

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

*IN THE MATTER OF Section 101 of the Courts of Justice Act, R.S.O. 1990 c.C.43, as amended,
and in the matter of Section 243(1) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3,
as amended*

B E T W E E N:

NATIONAL BANK OF CANADA

Applicant

- and -

**NIMBUS ENVIRONMENTAL SOLUTIONS INC., OAKDALE ENTERPRISES INC.,
NIMBUS WATER SYSTEMS INC., 365 PRO INSTALLATIONS INC.,
2242462 ONTARIO LIMITED AND WATER FILTER CART INC.**

Respondents

**FACTUM OF THE RECEIVER
(Motion Returnable November 9, 2021)**

November 4, 2021

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Court File No. CV-21-00667395-00CL

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FACTUM OF THE RECEIVER

PART I - OVERVIEW

1. BDO Canada Limited, in its capacity as court-appointed receiver and manager of all of the property, assets, and undertakings of each of the Respondents (the “**Receiver**”), seeks an order (the “**Approval and Vesting Order**”), among other things, vesting in the Purchaser the Respondents’ right, title and interest in and to the assets (the “**Purchased Assets**”) described in the agreement of purchase and sale between the Receiver and 2752837 Ontario Inc. (the “**Purchaser**”) dated September 6, 2021 (the “**Stalking Horse Agreement**”).
2. The Approval and Vesting Order should be granted because: (i) the transaction contemplated by the Stalking Horse Agreement (the “**Transaction**”) represents the highest and best viable offer received after conducting a robust sales process; (ii) the net proceeds

of the Transaction are greater than the estimated liquidation value; (iii) the Transaction will result in a continuation of the Respondents' business and preserve jobs for a number of employees and value for customers, suppliers, and other stakeholders; and (iv) the Court-approved sales process was fair, transparent, and conducted in accordance with its terms, and therefore the *Soundair* principles have been satisfied.

PART II - THE FACTS

3. The Second Report of the Receiver dated November 1, 2021 (the "**Second Report**") provides a detailed description of the facts relevant to the relief sought by the Receiver. A summary of the facts is set out below. All capitalized terms not expressly defined herein are defined in the Second Report.

Stalking Horse Agreement

4. Shortly after the commencement of the Receivership Proceeding, the Receiver engaged in discussions with JLHD Investments Inc. ("**JLHD**"), a secured creditor of the Nimbus Group, whereby JLHD expressed an interest in acquiring substantially all of the Property of the Nimbus Group with a view to continuing the Business as a going concern.¹
5. As a result of these discussions, the Receiver entered into the Stalking Horse Agreement with the Purchaser (an affiliate of JLHD) on September 6, 2021. The key terms of the Stalking Horse Agreement are summarized below:²

¹ First Report of the Receiver dated September 8, 2021 ("**First Report**") at para 33.

² First Report at para 34; Second Report of the Receiver dated November 1, 2021 ("**Second Report**") at para 14.

- (a) the Purchaser will pay the aggregate amount of \$13 million for substantially all of the Property of Water Systems, Oakdale, and Environmental (the “**Stalking Horse Bid**”) comprised of a deposit of \$650,000 (the “**Stalking Horse Deposit**”) and the balance of \$12,350,000 due upon closing. The Stalking Horse Deposit has been received and is in a non-interest bearing trust account held by the Receiver;
- (b) the Purchased Assets are to be purchased on an “As Is, Where Is” basis; and
- (c) the closing of the Transaction is to occur 11 days after the Approval and Vesting Order is issued, with an outside closing date of November 26, 2021 (the “**Closing**”).

Sale and Investment Solicitation Process

- 6. In conjunction with the Stalking Horse Agreement, the Receiver developed a sale and investment solicitation process (the “**SISP**”) to market the Business and Property in an open and transparent manner. The Stalking Horse Agreement effectively set a “base line” for the SISP. The Stalking Horse Agreement and the SISP were approved by Order of the Court dated September 13, 2021 (the “**September Order**”).³
- 7. The SISP was effectively designed to determine whether the Receiver could obtain a “Superior Offer” to the Stalking Horse Bid. A Superior Offer means a Bid that is: (i) credible and financially viable on terms that are more favourable (and no more burdensome

³ Second Report at para 16; First Report at para 41; Second Report at para 2.

or conditional) than the terms of the Stalking Horse Bid; and (ii) for cash consideration in the amount of at least \$13,400,000.⁴

8. In accordance with the SISP, the Receiver, among other things:⁵
 - (a) prepared a list of Potential Bidders and contacted 162 financial and industry participants regarding the opportunity;
 - (b) advertised the opportunity in The Globe and Mail (National Edition);
 - (c) executed NDAs with 45 Potential Bidders, circulated the Confidential Information Package to such bidders, and granted such bidders access to the virtual data room created by the Receiver; and
 - (d) assisted the 30 Potential Bidders that accessed the data room in their respective due diligence processes and negotiated and solicited expressions of interest from such bidders, including by facilitating site visits and key customer and employee discussions with two of these bidders.

9. The Bid Deadline was originally scheduled for October 13, 2021. However, given that the majority of the Potential Bidders requested additional time to submit their respective bids, the Receiver extended the Bid Deadline to October 15, 2021 in accordance with the terms of the SISP.⁶

⁴ This amount is the aggregate of the Purchase Price under the Stalking Horse Agreement (\$13,000,000) plus the Break Fee and Expense Reimbursement (\$300,000) plus an incremental increase of \$100,000, as required under the terms of the SISP and the Stalking Horse Agreement. See the Second Report, Appendix C, page 1.

⁵ Second Report at paras 17-18.

⁶ Second Report at para 19.

10. Two Bids were submitted by the Bid Deadline (in addition to the Stalking Horse Bid). However, neither of these Bids qualified as “Superior Offers”.⁷
11. The first such Bid was for \$18.1 million (which exceeds the Stalking Horse Bid). However, the party presenting this Bid failed to provide the Deposit and otherwise demonstrate its financial ability to consummate the proposed transaction. In addition, this party became non-responsive to the Receiver regarding its financial capabilities. As a result, this party did not constitute a Qualified Bidder and its Bid did not qualify as a Superior Offer.⁸
12. The second such Bid was only in respect of the Real Estate and did not contemplate a going concern transaction that would result in a continuation of the Business. This Bid did not qualify as a Superior Offer because the consideration was less than the Stalking Horse Bid.⁹
13. Given that no Superior Offers were received as a result of the SISP, the Auction process was not required and the Stalking Horse Bid was deemed to be the Successful Bid.¹⁰
14. The Stalking Horse Agreement and the Transaction were previously approved by this Court on September 13, 2021. The Receiver now seeks approval of the sale and vesting of the Purchased Assets in and to the Stalking Horse Bidder in accordance with the terms and conditions of the Stalking Horse Agreement.¹¹

⁷ Second Report at paras 21-24.

⁸ Second Report at para 23.

⁹ Second Report at para 24.

¹⁰ Second Report at para 24.

¹¹ Second Report at para 2.

PART III - THE ISSUE

15. The primary issue on this motion is whether this Court should approve the sale and vesting of the Purchased Assets in and to the Stalking Horse Bidder.

PART IV - LAW & ANALYSIS

A. The Approval and Vesting Order should be Granted

16. It is well-established that where a Court is asked to approve a transaction and grant a sale approval and vesting order in the context of a receivership, the Court must consider the following principles delineated by the Ontario Court of Appeal in *Royal Bank of Canada v. Soundair Corp.* (collectively, the “**Soundair Principles**”):¹²
- (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 obtained offers; and
 - (d) whether the working out of the process was unfair.
17. Absent clear evidence that a proposed sale is improvident or that there was unfairness in the process, a Court is to grant deference to the recommendation of the Receiver to sell a debtor’s assets. Only in “exceptional circumstances” will a Court intervene and proceed contrary to the recommendation of its officer, the Receiver.¹³

¹² *Royal Bank v. Soundair Corp.*, 1991 CanLII 2727 (ONCA).

¹³ *Ibid* at paras 14, 21, 29 & 58.

18. The Soundair Principles are satisfied in the present case and therefore the Approval and Vesting Order should be granted for the following reasons:

- (a) **Sufficient effort was made to obtain the best price.** The objective of the SISP was to obtain the highest and best value for the Business and/or the Property and ultimately determine whether a “Superior Offer” could be obtained. The Receiver conducted a robust process to canvass the market and solicit interest from prospective purchasers all in accordance with the terms of the Court-approved SISP. Interested parties were provided with a reasonable opportunity to conduct due diligence, consider potential transactions and deal structures, and make an offer by the Bid Deadline. No Superior Offers were received. The Receiver is of the view that the Stalking Horse Bid is fair and reasonable. It is unlikely that any further marketing efforts would result in a superior transaction.
- (b) **The interests of all parties have been served.** The Transaction provides for the best possible outcome in the circumstances for all parties with an economic interest in this proceeding. The Receiver consulted with the senior secured creditor throughout the SISP. The senior secured creditor is supportive of the Transaction and the selection of the Stalking Horse Bid as the Successful Bid. Given that the Stalking Horse Bid represents the highest and best offer presented by any Qualified Bidder, the Receiver submits that the interests of all parties have been served and the underlying “value maximization” objective of this receivership proceeding has been achieved.
- (c) **The sales process was run with integrity.** The Business and Property were extensively marketed by the Receiver. The SISP was conducted in accordance with

its terms, which were approved by the Court. The SISP (and the timelines contemplated thereunder) appropriately balanced the need to move quickly to address the limited cash flow available with a realistic timetable that encourages a robust and competitive sales process.

- (d) **There was no unfairness.** The SISP was conducted in a fair and transparent manner in accordance with its terms and under the supervision of this Court. The terms of the SISP are publicly available on the Receiver's website and were circulated to each Potential Bidder by way of the Bid Letter. The Receiver accommodated the Potential Bidders by extending the Bid Deadline in an effort to secure the highest and best offer. The Receiver provided each Potential Bidder with an equal opportunity to conduct due diligence and submit an offer.
19. The Transaction provides for the continuation of the Business, thus preserving jobs for a number of employees in the Greater Toronto Area and value for customers, suppliers, and other stakeholders of the Nimbus Group. The Transaction represents the highest and best viable offer in the circumstances. The net proceeds of the Transaction are greater than the estimated liquidation value of the Property. The Receiver therefore recommends that the Court grant the Approval and Vesting Order.
20. Neither the SISP, nor the Receiver's implementation thereof, were improvident or unfair in terms of process. There are no exceptional circumstances that would lead this Court to proceed contrary to the recommendation of the Receiver. Accordingly, the Receiver submits that the Approval and Vesting Order should be granted.

PART V - RELIEF REQUESTED

21. For all of the foregoing reasons, the Receiver requests that this Honourable Court grant an Order substantially in the form of the draft Approval and Vesting Order located at Tab 3 of its Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of November, 2021

November 4, 2021



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SCHEDULE "A"
LIST OF AUTHORITIES

No.	Case Law
1	<i>Royal Bank v. Soundair Corp.</i> , [1991] O.J. No. 1137

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Proceedings commenced at Toronto, Ontario

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