

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

BETWEEN:

ROYAL BANK OF CANADA

Applicant

- and -

**2236715 ONTARIO LIMITED
o/a LUXURY AND SPORTS CARS**

Respondent

**FACTUM OF THE RECEIVER
(Motion returnable December 4, 2018)**

December 3, 2018

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Spergel Inc.

TO: SERVICE LIST

PART I - NATURE OF MOTION

1. This is a motion by the court-appointed receiver msi Spergel Inc. ("**Spergel**", or the "**Receiver**") for, *inter alia*:
 - (a) An Order approving the Receiver's First Report to the Court dated November 26, 2018 (the "**First Report**") and the activities and conduct of the Receiver as detailed therein;
 - (b) A Declaration that the following vehicles are included in the Property of the Debtor as defined in the Appointment Order:
 - (i) Mercedes-Benz M-Class 4JGDA2EB7FA452675;
 - (ii) 2014 Mercedes-Benz CLS-Class Luxury Sedan WDDLJ9BB6EA094485;
 - (iii) 2011 Porsche Panamera WP0AA2A76BL014785;
 - (iv) 2016 BMW X3 5UXWX9C53G0D63101;
 - (v) 2014 BMW 5351 WBA5B3C57ED530245;
 - (vi) 2014 Mercedes-Benz M-Class Luxury 4JGDA2EB1EA386851; and
 - (vii) 2014 Audi S5 WAULGBFR7EA039791.(collectively the "**Vehicles**")
 - (c) An Order that the sale by auction of the Vehicles (the "**Sale**") contemplated by the North Toronto Auction's Used Vehicle Consignment Agreement between the Receiver and Northern Auto Auctions of Canada Inc. o/a North Toronto Auction ("**NTA**") and appended to the First Report of the Receiver (the "**Auction Agreement**") be approved, and the execution of the Auction Agreement by the Receiver be and is authorized and approved, with such minor amendments as the Receiver may deem necessary, and that the Receiver be authorized and directed to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the Sale by auction, and for the conveyance of the Vehicles (the "**Purchased Vehicles**") to the purchasers at auction (the "**Purchasers**");

- (d) An Order that the fees and disbursements of the Interim Receiver as detailed in the First Report (the "**Interim Receiver's Fees**") and payment of same be approved;
- (e) An Order that the fees and disbursements of counsel to the Interim Receiver, Harrison Pensa LLP, as detailed in the First Report (the "**Interim Counsel Fees**") and payment of same be approved.

Approval and Vesting Order

- (f) An Order that the Vehicles shall be sold by auction as contemplated by the Auction Agreement, and upon delivery of a receipt for payment in full by NTA to each of the Purchasers, that all of the Debtor's right, title and interest in and to each of the Purchased Vehicles so purchased shall vest in each of the Purchasers free and clear of any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges, or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the "**Claims**") including, without limiting the generality of the foregoing: (i) any encumbrances or charges created by the Order of the Appointment Order, (ii) all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Ontario) or any other personal property registry system (all of which are collectively referred to as the "**Encumbrances**").
- (g) An Order that for the purposes of determining the nature and priority of Claims, the proceeds received by the Receiver pursuant to the Auction Agreement shall stand in the place and instead of the Purchased Vehicles, and that following the completion of the Sale, any and all Claims and Encumbrances shall attach to the proceeds received by the Receiver pursuant to the Auction Agreement with the same priority as they had with respect to the Purchased Vehicles sold at the Sale immediately prior to the Sale, as if the Purchased Vehicles had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale.

- (h) An Order that, notwithstanding:
- i. the pendency of these proceedings;
 - ii. any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act (Canada)* in respect of the Debtor and any bankruptcy order issued pursuant to any such applications; and,
 - iii. any assignment in bankruptcy made in respect of the Debtor;

the vesting of the Purchased Vehicles in each of the Purchasers pursuant to this Order shall be binding on any trustee in bankruptcy that may be appointed in respect of the Debtor and shall not be void or voidable by creditors of the Debtor, nor shall it constitute nor be deemed to be a fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the Bankruptcy and Insolvency Act (Canada) or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

- (i) A Request that any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, including the Ministry of Transportation Ontario, provide the aid and recognition to give effect to this Order and to assist the Receiver, its agents or the Purchasers in carrying out the terms of this Order, and that all courts, tribunals, regulatory and administrative bodies make such orders and provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.
- (j) Such further and other relief as counsel may request and this Honourable court may permit.

PART II - THE FACTS

Previous Actions of the Receiver

1. On August 3, 2018, and upon application of Royal Bank of Canada (the “**Bank**”), an order was made by the Honourable Justice Dunphy (the “**Appointment Order**”) appointing the Receiver over the assets, undertakings, and properties (as defined in the Appointment Order) of 2236715 Ontario Limited o/a Luxury and Sports Cars (the “**Debtor**”).

First Report to the Court Submitted by the Receiver dated November 26, 2018 (the “First Report”), para 1.0.2 and Appendix “1” thereto

2. Prior to the receivership, the Debtor carried on business as a used vehicle dealership from leased premises located in Woodbridge, Ontario.

First Report, para 1.0.1

3. Prior to Spergel’s Appointment as Receiver, it was appointed as interim receiver (in such capacity, the “**Interim Receiver**”), without security, of all the assets, undertakings, and properties of the Debtor by order of the Honourable Justice Hainey dated July 4, 2018.

First Report, para 1.0.4

4. Spergel, in its capacity as Interim Receiver, filed its first report dated July 24, 2018 and the supplemental report thereto dated August 1, 2018, regarding, *inter alia*, the transfer of the Vehicles from the Debtor to Chartreuse Bancorp Inc. (“**Chartreuse**”), and the claimed purchase money security interest of Chartreuse in the Vehicles as a result of the aforementioned transfer.

First Report, paras 1.0.5 to 1.0.7 and Appendices “2” to “5” thereto

5. The Bank also claims a priority interest in the Vehicles as secured creditor of the Debtor, with a general security interest in all of the Debtor’s property.

First Report, paras 1.0.2 and 1.0.8

6. As Interim Receiver, Spergel recommended to the Court, and the Court approved, that, upon its appointment as Receiver, it enter into an agreement with Chartreuse by which the Vehicles would be marketed and sold by Chartreuse, subject to certain terms (the “**Vehicle Sale Agreement**”).

First Report, paras 1.0.9 and 1.0.10

Actions of the Receiver

7. On August 14, 2018, the Receiver finalized the terms of the Vehicle Sale Agreement with Chartreuse and obtained an executed copy of same.

First Report, para 3.0.2 and Appendix “6” thereto

8. The Vehicle Sale Agreement provided, *inter alia*, that in the event that Chartreuse was unable to sell the Vehicles after making all reasonable efforts, or in any case following sixty (60) days from the execution of the Vehicle Sale Agreement, the Sale of the Vehicles would proceed via the Toronto Automotive Vehicle Auction (the “**Auction**”) by NTA at a net sale price to be approved by both NTA and the Receiver. The net proceeds of any such Sale are to be paid directly from NTA to the Receiver, to be held in trust and released with the consent of the Bank, Chartreuse, and the Receiver, or else by Order of the Court, and on a without prejudice basis to the claim of Chartreuse or any other party for priority to the sales proceeds of the Vehicles.

First Report, para 3.0.3

9. As Chartreuse was unable to sell any of the Vehicles, on October 12, 2018, and pursuant to the Vehicle Sale Agreement, Chartreuse agreed to allow the Vehicles to be sold at Auction by NTA, and the Receiver did arrange for the transport of the Vehicles to the Auction in preparation for the Sale thereof.

First Report, paras 3.0.4 to 3.0.5

10. Between approximately October 24, 2018 and November 7, 2018, the Receiver and Chartreuse engaged in discussions regarding the proper sale price for the Vehicles at Auction; during this time, Chartreuse expressed concerns regarding the sale prices set by NTA for the Vehicles.

First Report, paras 3.0.6 to 3.0.7 and Appendix "7" thereto

11. At the request of the Receiver and due to Chartreuse's stated concerns over the sale price of the Vehicles, Chartreuse was invited to provide a proposed reserve price for each Vehicle at the Auction; however, the total of the proposed reserve prices provided by Chartreuse was approximately \$5,450 less than the average retail value for same as determined by NTA.

First Report, para 3.0.8 and Appendix "8" thereto

12. On November 8, 2018, the Receiver informed Chartreuse of the Receiver's position that Chartreuse's proposed reserve prices were unreasonable, and, that Chartreuse had been unable to sell the Vehicles while in possession of same, the Receiver would proceed with the Sale of the Vehicles as follows:

- (a) Place the Vehicles in the November 15, 2018 Auction with the reserve price being set as the average between the average retail value and the estimated auction value provided by NTA;
- (b) In the event that any of the Vehicles are not sold they will be re-listed at the following auction with the reserve being set at the estimated auction value provided by NTA;
- (c) In the event that any Vehicles are not sold at the second Auction, they will be re-listed at the following Auction with no reserve.

First Report, para 3.0.9

13. The Receiver further advised Chartreuse that, should the above arrangement be unacceptable to Chartreuse, the Receiver would seek direction of the Court with respect to the reserve price for the Vehicles, and the approval of the Court for the Receiver's disposition of same. Chartreuse has responded to this communication on a without prejudice basis.

First Report, paras 3.0.10 to 3.0.11 and Appendix "9" thereto

Transfer of the Vehicles

14. Upon its appointment as Interim Receiver, Spergel discovered that the Vehicles had been transferred from the Debtor to Chartreuse in June, 2018, with no consideration received by the Debtor from Chartreuse for same; as a result, it is the position of the Receiver that the transfer of the Vehicles was improper and that the Vehicles in fact form part of the Property of the Debtor.

First Report, para 3.0.12

15. Despite the request of the Receiver, Chartreuse has failed or refused to provide the Receiver with sufficient support for its claim to priority over the Vehicles.

First Report, paras 3.0.13 to 3.0.15

Auction Agreement

16. As at the date of the herein motion, the terms of the Auction Agreement have not yet been finalized, and the Auction Agreement is not yet executed; however, the Receiver has provided the Court with a redacted version of an agreement which the Receiver expects to be comparable with the final Auction Agreement as between the Receiver and NTA and which will govern the Sale.

First Report, para 4.0.1 and Appendix "10" thereto

17. The Auction is set to take place on December 20, 2018, and it is the Receiver's position that the rates and commissions provided for in the Auction Agreement are fair and reasonable, and that a public auction will provide for the most reasonable and profitable manner for the sale of the Vehicles. The net proceeds of the Auction shall be held by

the Receiver pending further Order of this Court regarding distribution. Any Vehicles which remain unsold shall be offered for sale at a subsequent auction.

First Report, paras 4.0.2 and 4.0.3

Fees and Disbursements

18. The current Interim Receiver's Fees, inclusive of disbursements and HST and including fees and disbursements incurred by the Interim Receiver, total \$20,911.71. On October 1, 2018, the Interim Receiver provided the Notice of Application for Taxation of Accounts and Discharge of Interim Receiver to the service list. No objection was filed within 30 days of the sending of the notice.

First Report, paras 5.0.1 and 5.0.2 and Appendix "11" thereto

19. The current Interim Counsel Fees of Harrison Pensa LLP total \$23,102.29 inclusive of disbursements and HST. It is the position of the Interim Receiver and the Receiver that such fees and disbursements are reasonable and necessary.

First Report, paras 6.0.1 and 6.0.2 and Appendix "12" thereto

PART III - ISSUES, LAW AND ARGUMENT

A. The Receiver's Activities

20. The Receiver's activities in these proceedings have been undertaken in furtherance of the Receiver's duties and are consistent with the Receiver's powers, as set out in the Appointment Order. The Receiver has acted reasonably and in the best interests of the Respondents' stakeholders. It is respectfully submitted that the Receiver's activities should therefore be approved by this Court.
21. This Court has the jurisdiction to approve such activities. The "court has the inherent jurisdiction to review and either approve or disapprove of the activities of a court appointed receiver" and "it would be unusual and illogical [if] the receiver could come to court for prior approval but not post approval."

Bank of America Canada v. Willann Investments Ltd. (1993) 20 C.B.R. (3d) 223 (ONSC), Tab 1 at paras. 3 and 4

22. All of the Receiver's activities were conducted within the ambit of its powers granted by the Appointment Order and each of the activities were necessary to ensure that the proceedings were as orderly, effective and fair to all stakeholders as possible.
23. The Receiver therefore respectfully submits that its activities to date should be approved by this Court.

B. Approval of the Sale and the Approval and Vesting Order

24. The Receiver submits that, as Chartreuse did not provide the Debtor with consideration for the Vehicles, the Vehicles form part of the Property of the Debtor and are therefore subject to the terms of the Appointment Order.
25. Receivers are clothed with the powers set out in the order appointing them. Receivers are consistently granted the power to market and sell property belonging to a debtor. The Court further approved the Vehicle Sale Agreement which provided for the Sale of the Vehicles via the Auction, in the manner recommended by the Receiver herein. The Appointment Order also provides the Receiver with the power to market and sell or otherwise transfer the Property of the Debtor, including the Vehicles. Absent evidence that a sale is improvident or that there was an abuse of process, it is respectfully submitted that a Court is to grant deference to the recommendation of the Receiver to proceed with the Sale of the Vehicles via the Auction.

Appointment Order, sub-paragraphs 3(j) and 3(k)

Vehicle Sale Agreement, sub-paragraph 1(k), at Appendix "6" to the First Report

Integrated Building Corp. v. Bank of Nova Scotia (1989), 75 C.B.R. (N.S.) 158 (Alta. C.A.), Tab 2

Battery Plus Inc. (Re.), [2002] O.J. No. 731, Tab 3 at para. 2-3, 19, 22-23, 34-5

26. Under Section 100 of the *Courts of Justice Act* (Ontario), this Honourable Court has the power to vest in any person an interest in real or personal property that the court has the authority to order be disposed of, encumbered or conveyed.

Courts of Justice Act (Ontario), R.S.O. 1990, c. C-43, s. 100, Tab 4

27. Where a Court is asked to approve a transaction in a receivership context, the Court is to consider:

- i. whether the party made a sufficient effort to obtain the best price and to not act improvidently;
- ii. the interests of all parties;
- iii. the efficacy and integrity of the process by which the party obtained offers; and
- iv. whether the working out of the process was unfair.

Royal Bank of Canada v. Soundair Corp. (1991), 4 O.R. (3d) 1 (ONCA), Tab 5 at para. 16

Skyepharma PLC v. Hyal Pharmaceutical Corp. (1999), 12 C.B.R. (4th) 87 (ONSC., appeal quashed, (2000), 47 O.R. (3d) 234 (C.A.)), Tab 6 at para. 3

28. Only in exceptional circumstances where there is clear evidence that a sale is improvident or involved an abuse of process will a Court intervene and proceed contrary to the recommendation of its officer, the Receiver.

Royal Bank of Canada v. Soundair, supra at para. 21

Skyepharma PLC, supra at para. 3

29. Based on the foregoing, it is respectfully submitted that this Honourable Court should approve the Sale and grant the Approval and Vesting Order, in accordance with the recommendation of the Receiver. It is the Receiver's position that the Sale be approved by the Court for the following reasons:

- (a) The Vehicle Sale Agreement, as approved by this Honourable Court, specifically contemplates the Sale of the Vehicles by Auction;
- (b) The Appointment Order provides the Receiver with the authority to market and sell the Property of the Debtor;

- (c) The Sale by Auction of the Vehicles pursuant to the Auction Agreement will result in the best and highest price for the Vehicles, given the previous inability of Chartreuse to sell same, and will result in greater net proceeds than if the Receiver were to market and sell the Vehicles on an individual basis; and,
- (d) The proceeds of the Auction shall be held by the Receiver, and shall not be distributed absent the consent of the Bank and Chartreuse, or pending an Order of this Honourable Court which determine the issue of priority as between the Bank and Chartreuse regarding the Vehicles.

C. The Interim Receiver's Fees And Interim Counsel Fees Should Be Approved

- 30. The Receiver respectfully submits that the Interim Receiver's Fees and Interim Counsel Fees as detailed in the First Report should be approved.
- 31. In determining whether to approve the fees of a receiver and its counsel, the Court should consider whether the remunerations and disbursements incurred in carrying out the receivership were fair and reasonable and take into consideration the following factors, which constitute a useful guideline, but are not exhaustive:
 - (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.

Bank of Nova Scotia v. Diemer, 2014 ONCA 851, Tab 7 at paras 33 and 45.

- 32. It is the Receiver's view that it and its counsel's fees and disbursements were incurred at the respective party's standard rates and charges, and are fair, reasonable and

justified in the circumstances. Further, the fees and disbursements sought accurately reflect the work done by the Receiver/Interim Receiver and by its counsel in connection with the receivership.

PART IV - ORDER REQUESTED

33. The Receiver requests the following Orders:

- (a) That the Sale be approved as recommended by the Receiver and that an Approval and Vesting Order be granted; and
- (b) That the additional relief sought in the Ancillary Order be granted, including the declaration that the Vehicles form part of the Property of the Debtor.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of December, 2018.

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Lawyers for the Receiver

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Bank of America Canada v. Willann Investments Ltd.* (1993) 20 C.B.R. (3d) 223 (ONSC)
2. *Integrated Building Corp. v. Bank of Nova Scotia* (1989), 75 C.B.R. (N.S.) 158 (Alta. C.A.)
3. *Battery Plus Inc. (Re.)*, [2002] O.J. No. 731
4. *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (ONCA)
5. *Skyepharm PLC v. Hyal Pharmaceutical Corporation*, 1999 CanLII 15007 (ONSC)
6. *Bank of Nova Scotia v. Diemer*, 2014 ONCA 851

SCHEDULE "B"
RELEVANT STATUTES

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

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and

2236715 ONTARIO LIMITED o/a LUXURY AND SPORTS CARS

Applicant

Respondent

Court File No: CV-18-00600821-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at TORONTO

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