

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

**IN THE MATTER OF SECTION 243(1) OF THE  
BANKRUPTCY AND INSOLVENCY ACT AND SECTION 101  
OF THE COURTS OF JUSTICE ACT**

**B E T W E E N:**

**NATIONAL BANK OF CANADA**

Applicant

- and -

**EVERGREEN CONSUMER BRANDS INC.**

Respondent

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**FACTUM OF THE RECEIVER**  
(Approval and Vesting Order)  
(Returnable March 10, 2020)

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March 9, 2020

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

**IN THE MATTER OF SECTION 243(1) OF THE *BANKRUPTCY  
AND INSOLVENCY ACT* AND SECTION 101 OF THE *COURTS  
OF JUSTICE ACT***

**B E T W E E N:**

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**EVERGREEN CONSUMER BRANDS INC.**

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**FACTUM OF THE RECEIVER**

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**PART I – NATURE OF THIS MOTION**

1. This Motion by Deloitte Restructuring Inc. (“**Deloitte**”), in its capacity as receiver and manager (the “**Receiver**”) of the assets, undertakings and properties of Evergreen Consumer Brands Inc. (the “**Debtor**”), is for orders substantially in the form of the draft order, filed:<sup>1</sup>
  - i. abridging the time for service of the motion record and dispensing with further service thereof,
  - ii. approving the asset purchase agreement dated March 2, 2020 (the “**APA**”) between the Receiver and LEC Custom Products, Inc. (the “**Purchaser**”),
  - iii. vesting in the Purchaser the Purchased Assets (as that term is defined in the APA) free and clear of and from any and all Encumbrances (as that term is defined in the APA),
  - iv. directing third parties that may be in possession of Purchased Assets to deliver same to the Purchaser upon request by the Receiver, and

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<sup>1</sup> Draft Approval and Vesting Order, Tab 3 of the Motion Record of the Receiver.

- v. sealing from the public record, until the filing of the Receiver's Certificate (as that term is defined in the draft order) or further order of this court, whichever occurs earlier, an unredacted version of the Receiver's March 3, 2020 first report (the "**First Report**") as well as its confidential Appendices "B" (Confidential Information Memorandum dated December 2019), "C" (comparison of offers), and "D" (unredacted version of the APA).

## PART II – FACTS

2. The Debtor's business is the manufacturing and distribution of personal care products.<sup>2</sup> It has 39 employees and 3 managers.<sup>3</sup> As at February 13, 2020, it was indebted to its major secured and trade creditors for approx. \$45,900,000, including the Applicant for approx. \$18,500,000.<sup>4</sup>
3. The Debtor experienced financial difficulties in 2019 which led it to default towards the Applicant.<sup>5</sup> In February 2019, with the Debtor's consent, the Applicant retained Deloitte as consultant to the Debtor.<sup>6</sup> The Debtor also retained Alvarez & Marsal Canada Securities ULC ("**A&M**"). With the assistance of Deloitte and A&M, the Debtor initiated a refinancing offers solicitation process in November 2019. It led to 5 offers, all insufficient to fully repay the Applicant. They were rejected.<sup>7</sup> Rather, the Applicant and the Debtor entered into a December 16, 2019 amended forbearance agreement wherein the Debtor agreed to continue seeking recapitalization prospects and commence a sale and investment process (the "**SISP**") for its assets and business satisfactory to the Applicant.<sup>8</sup>
4. A Confidential Information Memorandum ("**CIM**") was prepared. The SISP terms were agreed to, the key ones being:
  - i. non-binding letters of intent ("**LOIs**") due by January 24, 2020,

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<sup>2</sup> First Report, para. 2.

<sup>3</sup> First Report, para. 13.

<sup>4</sup> First Report, paras. 9, 14.

<sup>5</sup> First Report, paras. 8, 12.

<sup>6</sup> First Report, para. 8.

<sup>7</sup> First Report, para. 16.

<sup>8</sup> First Report, para. 17.

- ii. LOIs to include the proposed **(i)** valuation, **(ii)** terms of acquisition, investment, or financing, **(iii)** treatment of employees and management, and **(iv)** due diligence and transaction timeline,
  - iii. best LOI offers to be invited to submit binding proposals and draft agreements by January 31, 2020, and
  - iv. transaction to be consummated by February 21, 2020.<sup>9</sup>
5. Such a relatively short timeframe was commercially reasonable considering the Debtor's worsening financial situation.<sup>10</sup> It did not prevent substantial market participation. 195 private equity and potential strategic partners received teasers, of which 39 executed non-disclosure agreements and received the CIM, 11 submitted LOIs, and 5 submitted binding proposals.<sup>11</sup>
6. Deloitte identified 2 leading offers and entered into further negotiations with the bidders. While negotiations ensued, the Applicant sought the appointment of Deloitte as Receiver to, among other things, complete the negotiations pursuant to the SISP and allow an application for a vesting order. The Receiver was appointed on February 13, 2020 pursuant to the *Courts of Justice Act* and the *Bankruptcy and Insolvency Act*,<sup>12</sup> with authorization and power to, *inter alia*, adopt and continue the SISP if it deems it advisable, market and sell the Purchased Assets, and apply for a vesting order.<sup>13</sup>
7. Following its appointment, the Receiver identified the Purchaser's offer as the best one because **(i)** its all-cash purchase price is higher than any other all-cash proposals, **(ii)** the Purchaser requires little further due diligence, resulting in low closing risk, **(iii)** it provides for the retained employment of all non-management employees and potentially certain members of management, and the continuation of the Debtor's business, and **(iv)** it presents the quickest path to closing and return to normal operations, limiting disruption for suppliers, customers and other stakeholders.<sup>14</sup>

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<sup>9</sup> First Report, para. 18.

<sup>10</sup> First Report, para. 19.

<sup>11</sup> First Report, para. 20 and confidential Appendix "C" (comparison of offers received).

<sup>12</sup> First Report, para. 1.

<sup>13</sup> First Report, para. 3, and February 13<sup>th</sup>, 2020 appointing order, Appendix "A" to the First Report, paragraphs 3(j), (k), and (l), *inter alia*.

<sup>14</sup> First Report, paras. 22-23.

8. The salient terms of the APA are:
- i. **Purchase price** – Subject to the sealing order sought herein.
  - ii. **Purchased Assets** – as defined in the APA. Generally: all Debtor’s assets except cash on hand, amounts receivable from tax authorities and certain equipment leases.
  - iii. **Employees** – Receiver to pay all wages up to closing date, following which Purchaser will engage the employees and be responsible for wages.
  - iv. **Third Party Storage** – Receiver to take reasonable steps to deliver the Purchased Assets stored at third-party locations.
  - v. **Vesting Order** – the sale is conditional on the Receiver obtaining an order vesting the Purchased Assets in the Purchaser free and clear of all Encumbrances.<sup>15</sup>

### **PART III – ISSUES AND THE LAW**

#### **(A) Approval and Vesting Order**

9. The first issue is whether this Court should approve the APA and vest the Purchased Assets in the Purchaser free and clear of all Encumbrances.
10. The Court of Appeal in *Royal Bank of Canada v Soundair Corp.*<sup>16</sup> set out the following non-limitative guiding factors in whether to grant an approval and vesting order applied for by a receiver: **(i)** whether a sufficient effort was made to get the best price, without acting improvidently, **(ii)** the interests of all parties, **(iii)** the efficacy and integrity of the process by which offers are obtained, and **(iv)** whether there has been unfairness in the working out of the process.<sup>17</sup> The interests of all parties include those of the Purchaser.<sup>18</sup>
11. This test is applicable regardless of whether the sale stems from a court-approved process or one that predates or overlaps the receivership. In the latter case, the court may consider whether further sales efforts could realistically lend a better result, taking costs into account. If not, this supports the approval of the transaction at hand.<sup>19</sup>

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<sup>15</sup> First Report, para. 25.

<sup>16</sup> [1991] O.J. No. 1137 ([1991 CanLII 2727](#)) (ON CA) (“*Soundair*”).

<sup>17</sup> *Soundair*, p. 9.

<sup>18</sup> *Reciprocal Opportunities Incorporated v Sikh Lehar International Organization*, [2018 ONCA 713](#), Tab 1 of the Receiver’s Brief of Authorities (the “**Brief**”), paras. 55-56, 61-62.

<sup>19</sup> *Elleway Acquisitions Limited v 4358376 Canada Inc.*, [2013 ONSC 7009](#) (“*Elleway*”), Tab 2 of the Brief, paras. 33-34, 37.

12. Here, the APA and the SISP are fair and reasonable. The above factors are met.

Reasonableness of Process and Receiver's Approval

13. As recounted above, the APA stems from the SISP, a process that began before the appointment of the Receiver. It did not result from a Court-approved sale process.
14. A preapproved sale process may be ideal, but it is not necessary.<sup>20</sup> The process may predate any filing.<sup>21</sup> It need not be perfect; it must only be reasonable.<sup>22</sup>
15. An important factor is that a court officer is satisfied of the process' fairness in the circumstances. The court "should place a great deal of confidence in the receiver's expert business judgement",<sup>23</sup> especially if the receiver was involved and consulted in the sale process, whether before or after its formal appointment.<sup>24</sup>
16. As noted above, since early 2019, the Debtor has made good faith, serious efforts to locate refinancing, sale and investment opportunities allowing its business' continuation. Assisted by professional advisors A&M, it first ran a refinancing offers solicitation process, which led to 5 offers, and the SISP, which further scoured the market, with 195 teasers received, 39 non-disclosure agreements executed and CIMs provided, 11 LOIs submitted, and 5 binding proposals made.<sup>25</sup>
17. The Receiver was consulted and involved throughout. It opines the SISP was commercially reasonable, as it fairly and openly exposed the Purchased Assets to the market, produced significant participation, and led to the best transaction in the circumstances.<sup>26</sup>
18. Therefore, it is respectfully submitted that the process leading to the APA is fair and reasonable in the circumstances.

Reasonableness of Transaction and Effect of Sale on Stakeholders

19. The Receiver reports that the APA is commercially fair and reasonable. Taking into account all the circumstances, it is the best offer received in the SISP. Its all-cash purchase price is

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<sup>20</sup> *Bloom Lake, g.p.l. (Arrangement relatif à)*, [2015 OCCS 1920](#) ("*Bloom Lake*"), Tab 3 of the Brief, para. 29; *Soundair*, p. 17-18.

<sup>21</sup> *Nelson Education Limited (Re)*, [2015 ONSC 5557](#) ("*Nelson*"), Tab 4 of the Brief, paras. 31-33.

<sup>22</sup> *Bloom Lake*, Tab 3 of the Brief, para. 59; see also para. 39; *Soundair*, p. 8; see also p. 17-19.

<sup>23</sup> *Skyepharma PLC v Hyal Pharmaceutical Corp.*, [1999 CanLII 15007 \(ON SC\)](#), Tab 5 of the Brief, paras. 3, 7.

<sup>24</sup> *Tool-Plas Systems Inc. (Re)*, [2008 CanLII 54791 \(ON SC\)](#), Tab 6 of the Brief, paras. 4, 5, 18.

<sup>25</sup> First Report, paras. 8, 16-20.

<sup>26</sup> First Report, para. 28.

higher than any other all-cash offers received. The Purchaser requires little further due diligence, resulting in low closing risk. The APA provides for the retained employment of all non-management employees and potentially certain members of management. The Purchaser has the will and capacity to integrate the Debtor's business. Such continuation is to the benefit of all stakeholders, limiting disruption for suppliers, customers and employees.<sup>27</sup>

20. The Applicant, an important secured creditor of the Debtor,<sup>28</sup> advised the Receiver that it supports this court's granting the relief sought.<sup>29</sup> Other secured creditors and potentially interested parties received notice of the herein motion.<sup>30</sup>
21. Therefore, the APA itself is commercially fair and reasonable in the circumstances.
22. The APA is subject to this Court vesting the Purchased Assets in the purchaser free and clear. This is a "normal relief given in an asset sale" in insolvency proceedings and it is appropriate in this case for the reasons highlighted above.<sup>31</sup>

**(B) Sealing Order**

23. The second issue is whether this court should grant an order sealing from the public record the unredacted version of the First Report as well as its confidential appendices "B", "C" and "D" until the filing of the Receiver's Certificate or further order of this court.
24. Such sealing orders are regularly granted in connection with approval and vesting orders. They protect the integrity of the process, in case the transaction does not close for any reason, by preventing a bidder from getting an unfair advantage. This has been found to "greatly outweigh" any deleterious effects.<sup>32</sup> This case is no different and this concern is present here.<sup>33</sup> The sealing order requested is therefore appropriate.

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<sup>27</sup> First Report, paras. 22-23, 28.

<sup>28</sup> Without admission, the Applicant appears, at this stage, to be the first ranking secured creditor on most of the Debtor's assets.

<sup>29</sup> First Report, paras. 28-29.

<sup>30</sup> Affidavit of service of Katie Parent sworn March 3, 2020, filed.

<sup>31</sup> *Nelson*, Tab 4 of the Brief, para. 40.

<sup>32</sup> *Elleway*, Tab 2 of the Brief, paras. 47-48.

<sup>33</sup> First Report, para. 30.

**PART IV – NATURE OF THE ORDER SOUGHT**

25. The Receiver therefore request orders substantially per the draft order, filed.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 9<sup>th</sup> day of March, 2020.

Colin M. Sloan Walsh and Amber LLP.

## SCHEDULE A – LIST OF AUTHORITIES

Tab of Brief

- n/a *Royal Bank of Canada v Soundair Corp.*, [1991 CanLII 2727 \(ON CA\)](#)
1. *Reciprocal Opportunities Incorporated v Sikh Lehar International Organization*, [2018 ONCA 713](#)
  2. *Elleway Acquisitions Limited v 4358376 Canada Inc.*, [2013 ONSC 7009](#)
  3. *Bloom Lake, g.p.l. (Arrangement relatif à)*, [2015 QCCS 1920](#)
  4. *Nelson Education Limited (Re)*, [2015 ONSC 5557](#)
  5. *Skyepharma PLC v Hyal Pharmaceutical Corp.*, [1999 CanLII 15007 \(ON SC\)](#)
  6. *Tool-Plas Systems Inc. (Re)*, [2008 CanLII 54791 \(ON SC\)](#)

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## **SCHEDULE B – RELEVANT STATUTES**

### *Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3, s. 243(1):*

243 (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

- (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
- (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
- (c) take any other action that the court considers advisable.

### *Courts of Justice Act, R.S.O. 1990, c. C.43, s. 101:*

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.

101 (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

(2) An order under subsection (1) may include such terms as are considered just.

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Court File No. CV-20-00636080-00CL

***ONTARIO***  
**SUPERIOR COURT OF JUSTICE**  
**COMMERCIAL LIST**  
**Proceeding commenced in TORONTO**

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**(Approval and Vesting Order)**  
**(Motion Returnable March 10, 2020)**

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