

Court File No.: CV-23-00699238-00CL

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

ORTHO STUDIO EXPRESS, INC.

Applicant

-and-

DIGITAL ORTHODONTIC CARE INC.

Respondent

**FACTUM OF THE RECEIVER
(RE: VESTING, DISTRIBUTION AND DISCHARGE ORDERS)**

February 12, 2024

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TO: THE SERVICE LIST

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PART I – OVERVIEW

1. This motion is brought by Richter Inc., in its capacity as the Court-appointed receiver (the “**Receiver**”) over all of the assets, undertakings and property (the “**Property**”) of Digital Orthodontic Care Inc. (the “**Company**”).

2. This factum is filed in support of the Receiver’s motion seeking three orders (the “**Orders**”) from the Ontario Superior Court of Justice (Commercial List) (the “**Court**”):
 - (a) an Approval and Vesting Order, substantially in the form attached at Tab 3 of the Motion Record (the “**Arcadlab AVO**”) that, among other things:
 - (i) approves the transaction and the purchase agreement as between the Receiver and Ortho Studio Express, Inc. (the “**Purchaser**”) dated October 6, 2023 (the “**Arcadlab Purchase Agreement**”); and
 - (ii) vests in favour of the Purchaser all of the Company’s right, title, and interest and assets described in the Arcadlab Purchase agreement (the “**Arcadlab Shares**”);

 - (b) an Approval and Vesting Order (the “**Stalking Horse AVO**”), substantially in the form appended at Tab 5 of the Receiver’s Motion Record that, among other things:
 - (i) approves the transaction of the stalking horse purchase agreement as between the Receiver and the Purchaser dated August 9, 2023 (the “**Stalking Horse Agreement**”); and
 - (ii) vests in favour of the Purchaser all of the Company’s right, title, and interest in the assets described in the Stalking Horse Agreement (the “**Stalking Horse Assets**”); and

- (c) a Distribution and Discharge Order (the “**Ancillary Order**”), substantially in the form appended at Tab 7 of the Receiver’s Motion Record, that, among other things:
- (i) abridges the time for service of this motion and declares that the motion is properly returnable before the court;
 - (ii) approves the actions and activities of the Receiver, as set out in the Second Report of the Receiver dated February 9, 2024 (the “**Second Report**”), including the Receiver’s Statement of Receipts and Disbursements for the period of July 4, 2023 to February 9, 2024 provided, however, 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 such approval;
 - (iii) approves the fees and disbursements of the Receiver and of its independent legal counsel, Reconstruct LLP (“**Reconstruct**”), as set out in the Second Report;
 - (iv) authorizes and directs the Receiver to make the following distributions as described in the Second Report (the “**Proposed Distributions**”):
 - (1) a distribution to the Receiver and its counsel, Reconstruct, for their outstanding fees and disbursements (the “**Remaining Fees and Disbursements**”);
 - (2) a payment of the costs owing by the Receiver for record retention and destruction;

- (3) a distribution to the Canada Revenue Agency (“**CRA**”) for amounts owing, if any, as a result of the Proposed HST Assessment (as defined herein); and
 - (4) a distribution of any remaining funds, in quantum and timing at the discretion of the Receiver, to the Purchaser in partial satisfaction of the secured claim against the Company;
 - (v) approves the discharge of the Receiver upon the filing of the Discharge Certificate in the form attached to the Ancillary Order (the “**Discharge Certificate**”), certifying that the remaining receivership tasks described in the Second Report have been completed by the Receiver; and
 - (vi) releases and discharges the Receiver from any and all liability that it now has or may hereafter have by reason of, or in any way arising out of, the acts or omissions of the Receiver while acting in its capacity as Receiver herein, save and except for any gross negligence or wilful misconduct on the Receiver’s part.
3. The Receiver is presently unaware of any opposition to the requested relief.

PART II – FACTS

4. The facts of this motion are set out in the Second Report filed in support of this motion.¹

A. Background of the Receivership Proceeding

5. The Company is a privately owned corporation that manufactures customized orthodontic

¹ The Second Report of the Receiver dated February 9, 2024, Tab 2 of the Receiver’s Motion Record (“**Second Report**”).

supplies and related accessories.²

6. On July 4, 2023 (the “**Date of Appointment**”) – pursuant to an application brought by the Purchaser under section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the “**BIA**”), and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended – the Court appointed the Receiver over the Company.³

7. The Purchaser is the Company’s senior secured creditor that is owed approximately USD \$5 million in principal, plus interest and fees (the “**Purchaser’s Debt**”) pursuant to a Line of Credit Grid Promissory Note dated March 20, 2020 (the “**Note**”).⁴ The Note is secured over all of the Company’s present and after acquired personal Property.⁵ The Receiver has received an independent legal opinion, subject to the customary assumptions and qualifications, that the security interests granted in favour of the Purchaser are valid and enforceable.⁶

8. The primary objective of the Company’s receivership proceeding is to create a stabilized environment to allow the Receiver to realize on the Property for the benefit of all stakeholders.⁷

9. In order to reach that objective, the Receiver:

- (a) engaged Infinity Asset Solutions Inc. (the “**Agent**”) to conduct a liquidation sale under a net minimum guarantee arrangement (“**Liquidation Sale**”) in respect of the Company’s tools, equipment, vehicle, and furniture (collectively, the “**Liquidation Property**”); and
- (b) developed a sale and solicitation process (“**Sale Process**”) for materially all of the

² Second Report, *ibid*, para. 15.

³ Second Report, *ibid*, para. 2.

⁴ Second Report, *ibid*, para. 21.

⁵ Second Report, *ibid* at para 21.

⁶ Second Report, *ibid*, para. 45.

⁷ First Report of the Receiver dated August 10, 2023, para. 2.

Property of the Company except for the Liquidation Property (the “**Marketed Property**”).⁸ As part of the Sale Process, the Receiver and Purchaser entered into a Stalking Horse Agreement wherein the Purchaser agreed to purchase some of the Marketed Property (i.e. the Stalking Horse Assets, which excluded the Arcadlab Shares and the Company’s interest in a company called Dental SPV (the “**Dental SPV Shares**”)) for a credit bid totalling \$3,000,000 of the Purchaser’s Debt.⁹

10. On August 17, 2023, Justice Conway granted an Order (the “**Sale Process Order**”) that, among other things:

- (a) approved the Receiver’s engagement of the Agent and the Liquidation Sale;
- (b) approved the Sale Process for the Marketed Property;
- (c) approved the Stalking Horse Agreement; and
- (d) conditionally vested the Company’s right, title and interest in and to the assets described in the Stalking Horse Agreement in favour of the Purchaser in the circumstances where the Stalking Horse Agreement was the sole bid in the Sale Process.¹⁰

B. Completion of the Liquidation Sale

11. Pursuant to the Sale Process Order, the Receiver and the Agent entered into an auction services agreement dated September 6, 2023 in respect of the Liquidation Sale.¹¹

⁸ Second Report, *ibid*, para. 17.

⁹ Second Report, *ibid*, para. 22.

¹⁰ Second Report, *ibid*, paras. 3-4.

¹¹ Second Report, *ibid*, para. 14.

12. The Liquidation Sale conducted by the Agent concluded September 13, 2023 and resulted in proceeds totaling approximately \$533,000.¹²

C. Completion of the Sale Process

13. The purpose of the Sale Process was to broadly canvass the market for a value-maximizing transaction for the Marketed Property while providing the certainty of a transaction through the Stalking Horse Agreement.¹³

14. In accordance with the Sale Process Order, the Receiver conducted the Sale Process as follows:

- (a) the Receiver prepared a list of potentially interested parties (the “**Prospective Participants**”) with the assistance of the Company and the Purchaser. The Prospective Participants included both financial and strategic buyers, including both domestic and foreign parties;
- (b) the Receiver prepared an interest solicitation summary document detailing the acquisition opportunity and distributed same to approximately 58 Prospective Participants, including more than 40 strategic buyers;
- (c) the Receiver placed a notice of the Sale Process in The Globe & Mail (National Edition);
- (d) the Receiver developed and maintained a virtual data room (“**Data Room**”), which Prospective Participants received access to when they executed a non-disclosure

¹² Second Report, *ibid*, para. 16.

¹³ Second Report, *ibid*, para. 17.

agreement (the “**NDA**”);¹⁴ and

- (e) the Receiver facilitated the seven parties that executed NDAs (the “**Prospective Bidders**”) perform their due diligence including by updating the Data Room and responding to questions.¹⁵

15. The Prospective Bidders were required to submit any bids to the Receiver by no later than 5: 00 pm (Toronto time) on September 29, 2023 (the “**Bid Deadline**”). Pursuant to the terms of the Sale Process, the Receiver extended the Bid Deadline to 5:00 pm (Toronto time) on October 6, 2023 in order to facilitate additional diligence requests.¹⁶

16. The bids had to satisfy various criteria specified in the Sale Process including being unconditional on further due diligence or obtaining financing, disclosing information on the bidder and its financial ability to consummate the transaction, containing a blackline comparison to the Stalking Horse Agreement, and providing a purchase price sufficient to pay the portion of priority payables attributable to the Marketed Property.¹⁷

17. Three bids, other than the Stalking Horse Agreement, were received prior to the Bid Deadline:

- (a) No bids were received for the Stalking Horse Assets other than the bid pursuant to the Stalking Horse Agreement;
- (b) Two bids were received for the Arcadlab Shares; and
- (c) One bid was received for the Dental SPV Shares.¹⁸

¹⁴ Second Report, *ibid*, para. 19.

¹⁵ Second Report, *ibid*, para. 21.

¹⁶ Second Report, *ibid*, para. 20.

¹⁷ The Sale Approval Order, Schedule ‘A’, para. 16.

¹⁸ Second Report, *supra*, para. 21.

These bids are described further below.

Stalking Horse Assets and the Stalking Horse Agreement

18. At the completion of the Sale Process, there were no other bids received for the Stalking Horse Assets such that the Receiver deemed the Stalking Horse Agreement as the highest and best bid for the Stalking Horse Assets.¹⁹

19. The Sale Process Order conditionally approved the Stalking Horse Agreement and conditionally vested the Stalking Horse Assets with the Purchaser in the circumstances “where no bids (other than the Stalking Horse Agreement) are received by the Receiver”.²⁰

20. Although there were multiple bids received in the Sale Process, no other bids were received for the Stalking Horse Assets. The wording in the Sale Process Order is unclear whether the condition of “no bids” is satisfied if there were other bids in the Sale Process but not for the Stalking Horse Assets. Accordingly, out of an abundance of caution, the Receiver seeks approval of the Stalking Horse AVO which vests the Stalking Horse Assets in the Purchaser.²¹

21. The key terms of the Stalking Horse Agreement are as follows:

- (a) Purchase Price: \$3,000,000 million to be paid by way of a credit bid of the Purchaser’s Debt.
- (b) Purchased Assets: on an “as is, where is” basis, the Company’s intellectual property, legal actions where the Company is the moving party, tax refunds, credits, rebates, claims to insurance reimbursements, investment property and books and records related to the Stalking Horse Assets.

¹⁹ Second Report, *ibid*, paras. 21 and 25.

²⁰ Second Report, *ibid*, para. 24.

²¹ Second Report, *ibid*, para. 24.

- (c) Closing Date: closing is scheduled to occur five (5) business days following the later of: (i) the selection of the Stalking Horse Agreement as the successful bid, and (ii) the issuance of the Stalking Horse AVO, or such other date as may be agreed in writing between the parties.
- (d) Conditions: the only material condition precedent contemplated by the Stalking Horse Agreement is the Purchaser being chosen as the “Winning Bidder” and the granting of the Stalking Horse AVO.²²

Bids for the Arcadlab Shares and the Arcadlab Purchase Agreement

22. As noted above, two bids were submitted to the Receiver in respect of the Arcadlab Shares:

- (a) a cash bid in the amount of USD \$10,000 submitted in the form of a letter of intent; and
- (b) a credit bid from the Purchaser in the amount of \$2,000,000 submitted in substantially the same form as the Stalking Horse Agreement.²³

23. The Receiver considered both bids based on the criteria specified in the Sale Process. After its review of both bids, the Receiver deemed the Purchaser’s bid to be the highest and best bid for the Arcadlab Shares. Accordingly, the Receiver and Purchaser entered in the Arcadlab Purchase Agreement.²⁴

24. The key terms of the Arcadlab Purchase Agreement are as follows:

²² Second Report, *ibid*, para. 22.

²³ Second Report, *ibid*, para. 27.

²⁴ Second Report, *ibid*, para. 29.

- (a) Purchase Price: \$2,000,000 million to be paid by way of a credit bid of the Purchaser's Debt (the "**Arcadlab Credit Bid**"), such that on closing the Purchaser's Debt shall be partially repaid in the amount of the Arcadlab Credit Bid.
- (b) Purchased Assets: all shares of Arcadlab, LLC issued to the Company, along with all of the Company's right, title and interest (including any choses in action relating thereto) in and to such shares or any other shares of Arcadlab, LLC and all books and records related to the Arcadlab Shares.
- (c) Excluded Assets: the right, title, benefit and interest of the Company in and to the assets of the Company that are not the Arcadlab Shares.
- (d) Assumption of Liabilities: the Purchaser will assume only those liabilities in respect of the Arcadlab Shares including any costs associated with obtaining consent to transfer the Arcadlab Shares.
- (e) Representations and Warranties: consistent with the standard terms of an insolvency transaction, i.e. on an "as is, where is" basis, with limited representations and warranties.
- (f) Closing Date: the date that is five business days following the later of (i) the selection of the Arcadlab Purchase Agreement as the successful bid and (ii) the date of the Stalking Horse AVO, or such other date as may be agreed in writing between the parties hereto.²⁵

25. The Receiver is of the view that the transaction contemplated in the Arcadlab Purchase Agreement is in the best interests of the Company's stakeholders as it represents the best and

²⁵ Second Report, *ibid*, para. 28.

highest offer for the Arcadlab Shares after extensive marketing of the assets in the Sale Process.²⁶

The Dental SPV Offer

26. The Receiver received one bid in the amount of US \$15,000 for the Dental SPV Shares (the “**Dental SPV Offer**”).²⁷

27. Following receipt of the Dental SPV Offer, the Receiver explored the feasibility of completing a transaction for the Dental SPV Shares. Based on the Receiver’s analysis, it determined that the estimated costs to complete such transaction would exceed the amounts realized from such sale. In particular, the Dental SPV Shares are shares in a foreign jurisdiction (France) registered/held in the name of a former principal of the Company (for the benefit of the Company), and any sale of such shares are subject to a right of first refusal in favour of the Dental SPV shareholders.²⁸

28. The Dental SPV Shares include shares in a foreign jurisdiction, France, registered in the name of a former principal of the Company, and any such shares are subject to the right of first refusal in favour of the Dental SPV shareholders.²⁹

29. The Receiver requested the bidder increase its bid to cover the professional costs to complete the transaction. The bidder was unwilling to do so. Therefore, the Receiver determined the Dental SPV Offer was not a viable transaction.³⁰

30. In the circumstances, and given the lack of interest in the Dental SPV Shares, the Receiver does not intend to take any further steps in respect of the Dental SPV Shares.³¹

²⁶ Second Report, *ibid*, paras. 29-30.

²⁷ Second Report, *ibid*, para. 31.

²⁸ Second Report, *ibid*, para. 32.

²⁹ Second Report, *ibid*, para. 32.

³⁰ Second Report, *ibid*, para. 33.

³¹ Second Report, *ibid*, para. 34.

D. Repayment of the Receiver's Borrowing Charge

31. Pursuant to the Appointment Order, the Receiver was authorized to borrow up to \$400,000, as it considered necessary or desirable, to fund the cost of the receivership (the "**Receiver's Borrowings**").³²

32. Throughout the receivership, the Receiver borrowed \$70,000 in Receiver's Borrowings.³³ As the date of the Second Report, the Receiver's Borrowings, plus interest, have been fully repaid and no Receiver's Borrowings are outstanding.³⁴

E. Remaining Activities to Complete the Administration of the Estate

33. Given the completion of the Liquidation Sale and the Sale Process, the Receiver has completed its duties as set out in the Appointment Order and subsequent orders of the Court, save and except for the following activities (the "**Remaining Activities**"):

- (a) closing the transactions contemplated in the Stalking Horse Agreement and the Arcadlab Purchase Agreement, if approved by the Court;
- (b) paying the Remaining Fees and Disbursements and Reconstruct as described in the Second Report;
- (c) paying the costs for record retention and destruction as described in the Second Report;
- (d) filing any outstanding HST returns and pursuing potential recovery of any unclaimed HST input tax credits resulting from these receivership proceedings;

³² Second Report, *ibid*, para. 49.

³³ Second Report, *ibid*, para. 49.

³⁴ Second Report, *ibid*, para. 38.

- (e) paying any distribution to the Purchaser; and
- (f) completing other administrative matters incidental to these proceedings such as filing the Receiver's final statutory report pursuant to section 246(3) of the BIA.³⁵

Settlement of the Proposed HST Assessment

34. By letter dated November 30, 2023, CRA advised the Receiver that it was proposing a reassessment of the Company's pre-filing HST returns that would result in an obligation to CRA in the amount of approximately \$474,212 (the "**Proposed HST Assessment**").³⁶

35. The Receiver has reviewed the matter and notes the Proposed HST Assessment is inconsistent with the Company's books and records and could potentially be overstated by approximately \$466,000.³⁷

36. The Receiver and the CRA are in the process of reconciling the differences in their findings. In the event that CRA finalizes an assessment at a material amount, the Purchaser has advised the Receiver that it would petition the Company into bankruptcy, pursuant to the BIA, in order to re-order any priority afforded CRA in respect of its HST-related claim in a non-bankruptcy scenario.³⁸ In the interim, a contingency reserve of \$80,000 has been included in the Holdback (as defined herein) in relation to the Proposed HST Assessment.³⁹

Proposed Distributions

37. The Ancillary Order authorizes the Receiver to retain approximately \$120,000 (the "**Holdback**") from the available cash on hand to pay the following Proposed Distributions:

³⁵ Second Report, *ibid*, para. 60.

³⁶ Second Report, *ibid*, para. 50.

³⁷ Second Report, *ibid*, para. 51.

³⁸ Second Report, *ibid*, para. 52.

³⁹ Second Report, *ibid*, para. 52.

- (a) payment of the Remaining Fees and Disbursements of the Receiver and Reconstruct as described in the Second Report;
- (b) payment of the costs for record retention and destruction as described in the Second Report;
- (c) a distribution to the CRA for amounts owing, if any, as a result of the Proposed HST Assessment; and
- (d) a distribution of any remaining funds, in quantum and timing at the discretion of the Receiver, to the Purchaser in partial satisfaction of its secured claim against the Company.⁴⁰

38. Based on the net proceeds from the realization of the Property, there are insufficient funds to repay the entirety of the Purchaser's Debt. Therefore, it is not anticipated that the Purchaser will be paid in full, nor that any creditors ranking below the Purchaser will receive any repayments.

PART III – ISSUES

39. The issues on this motion are whether this Court should:
- (a) approve the Arcadlab AVO;
 - (b) approve the Stalking Horse AVO;
 - (c) approve the activities and actions of the Receiver as set out in the Second Report of the Receiver;
 - (d) approve the fees of the Receiver and its counsel;

⁴⁰ Second Report, *ibid*, paras. 56-59.

- (e) approve the Proposed Distributions; and
- (f) discharge the Receiver upon the filing of the Discharge Certificate.

PART IV – LAW & ARGUMENT

A. The Arcadlab AVO Should be Approved

40. It is well established that in determining whether to approve a transaction proposed by a receiver, the Court considers the factors set out in *Royal Bank v Soundair Corp*:

- (a) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;
- (b) the interests of all 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 (collectively, the “**Soundair Principles**”).⁴¹

41. Unless a proposed transaction clearly offends the *Soundair* Principles, courts generally uphold the business judgment of the parties and the court-appointed officer overseeing the sale.⁴²

42. The applicable *Soundair* Principles have been satisfied in respect of the Arcadlab Purchase Agreement and related relief:

- (a) **The Receiver undertook significant effort to obtain the best possible price and has not acted improvidently.** The Sale Process was designed to obtain the

⁴¹ *Royal Bank of Canada v. Soundair Corp.*, [1991 CanLII 2727 \(ON CA\)](#) (“**Soundair**”).

⁴² *Soundair*, *ibid*, [para. 21](#); applied in *Terrace Bay Pulp Inc. (Re)*, 2012 ONSC 4247 [Morawetz J.], [paras. 45-66](#).

highest price for the Arcadlab Shares based on the limited market for the asset. After an extensive Sale Process, the Receiver received two offers for the Arcadlab Shares. On review of those offers, the Receiver determined that the Arcadlab Purchase Agreement was the highest and best offer for the Arcadlab Shares given, among other things, it provided the highest value for the Arcadlab Shares and was submitted in the form of a comprehensive purchase agreement on an “as is, where is” basis.

- (b) **The Receiver has acted fairly, efficiently and with integrity in considering the interests of all stakeholders.** In conducting the Sale Process, the Receiver has considered the interests of all parties. The Receiver’s primary intent was to maximize the chances of realization for the benefit of all creditors, with a view to minimizing closing risk and delay (given the continuing accrual of interest and fees on the secured debt). The Receiver’s decision to proceed with the Arcadlab Purchase Agreement is aligned with this intention.
- (c) **The Sale Process undertaken by the Receiver was commercially reasonable, efficient and conducted with integrity.** The Sale Process was developed in consultation with key stakeholders and approved by the Court in the Sale Process Order. The Receiver conducted the Sale Process in accordance with the terms of the Sale Process Order. The Sale Process appropriately balanced the need to provide bidders with sufficient time to conduct due diligence and submit bids with the limited liquidity of the Company.
- (d) **There has been no unfairness in the working out of the process.** At all times the Receiver treated bidders in an even-handed manner. There has been no evidence filed or allegations made to suggest the Sale Process or the Arcadlab Purchase

Agreement is unfair. In contrast, the Arcadlab Purchase Agreement sees a substantial repayment to the Company's senior secured creditor.

43. Based on the foregoing, the Receiver is of the view that the Arcadlab Purchase Agreement should be approved.⁴³

B. The Stalking Horse AVO Should be Approved

44. As noted above, the Sale Process Order conditionally vested the Stalking Horse Assets in the Purchaser in circumstances "where no bids (other than the Stalking Horse Agreement) are received by the Receiver."⁴⁴ Although there were multiple bids received in the Sale Process, no other bids were received for the Stalking Horse Assets.⁴⁵

45. The wording in the Sale Process Order is unclear whether the condition of "no bids" is satisfied if there were other bids in the Sale Process but not for the Stalking Horse Assets. Accordingly, out of an abundance of caution, the Receiver seeks approval of the Stalking Horse AVO which vests the Stalking Horse Assets in the Purchaser.

46. In seeking the Sale Process Order, the Receiver filed a factum, in part, detailing why the Stalking Horse Agreement satisfied the *Soundair* Principles. In granting the Sale Process Order conditionally vesting the Stalking Horse Assets in the Purchaser, the Court agreed that the Stalking Horse Agreement satisfied the *Soundair* Principles.

47. The Receiver submits that it remains appropriate for the Court to approve the Stalking Horse Agreement and vest the Stalking Horse Assets in the Purchaser. In particular, the transaction contemplated by the Stalking Horse Agreement satisfies the *Soundair* Principles for

⁴³ Second Report, *ibid*, para. 29.

⁴⁴ Second Report, *ibid*, para. 24.

⁴⁵ Second Report, *ibid*, para. 24.

substantially the same reasons set out in paragraph 42(a)-(d). The Receiver undertook significant effort to obtain the best possible price for the Stalking Horse Assets by extensively marketing the assets in accordance with the Court-approved Sale Process and entering into the Stalking Horse Agreement to set a floor price to incentivize competitive bidding in the Sale Process. At the conclusion of the Sale Process, the Stalking Horse Agreement was the only offer for the Stalking Horse Assets.

48. Based on the foregoing, the Receiver respectfully submits that the Court should approve the Stalking Horse AVO.

C. Approval of the Activities and Actions of the Receiver

49. The Receiver is seeking approval of its activities and actions as set out in the Second Report.

50. All activities and actions of the Receiver described in the Second Report were all necessary and undertaken in good faith pursuant to the Receiver's duties and powers set out in the Appointment Order, and were in each case in the best interests of the Company's stakeholders generally.

D. The Fees of the Receiver and its Counsel Should be Approved

51. The Appointment Order provides, among other things, that:

- (a) The Receiver and its legal counsel shall pass its accounts from time to time and for this purpose the accounts of the Receiver and its legal counsel are referred to a Judge of the Court; and
- (b) Prior to passing of its accounts, the Receiver shall be at liberty from time to time to apply reasonable amounts, out of the monies in its hands, against its fees and

disbursements, including legal fees and disbursements, incurred at the normal rates and charges of the Receiver or its counsel, and such amounts shall constitute advances against its remuneration and disbursements when and as approved by this Court.

52. In accordance with the Appointment Order, the Receiver seeks the approval of the professional fees incurred by it and its legal counsel, Reconstruct, including their estimated fees to complete this proceeding. In particular, the following fees and disbursements have been or are anticipated to be incurred in this proceeding:

- (a) As set out in the Fee Affidavit of Jonathan Joffe, for the period from the Date of Appointment to February 7, 2024, the Receiver's accounts amount to \$198,404.04, which is comprised of \$172,698.00 in fees, \$2,886.80 in disbursements, and \$22,825.24 in HST.⁴⁶
- (b) As described in the Fee Affidavit of Caitlin Fell, for the period from the Date of Appointment to February 8, 2024, Reconstruct's accounts amount to \$54,822.61, which is comprised of \$47,801.00 in fees, \$714.58 in disbursements, and \$6,307.03 in HST.⁴⁷
- (c) In addition to the above-noted fees, the Receiver and Reconstruct have estimated they will incur approximately \$25,000 (excluding HST) in future fees and disbursements to perform the Remaining Activities on the assumption that there are no delays, disputes or unforeseen developments in connection with these proceedings.⁴⁸

53. In considering whether to approve the professional fees and disbursements in a receivership, the Court considers whether the compensation sought is "fair and reasonable", with an emphasis on the value provided and what was accomplished.⁴⁹ In particular, the following non-

⁴⁶ Second Report, Appendix G, Affidavit of Jonathan Joffe sworn February 9, 2024, para. 4

⁴⁷ Second Report, Appendix H, Affidavit of Caitlin Fell sworn February 9, 2024, para. 6

⁴⁸ Second Report, *ibid*, para. 48.

⁴⁹ *Bank of Nova Scotia v Diemer*, 2014 ONCA 851 ("*Diemer*"), [paras. 44-45](#).

exhaustive factors assist in providing guidance on how to evaluate the quantum of requested fees:

- (a) The nature, extent and value of the assets;
- (b) The complications and difficulties encountered;
- (c) The degree of assistance provided by the debtor;
- (d) The time spent;
- (e) The receiver's knowledge, experience and skill;
- (f) The diligence and thoroughness displayed;
- (g) The responsibilities assumed;
- (h) The results of the receiver's efforts; and
- (i) The cost of comparable services when performed in a prudent and economical manner.⁵⁰

54. The Receiver and Reconstruct's fees and disbursement are fair and reasonable. The Receiver, with the assistance of Reconstruct, provided significant value to the Company's stakeholders including by, among other things:

- (a) creating a stabilized environment for the Company to undergo this receivership proceeding;
- (b) taking all necessary and reasonable steps to wind-down the operations of the

⁵⁰ *Diemer, ibid*, [paras. 33-35](#).

Company;

- (c) maximizing the realization of the Company's Property through conducting the Liquidation Sale and the Sale Process, which resulted in collective consideration of approximately \$5.5 million; and
- (d) completing all its duties as set out in the Appointment Order and subsequent orders of the Court, save and except for the Remaining Activities, which the Receiver will undertake forthwith.

55. Based on the foregoing, the Receiver respectfully submits that the Receiver's fees, and those of its legal counsel, should be approved by this Court.

E. The Proposed Distributions Should be Authorized

56. The Receiver seeks authorization and direction from the Court to make the Proposed Distributions from funds currently in the estate or that may subsequently accrue to the estate as follows:

- (a) payment of the Remaining Fees and Disbursements of the Receiver and Reconstruct as described in the Second Report;
- (b) payment of the costs for record retention and destruction as described in the Second Report;
- (c) a distribution to the CRA for amounts owing, if any, as a result of the Proposed HST Assessment; and
- (d) a distribution of any remaining funds, in quantum and timing at the discretion of the Receiver, to the Purchaser in partial satisfaction of its secured claim against the Company.

57. The Receiver's Proposed Distributions comply with the priority of charges and security

interests in respect of the Company's Property as:

- (a) there is a first-ranking Receiver's Charge pursuant to the Appointment Order in favour of the Receiver and Reconstruct for their fees and disbursements;⁵¹
- (b) the Receiver's Borrowings has been repaid;⁵²
- (c) there is a potential amount owing to the CRA as a result of the Proposed HST Assessment;⁵³
- (d) the Receiver is not aware of any claims that could be owing pursuant to sections 81.1 and 81.6 of the BIA;⁵⁴ and
- (e) the Purchaser is the senior secured creditor, as confirmed by an independent security review performed by Reconstruct.⁵⁵

58. In order to maximize efficiency and avoid the costs of returning to Court to seek approval of further distributions, it is appropriate for the Court to approve these future distributions to the Purchaser, as the Receiver deems appropriate, subject to the Receiver maintaining sufficient funds to complete the administration of the Company's receivership proceedings, including the settlement of the Proposed HST Assessment and payment of any outstanding disbursements.⁵⁶

59. Therefore, the Receiver submits it is appropriate for the Court to approve the Proposed Distributions.

F. The Receiver should be Discharged Upon the Filing of the Discharge Certificate

60. If this Court grants the requested Orders, the Receiver will have completed its duties and

⁵¹ Second Report, *ibid*, paras. 47-48.

⁵² Second Report, *ibid*, para. 49.

⁵³ Second Report, *ibid*, paras. 50-52.

⁵⁴ Second Report, *ibid*, paras. 53-55.

⁵⁵ Second Report, *ibid*, paras. 45 and 57.

⁵⁶ Second Report, *ibid*, para. 58.

obligations as set out in the Appointment Order subject to the Remaining Activities.⁵⁷

61. The Receiver intends to complete the Remaining Activities forthwith. Once it does so, it will have realized on the Property and completed its statutory duties as well as those duties set out in the Appointment Order.⁵⁸

62. Therefore, the Receiver respectfully submits that this receivership proceeding should be terminated and the Receiver should be discharged and released upon the filing of the Discharge Certificate with the Court.⁵⁹

PART V – RELIEF REQUESTED

63. The Company therefore seeks the Arcadlab AVO in the form filed as Tab 3 of the Motion Record, the Stalking Horse AVO in the form filed as Tab 5 of the Motion Record, and the Ancillary Order in the form filed as Tab 7 of the Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 12TH DAY OF FEBRUARY, 2024.



RECONSTRUCT LLP

⁵⁷ Second Report, *ibid*, para. 60.

⁵⁸ Second Report, *ibid*, para. 61.

⁵⁹ Second Report, *ibid*, para. 61.

SCHEDULE "A"**List of Authorities**

1. <i>Royal Bank of Canada v. Soundair Corp.</i> , 1991 CanLII 2727 (ON CA)
2. <i>Terrace Bay Pulp Inc. (Re)</i> , 2012 ONSC 4247
3. <i>Bank of Nova Scotia v Diemer</i> , 2014 ONCA 851

SCHEDULE "B"**Statutory Authorities****Bankruptcy and Insolvency Act, RSC 1985, c B-3****Court may appoint receiver**

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, RSO 1990, c C.43**Injunctions and receivers**

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.

Terms

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

Rules of Civil Procedure, RRO 1990, Reg. 194*Effect of Non-Compliance*

2.01 (1) A failure to comply with these rules is an irregularity and does not render a proceeding or a step, document or order in a proceeding a nullity, and the court,

- (a) may grant all necessary amendments or other relief, on such terms as are just, to secure the just determination of the real matters in dispute; or
- (b) only where and as necessary in the interest of justice, may set aside the proceeding or a step, document or order in the proceeding in whole or in part.

(2) The court shall not set aside an originating process on the ground that the proceeding should have been commenced by an originating process other than the one employed.

Attacking Irregularity

2.02 A motion to attack a proceeding or a step, document or order in a proceeding for irregularity shall not be made, except with leave of the court,

- (a) after the expiry of a reasonable time after the moving party knows or ought reasonably to have known of the irregularity; or
- (b) if the moving party has taken any further step in the proceeding after obtaining knowledge of the irregularity.

Court May Dispense with Compliance

2.03 The court may, only where and as necessary in the interest of justice, dispense with compliance with any rule at any time.

ORTHO STUDIO EXPRESS, INC.

and

DIGITAL ORTHODONTIC CARE INC.

Applicant

Respondent

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

Proceedings commenced at Toronto

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