

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: SALE PROCESS AND APPROVAL ORDER)**

August 15, 2023

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TO: THE SERVICE LIST

TABLE OF CONTENTS

PART I – OVERVIEW 1

PART II – FACTS 2

 A. Digital Orthodontic Care Inc. 2

 B. The Proposed Liquidation Plan..... 3

 C. The Proposed Sale Process 4

 D. The Stalking Horse Bid..... 6

PART III – ISSUES 8

PART IV – LAW & ARGUMENT 8

 A. This Court Should Approve the Liquidation Plan 8

 B. This Court Should Approve the Stalking Horse Sale Process 10

 C. This Court Should Approve the Stalking Horse Bid and Related Documents 14

 D. This Court Should Allow Termination of the Lease to the Premises 18

PART V – RELIEF REQUESTED 18

Schedule “A” 19

Schedule “B” 20

PART I – OVERVIEW

1. This motion 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**”), is for an Order that, among other things:

- (a) approves the Liquidation Plan (as described below) pursuant to a net minimum guarantee arrangement as between the Receiver and Infinity Asset Solutions (the “**Liquidator**”);
- (b) approves the Sale Process for materially all of the Property of the Company that is not subject to the Liquidation Plan (the “**Sale Process Property**”);
- (c) conditionally approves the transaction and the Stalking Horse Purchase Agreement as between the Receiver and Ortho Studio Express, Inc. (the “**Lender**” and, the “**Stalking Horse Bidder**”) dated August 10, 2023 (the “**Stalking Horse Bid**”);
- (d) conditionally authorizes the Receiver to complete the sale transaction contemplated by the Stalking Horse Agreement (the “**Transaction**”) in the event that the Stalking Horse Bid is the successful bid and to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the Transaction and for the conveyance of the Sale Process Property to the Stalking Horse Bidder;
- (e) approves the First Report of the Receiver dated August 11, 2023 (the “**First Report**”), as well as the activities described therein; and
- (f) authorizes the Receiver to terminate the lease of the Premises (as defined below) by providing to the landlord not less than seven (7) days’ prior notice in writing of its intention to do so.

PART II – FACTS

A. Digital Orthodontic Care Inc.

(a) Background of the Company

2. The facts and background with respect to this motion are fully set out in the First Report and the Affidavit of Mark Cassidy, sworn May 8, 2023 (the “**Cassidy Affidavit**”).

3. The Receiver was appointed pursuant to an order (the “**Appointment Order**”) of the Ontario Superior Court of Justice (Commercial List) (the “**Court**”), dated July 4, 2023 (the “**Date of Appointment**”). Pursuant to the Appointment Order, the Receiver is authorized to market any or all of the Property.

4. The Company, having operated under the business name SureCure Orthodontic Aligners, is a manufacturer of customized orthodontic supplies, primarily clear aligners used to straighten teeth and related accessories.¹

5. The Company operated from a leased premises located at 8400 Lawson Road, Units 2-4, in Milton, Ontario (the “**Premises**”).² An account statement provided by agents representing the Canada Life Assurance Company, the landlord of the Premises (the “**Landlord**”), indicates that as at the Date of Appointment, the Company owed approximately \$460,000 in occupancy cost arrears.³

(b) The Lender and the Company’s Secured Obligations

6. The Receiver understands that as at the Date of Appointment, the Company is indebted to the Lender in the principal amount of USD\$5 million, plus interest and fees under a Line of Credit

¹ First Report at para 16 ([Caselines Master E47](#)).

² First Report at para 17 ([Caselines Master E47](#)).

³ First Report at para 38 ([Caselines Master E51](#)).

Grid Promissory Note dated March 20, 2020 (the “**Secured Note**”).⁴ As security for the repayment of amounts owing under the Secured Note, the Company granted a general security agreement in favour of the Lender, including a security interest in all of its present and after acquired personal Property.⁵

7. On maturity of the Secured Note, the Company failed to repay the indebtedness thereunder. In addition, the Company defaulted on several quarterly interest payments as well as sold assets subject to the Lender’s collateral.⁶ In light of these defaults, the Lender sought the appointment of the Receiver.

B. The Proposed Liquidation Plan

8. In order to monetize the assets of the Company, the Receiver divided the Property into two silos: the Liquidation Property and the Sale Process Property (each as defined below). The Company’s tools, equipment, vehicle, and furniture (collectively, the “**Liquidation Property**”) were considered by the Receiver to warrant being sold under a liquidation, due to, among other things, the assessed value provided by the proposed liquidators relative to the cost of storage of the Liquidation Property at the Premises. The second group, the Sale Process Property, is comprised of intangibles and is further discussed below.

9. The Receiver solicited liquidation proposals from five liquidators in respect of the Liquidation Property.⁷ Four liquidators submitted multiple offers including outright purchases, net minimum guarantee offers, and strictly commission-based arrangements. After review of the proposals and consultation with the Lender, the Receiver proposes to engage the Liquidator to

⁴ First Report at para 21 ([Caselines Master E48](#)).

⁵ First Report at para 21 ([Caselines Master E48](#)).

⁶ Cassidy Affidavit at paras 18-23, 25 ([Caselines Master A15](#)).

⁷ First Report at para 41 ([Caselines Master E53](#)).

conduct a liquidation process under a net minimum guarantee arrangement (the “**Liquidation Plan**”).⁸

10. Pursuant to the Liquidation Plan, the Liquidator will pay the Receiver a guaranteed minimum amount of \$515,000 (the “**NMG Amount**”) for the Liquidation Property.⁹ Above the first \$515,000 in auction proceeds, the Liquidator will retain the next \$60,000 to cover expenses, marketing, labour and set-up fees.¹⁰ Proceeds of the proposed liquidation in excess of \$575,000 will be split 85/15 between the Receiver and the Liquidator, in the Receiver’s favour.¹¹ Further details on the Liquidation Plan are set out in paragraphs 41-43 of the First Report.¹²

11. The terms of the Liquidation Plan and the quantum of the NMG Amount are consistent with standard liquidation transactions within insolvency proceedings, to be completed on an “as-is, where is” basis, without any material representations or warranties.¹³ All sales of Liquidation Property are to be on the same terms.¹⁴

C. The Proposed Sale Process

12. Marketing the Company’s business as a going concern was not viable given:

- (a) the Company was and would continue to incur cash losses;
 - (b) the Company was utilizing only a fraction of the business’s infrastructure capacity;
- and

⁸ First Report at para 41 ([Caselines Master E53](#)).

⁹ First Report at para 42 ([Caselines Master E53](#)).

¹⁰ First Report at para 42 ([Caselines Master E53](#)).

¹¹ First Report at para 42 ([Caselines Master E53](#)).

¹² First Report at para 41 ([Caselines Master E53](#)).

¹³ First Report at para 43 ([Caselines Master E54](#)).

¹⁴ First Report at para 43 ([Caselines Master E54](#)).

(c) in light of the defaults listed above under the Secured Note, the Lender was not prepared to finance the cash losses anticipated to support a going-concern sale process.¹⁵

13. A sale solicitation process (the “**Sale Process**”) is proposed to be conducted by the Receiver for the Sale Process Property being the balance of the Company’s assets not subject to the Liquidation Plan. This includes intangible assets, *inter alia*: minority investments in other businesses, intellectual property and other credits, refunds and rebates.¹⁶

14. The Sale Process is contemplated to include the approval of a “stalking horse bid” submitted by the Lender.¹⁷ Subject to Court approval, the timeline proposed by the Receiver of the Sale Process is as follows:¹⁸

Milestone	Key Dates
Commencement of Sale Process	Promptly following the granting of the Sales Procedure Order
Distribution of Teaser Letter & Data Room to be opened	As soon as practical following the granting of the Sales Procedure Order
Bid Deadline	September 29, 2023
Auction Date (if required)	October 6, 2023
Approval Hearing Date (if required)	October 13, 2023
Outside Date	October 27, 2023

¹⁵ First Report at para 3 ([Caselines Master E44](#)).

¹⁶ First Report at para 6 ([Caselines Master E44](#)).

¹⁷ First Report at para 6 ([Caselines Master E44](#)).

¹⁸ First Report at para 47 ([Caselines Master E55](#)).

15. As soon as practicable after the Commencement Date, the Receiver will, among other things, arrange for the advertisement of the acquisition opportunity in such newspapers and journals or other publications as the Receiver may deem appropriate or advisable.¹⁹

16. As is standard, prospective bidders who have executed a confidentiality agreement will be provided with access to a virtual data room (the “**Data Room**”) to be maintained by the Receiver. The Data Room will contain various financial and other information concerning the Company and the Sale Process Property for purposes of performing diligence on the acquisition opportunity.²⁰

17. The Sale Process contemplates that any bid must include a minimum incremental amount of \$10,000 in excess of the aggregate purchase price contemplated by the Stalking Horse Agreement (the “**Overbid**”).²¹

D. The Stalking Horse Bid

18. Prior to its appointment, the Receiver understood that the Lender was considering the purchase of the Sale Process Property. Together with counsel, the Receiver negotiated the Stalking Horse Bid to monetize the Sale Process Property and set a floor price for other bidders taking part in the Sale Process.

19. The closing of the purchase transaction contemplated by the Stalking Horse Agreement is conditional on, among other things:

- (a) The Stalking Horse Bidder being declared the successful bidder by the Receiver in the Sale Process; and

¹⁹ First Report at para 47 ([Caselines Master E55](#)).

²⁰ First Report at para 47 ([Caselines Master E55](#)).

²¹ First Report at para 48 ([Caselines Master E56](#)).

- (b) Court approval of the Stalking Horse Bid, which approval the Receiver proposes to conditionally obtain as part of this motion in the event that the Stalking Horse Bidder is declared the successful bidder at the end of the Sale Process and there is no objection to the Transaction by any person on the Service List.²²

20. The purchase price to be paid under the Stalking Horse Bid is \$3,000,000 (the “**Purchase Price**”) payable by way of a credit on the outstanding balance owing under the Secured Note. Should the Transaction close, the Purchase Price will result in the Secured Note being partially repaid.

21. The Stalking Horse Bid, contains a break fee (the “**Break Fee**”) amounting to 2.8% of the Purchase Price.²³

22. The Receiver has received a written opinion from its independent counsel that subject to the customary assumptions and qualifications for opinions of this nature, the security interests in favour of the Lender are valid and enforceable as against a trustee in bankruptcy in the Province of Ontario.²⁴

23. In addition, the Stalking Horse Bid also contemplates the payment in cash of all amounts owing by the Company that are in priority to the Stalking Horse Bidder.²⁵ These priority amounts consist of amounts which by operation of law are in priority to the security interest of the Lender, including amounts that may be due and owing under the Receiver’s Charge (as defined in the Appointment Order).²⁶

²² First Report at para 45 ([Caselines Master E55](#)).

²³ First Report at para 48 ([Caselines Master E56](#)).

²⁴ First Report at para 22 ([Caselines Master E48](#)).

²⁵ First Report at para 48 ([Caselines Master E56](#)).

²⁶ First Report at para 48 ([Caselines Master E56](#)).

24. As further described below, the Receiver is looking to have the Transaction pursuant to the Stalking Horse Agreement conditionally approved, subject to it being selected as the successful bid pursuant to the terms of the Sale Process. The requested Order includes a condition that the Receiver must serve a report on the Service List declaring the Stalking Horse Bid as the successful bid (the “**Stalking Horse Approval Report**”). After service of the Stalking Horse Approval Report, any person shall have 10 business days to object to the Receiver in writing to the selection of the Stalking Horse Bid. In the event there is no objection, the Receiver will proceed to close the Transaction. If there is an objection, the Receiver will return to Court for approval of the Transaction.

PART III – ISSUES

25. The issues before this Court are whether, *inter alia*:
- (a) the Liquidation Plan should be approved;
 - (b) the Sale Process should be approved;
 - (c) the Stalking Horse Bid and the Transaction should be conditionally approved; and
 - (d) the Receiver should be empowered to terminate the lease of the Premises by providing to the Landlord no less than seven days’ prior notice in writing of its intention to do so.

PART IV – LAW & ARGUMENT

A. This Court Should Approve the Liquidation Plan

26. Receivers are consistently granted the power to sell property of a debtor, which is the case under the Appointment Order. Pursuant to the Appointment Order, the Receiver must receive approval of this Court in respect of any transaction with a value exceeding \$250,000. As the Liquidation Plan contemplates a guaranteed minimum amount of \$515,000 as the floor

consideration possible for the sale of the Liquidation Property, the Receiver is therefore seeking approval of the Liquidation Plan.

27. The Receiver solicited liquidation proposals from five liquidators in respect of the Liquidation Property.²⁷ The Receiver evaluated the offers received by the prospective liquidators, some of whom submitted multiple offers.²⁸ The Receiver proposes to enter into the Liquidation Plan, as the Receiver in exercising its commercial judgement considers it the best minimum offer to monetize the Liquidation Property.

28. Under the Liquidation Plan, the Liquidator will pay the Receiver the NMG Amount, being a guaranteed minimum amount of \$515,000.²⁹ Following the NMG Amount and the payment of the next \$60,000 to cover the expenses of the Liquidator, the remaining proceeds will be split 85/15 in favour of the Receiver.³⁰

29. The terms of the Liquidation Plan are consistent with standard insolvency transactions, to be completed on an “as-is, where is” basis, without any material representations or warranties.³¹ All sales of the Liquidation Property are to be on the same terms.

30. In negotiating the Liquidation Plan, significant effort was expended by the Receiver in evaluating the proposals advanced by prospective liquidators. In addition, the Receiver consulted with the Lender prior to selecting the Liquidator and agreeing to the proposed terms.³² The efficient liquidation of the Liquidation Property will allow the Receiver to vacate the Premises expediently in order to limit the rent payable to the Landlord in these receivership proceedings, and to minimize

²⁷ First Report at para 41 ([Caselines Master E53](#)).

²⁸ First Report at para 41 ([Caselines Master E53](#)).

²⁹ First Report at para 42 ([Caselines Master E53](#)).

³⁰ First Report at para 42 ([Caselines Master E53](#)).

³¹ First Report at para 43 ([Caselines Master E54](#)).

³² First Report at para 43 ([Caselines Master E54](#)).

other related expenses. The Receiver submits that the Liquidation Plan is in the best interests of creditors generally and will preserve estate funds.

B. This Court Should Approve the Stalking Horse Sale Process

31. The Court has previously held that the reasonableness and adequacy of any sales process proposed by a court-appointed receiver must be assessed in light of the factors that the Court will later take into account when considering the approval of the proposed sale resulting from that sale process.³³ These factors, identified in the Court of Appeal decision of *Royal Bank v. Soundair*, include: (i) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; (ii) the efficacy and the integrity of the process by which offers are obtained; (iii) whether there has been unfairness in the working out of the process; and (iv) the interests of all parties.³⁴

32. The use of stalking horse bids to set a baseline for the bidding process has been recognized by the Court as a reasonable and useful element of a sales process.³⁵ The Court in *CMM* held that when approving a proposed sales and marketing process, the following criteria (which operate harmoniously with the principles set out in *Soundair*) should be assessed:

- (a) the fairness, transparency and integrity of the proposed process;
- (b) the commercial efficacy of the proposed process in light of the specific circumstances facing the Receiver; and

³³ *CCM Master Qualified Fund v blutip Power Technologies*, 2012 ONSC 1750 at para 6 [CCM]; citing *Royal Bank of Canada v Soundair*, 1991 CanLII 2727 (ONCA) at para 16 [*Soundair*].

³⁴ *CCM Master Qualified Fund v blutip Power Technologies*, 2012 ONSC 1750 at para 6; *Ontario Securities Commission v. Bridging Finance Inc.*, 2021 ONSC 5338 at para 7.

³⁵ *CCM Master Qualified Fund v. blutip Power Technologies*, 2012 ONSC 1750 at para 7.

- (c) whether the sales process will optimize the chances, in particular the particular circumstances, of securing the best possible price for the assets up for sale.³⁶

33. Given that the Company is not conducting operations,³⁷ there is no reasonable alternative to a sale process. A sale process is necessary to realize and maximize the value of the Company's assets for the benefit of all stakeholders.

34. The Receiver submits that the proposed Sale Process satisfies the factors set out by the Court in *CMM* and ought to be approved by the Court.

(a) *Fairness, Transparency and Integrity:*

35. The proposed Sale Process is fair and transparent. All prospective purchasers that execute a confidentiality agreement will be provided with additional information about the Sale Process Property.³⁸ The Receiver consulted with, and obtained approval from, the Lender in the development of the Sale Process.

(b) *Commercial Efficacy in Light of Circumstances:*

36. The Receiver submits that the proposed Sale Process is commercially efficient in light of the circumstances faced by the Receiver. The Sale Process provides for a wide marketing of the Company's intangible assets by the Receiver, who has extensive experience selling distressed assets and businesses. In particular, given the nature of the Sale Process Property, the Receiver is of the view that canvassing the sale of such property to a wider audience, in a public manner, including advertising in various publications, will be beneficial to maximize recoveries for all

³⁶ *CCM Master Qualified Fund v blutip Power Technologies*, 2012 ONSC 1750 at para 6.

³⁷ First Report at para 3 ([Caselines Master E44](#)).

³⁸ First Report at para 47 ([Caselines Master E55](#)).

stakeholders. The proposed timelines of the Sale Process are sufficient to allow interested parties to perform diligence and submit offers, and are of a standard length in comparable proceedings.

37. The Sale Process contains specific criteria for bidders in order to create a commercially efficient process.³⁹ These criteria are typical to proceedings of this nature and are considered commercially reasonable.

(c) Optimizing Chances of Best Possible Sale Price:

38. The proposed Sale Process and Stalking Horse Bid will assist the Receiver in maximizing transaction value, and it represents a useful and reasonable tool in this Sale Process. It is anticipated that the Stalking Horse Bid will add competitive tension, thereby increasing the value to be derived from the Sale Process Property and provides an opportunity to complete a transaction with greater value than the Stalking Horse Agreement, should one materialize.⁴⁰

39. The Receiver will conduct a competitive auction if more than one qualified bid is received by the bid deadline set out in the Sale Process (the “**Auction**”).⁴¹ The Auction will allow for the bidders in the proposed Sale Process to submit higher, or otherwise better offers, for the Sale Process Property above that of the Stalking Horse Bid.

40. The Purchase Price is payable by way of a credit bid, which credit comprises a portion of the outstanding balance owing under the Secured Note. Subject to the customary assumptions and qualifications, the security interests in favour of the Lender are valid and enforceable in the Province of Ontario.⁴²

³⁹ First Report at paras 44-47 ([Caselines Master E54-E55](#)).

⁴⁰ First Report at para 44 ([Caselines Master E54](#)).

⁴¹ First Report at para 52 ([Caselines Master E58](#)).

⁴² First Report at para 22 ([Caselines Master E48](#)).

41. When assessing whether the purchase price in a stalking horse bid is fair and reasonable, the Court considers whether the bid “represents a fair and reasonable benchmark for all other bids” in the sale process.⁴³ That standard is met. The Receiver believes that the terms of the Transaction, including the total consideration provided is commercially reasonable in the circumstances.⁴⁴ Furthermore, the Receiver believes that the Stalking Horse Bid represents a satisfactory monetization of the Sale Process Property should it constitute a successful bid at the conclusion of the Sale Process.⁴⁵

42. The Stalking Horse Bid includes the Break Fee of approximately 2.8% and a Overbid of \$10,000. The Receiver has considered the reasonableness of the Break Fee and the Overbid.⁴⁶ In doing so, the Receiver has reviewed recent comparable stalking horse agreements wherein similar provisions have been approved in transactions of this nature.⁴⁷ Based on this comparison, the Receiver is of the view that, in the circumstances, the Break Fee and the Overbid are fair and reasonable to compensate the Stalking Horse Bidder for costs and expenses in relation to entering into the Stalking Horse Agreement and will not unduly “chill” bidding on the Sale Process Property as part of the Sale Process.⁴⁸

43. It is in the best interests of the Company and its stakeholders that the Stalking Horse Bid be approved in order to have the opportunity to maximize value and to protect downside risk in the event that a superior offer is not submitted.

⁴³ *Danier Leather Inc. (Re)*, 2016 ONSC 1044 at para 40.

⁴⁴ First Report at para 63 ([Caselines Master E63](#)).

⁴⁵ First Report at para 63 ([Caselines Master E63](#)).

⁴⁶ First Report at para 64 ([Caselines Master E63](#)).

⁴⁷ First Report at para 64 ([Caselines Master E63](#)).

⁴⁸ First Report at para 64 ([Caselines Master E63](#)).

44. For the reasons above, the Receiver submits that the Sale Process, and the inclusion of the Stalking Horse Bid therein, is appropriate in these circumstances.

C. This Court Should Approve the Stalking Horse Bid and Related Documents

45. The Receiver is requesting that the Court conditionally pre-approve the Stalking Horse Bid and provisionally vest the Sale Process Property to the Stalking Horse Bidder in the event that the Stalking Horse Bid is determined by the Receiver to be the successful bid pursuant to and in accordance with the Sale Process.⁴⁹ This relief is requested to avoid the time and cost of a subsequent sale approval hearing if no superior bids are identified through the Sale Process – and no written objections are raised by any person to the Receiver.

46. The Receiver proposes that the Stalking Horse Bid be pre-approved by this Court and that the vesting of the Sale Process Property to the Stalking Horse Bidder occur upon the satisfaction of the following conditions: (i) the Receiver serving the Stalking Horse Approval Report on the service list designating the Stalking Horse Bid as the successful bid; and (ii) the Receiver receiving no written objection from any person as to the selection by the Receiver of the Stalking Horse Bid as the successful bid within ten days of serving such the Stalking Horse Approval Report.⁵⁰

47. In the event that a qualified bidder other than the Stalking Horse Bidder is declared to be the successful bid, the Receiver intends to return to Court to seek Court approval of such successful bid.⁵¹ If there are objections to the selection of the Stalking Horse Bid by any person within ten days of serving the Stalking Horse Approval Report, the Receiver will return to this Court to seek formal Court approval of the Transaction.

⁴⁹ First Report at para 60 ([Caselines Master E61](#)).

⁵⁰ First Report at para 62 ([Caselines Master E62](#)).

⁵¹ First Report at para 61 ([Caselines Master E62](#)).

48. As noted above, the *Soundair* principles are the commonly used test for approving a sale of an insolvent entity's assets:

- (a) whether a sufficient effort was made to get the best price and whether the parties 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 process.⁵²

49. While the *Soundair* test requires that fair and reasonable efforts are made to sell the assets, it does not mandate that any particular form of sales process take place, or that certain terms are required in every sale process.⁵³

50. Each of the factors set out in *Soundair* described above supports approval of the Stalking Horse Bid at this time for the following reasons:

- (a) the Sale Process will allow the Receiver to expose the Sale Process Property to the wider market and offer prospective bidders the opportunity to conduct due diligence, resulting in a value for the Sale Process Property that the market deems appropriate. In doing so, effort will be taken to solicit the best bids available, thereby maximizing value for stakeholders;
- (b) the Lender, as the Company's senior secured creditor, is supportive of the Sale Process and the Transaction;
- (c) given the value of the secured debt outstanding relative to the assets of the Company, and efforts to test the market through the Sale Process, it is submitted that the Court can reasonably conclude the consideration under the Stalking Horse

⁵² [Royal Bank of Canada v Soundair Corp](#), (1991), 1991 CanLII 2727 (ONCA), 4 OR (3d) 1.

⁵³ [Re OEL Projects Ltd](#), 2020 ABQB 365 at para 29.

Bid is fair and reasonable absent an alternative transaction offering higher value submitted by the bid deadline in accordance with the Sale Process; and

- (d) all bidders will be added to the Service List, affording them with the opportunity raise written objection to the Receiver, should the Stalking Horse Bid be selected under the Sale Process. Should the Receiver receive any objection, it will return to Court and bring a motion approving the Stalking Horse Bid.

51. Courts have granted conditional sale approval orders while concurrently approving a sale process in other comparable proceedings, including in the insolvency proceedings of: *Decision One Corporation, Balanced Energy Oilfield Solutions, Dove Cleaners* and *0876242 BC Ltd.*⁵⁴

52. In the *Decision One* proceeding, Justice Penny conditionally approved a stalking horse credit bid at the outset of a sale process. In doing so, he found that conditional approval was needed in the circumstances of that case.⁵⁵ Similar to the case at hand, the stalking horse bid in *Decision One* was conditionally preapproved by the Court in circumstances where it was determined to be the highest and best transaction submitted for the assets.⁵⁶

53. In *Decision One*, the assets of the debtor being sold were not of sufficient value to fully satisfy its secured obligations to the senior secured lenders who appeared to be significantly underwater. Similarly, in these circumstances the Stalking Horse Bidder is submitting a credit bid of only a portion of the obligations owing under the Secured Note. Unless a better offer emerges in the Sale Process, the Lender will face a shortfall on their security, justifying the conditional

⁵⁴ [In the Matter of the Notice of Intention to make a Proposal of Decision One](#), (Court File No. 31-2946538) Order dated June 5, 2023 [*Decision One*]; *National Bank of Canada v Balanced Energy Oilfield Services Inc.* (Court File Number 2201-02699) [Orders dated March 30, 2022](#); *2519920 Ontario Inc. o/a Dove Cleaners*, (Court File No: 31-2803414) Order dated April 9, 2022 [*Dove Cleaners*]; [Institutional Mortgage Capital Canada Inv. C. 0876242 BC Ltd.](#), 2022 BCSC 1520.

⁵⁵ [In the Matter of the Notice of Intention to make a Proposal of Decision One](#), (Court File No. 31-2946538) Endorsement dated June 5, 2023.

⁵⁶ [In the Matter of the Notice of Intention to make a Proposal of Decision One](#), (Court File No. 31-2946538) Endorsement dated June 5, 2023.

approval of the Transaction to preserve estate funds, and minimize incurring additional expenses and professional fees.

54. Justice Penny additionally reasoned that if the Stalking Horse Bid is not the best offer in the Sale Process, there is the potential for an even better result, as is the case here.⁵⁷ The potential the Auction under the Sale Process provides the potential for a maximization of value for the Sale Process Property under a competitive bidding structure. If a superior bid is received, the Receiver intends to return to Court for approval of that bid.

55. In the Endorsement of Justice Gilmore in *Dove Cleaners*, the Court granted the conditional preapproval of a stalking horse bid while approving a sale process.⁵⁸ This occurred in circumstances where, similar to here, the request for pre-approval was not opposed, the senior secured lender was in agreement and all parties agreed that preapproval was the most expeditious and economical way to proceed.⁵⁹

56. In this case, the requested Order includes a condition that the Receiver must serve the Stalking Horse Approval Report declaring the Stalking Horse Bid as the successful bidder, after which any person, including unsuccessful bidders, shall have 10 business days to object to the selection of the Stalking Horse Bid.

57. Accordingly, it is the Receiver's position that the Court should conditionally pre-approve the Stalking Horse Bid and authorize the Receiver to complete the Transaction contemplated therein, subject to the satisfaction of the conditions set out in the proposed Order.

⁵⁷ [In the Matter of the Notice of Intention to make a Proposal of Decision One](#), (Court File No. 31-2946538) Endorsement dated June 5, 2023.

⁵⁸ [2519920 Ontario Inc. o/a Dove Cleaners](#), (Court File No: 31-2803414) Endorsement dated April 9, 2022.

⁵⁹ [2519920 Ontario Inc. o/a Dove Cleaners](#), (Court File No: 31-2803414) Endorsement dated April 9, 2022.

D. This Court Should Allow Termination of the Lease to the Premises

58. Under the Liquidation Plan, the Receiver is liquidating all tangible assets of the Company stored on the Premises. Following the liquidation, there will be no assets or employees of the Company on the Premises.

59. Under the Appointment Order, the Receiver is entitled to cease to carry on all or any part of the business, or cease to perform any contracts of the Company.

60. Courts have granted orders allowing, and setting the terms, for the termination of leases by Receivers.⁶⁰ In the circumstances, the termination of the lease of the Premises is commercially responsible and is in line with Appointment Order and the Receiver's duty to maximize value for all of the stakeholders of the Company.

PART V – RELIEF REQUESTED

61. Based on the foregoing, the Receiver respectfully request that this Court grant the proposed form of Order found at Tab 2 of the Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 15th DAY OF AUGUST, 2023

/s/ Reconstruct LLP

RECONSTRUCT LLP

⁶⁰ [White Oak Commercial Finance, LLC v Nygard Holdings Inc. et al](#) (Court File No. CI 20-01-26627) Order dated June 2, 2020. See also: [Yukon \(Government of\) v Yukon Zinc](#), 2021 YKCA 2 at paras 33-37.

SCHEDULE “A”

List of Authorities

1. <i>CCM Master Qualified Fund v blutip Power Technologies</i> , 2012 ONSC 1750.
2. <i>Royal Bank of Canada v Soundair Corp.</i> , (1991), 1991 CanLII 2727 (ONCA), 4 OR (3d) 1.
3. <i>Ontario Securities Commission v Bridging Finance Inc.</i> , 2021 ONSC 5338.
4. <i>Danier Leather Inc. (Re)</i> , 2016 ONSC 1044.
5. <i>Re OEL Projects Ltd.</i> , 2020 ABQB 365.
6. <i>In the Matter of the Notice of Intention to make a Proposal of Decision One</i> , (Court File No. 31-2946538) Order dated June 5, 2023.
7. <i>National Bank of Canada v Balanced Energy Oilfield Services Inc.</i> (Court File Number 2201-02699) <u>Orders dated March 30, 2022.</u>
8. <i>2519920 Ontario Inc. o/a Dove Cleaners</i> , (Court File No: 31-2803414) Order dated April 9, 2022.
9. <i>Institutional Mortgage Capital Canada Inv. C. 0876242 BC Ltd.</i> , 2022 BCSC 1520.
10. <i>In the Matter of the Notice of Intention to make a Proposal of Decision One</i> , (Court File No. 31-2946538) Endorsement dated June 5, 2023.
11. <i>2519920 Ontario Inc. o/a Dove Cleaners</i> , (Court File No: 31-2803414) Endorsement dated April 9, 2022.
12. <i>White Oak Commercial Finance, LLC v Nygard Holdings Inc. et al</i> (Court File No. CI 20-01-26627)
13. <i>Yukon (Government of) v Yukon Zinc</i> , 2021 YKCA 2.

SCHEDULE "B"

Statutory Authorities

Nil.

ORTHO STUDIO EXPRESS, INC.

and

**Court File No. CV-23-00699238-00CL
DIGITAL ORTHODONTIC CARE INC.**

Applicant

Respondent

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced at Toronto

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