained in the Receiver's motion record as may be amended and presented at the return of this Motion.

A handwritten signature in blue ink is written over a solid horizontal black line. The signature is stylized and appears to be 'Frank Spizzirri'.

**Frank Spizzirri, C.S.**

**SCHEDULE A – CASES**

1. *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Ressources Inc.* 2019 ONCA 508.
2. *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.).
3. *Skypharma PLC v. Hyal Pharmaceutical Corp.* (1999), 12 C.B.R. (4<sup>th</sup>) (Ont S.C.J., appeal quashed, (2000), 47 O.R. (3d) 234 (Ont. C.A.).
4. *Sierra Club of Canada v. Canada (Minister of Finance)* [2002] 2 S.C.R. 522.
5. *Confectionately Yours Inc., Re* 2002 CarswellOnt 3002 (Ont. C.A.).

## **SCHEDULE B**

### **Vesting orders**

**S. 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. R.S.O. 1990, c. C.43, s. 100.

### **Sealing documents**

**S. 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. R.S.O. 1990, c. C.43, s. 137(2).

**CANADIAN IMPERIAL BANK OF  
COMMERCE**

- and -

**NAUSS PLUMBING AND HEATING INC.**

**Applicant**

**Respondent**

**Court File No: CV-19-8866-0000**

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at:  
**SUDBURY**

**FACTUM  
(FEBRUARY 26, 2021)**

**AUDAXLAW PC**  
Barristers and Solicitors  
300 Bloor Street West  
Suite 670 West Tower  
Toronto, Ontario, M8X 2X2

**Frank Spizzirri, CS**  
**LSO No. 37327F**  
Tel: (416) 862-8329  
Fax: (416) 597-8330

**Lawyers for the Court-Appointed  
Receiver, MNP Ltd.**