

Court File No: CV-23-00705869-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

B E T W E E N:

ROYAL BANK OF CANADA

Applicant

- and -

TEN 4 SYSTEM LTD., 1000043321 ONTARIO INC. AND 1000122550 ONTARIO INC.

Respondents

FACTUM OF THE RECEIVER
(Motion returnable April 24, 2024)

April 17, 2024

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Lawyers for the Receiver,
msi Spergel inc.

TO: SERVICE LIST

NATURE OF MOTION

1. This motion by msi Spergel inc. ("**Spergel**"), in its capacity as court-appointed Receiver (the "**Receiver**"), appointed pursuant to an order of the Ontario Superior Court of Justice – Commercial List (the "**Court**") dated October 18, 2023 (the "**Appointment Order**") of the Property (as defined in the Appointment Order) of the Respondents, Ten 4 System Ltd. ("**Ten 4**"), 1000043321 Ontario Inc. ("**321 Ontario**") and 1000122550 Ontario Inc. ("**550 Ontario**" and together with Ten 4 and 321 Ontario, the "**Debtors**") for, *inter alia*, the following relief:
 - a) An Order that the time for service, filing and confirmation of the Notice of Motion and the Motion Record be abridged so that this motion is properly returnable April 24, 2024, and dispensing with further service and confirmation thereof;
 - b) An Order approving the First Report of the Receiver dated April 3, 2024 (the "**First Report**"), and the activities and conduct of the Receiver set out therein, 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 the approval of the First Report and the Confidential Appendices (as defined below);
 - c) Approving the Receiver's Interim Statement of Receipts and Disbursements as detailed in the First Report;
 - d) Directing the Debtors and the Principals (as defined below) to immediately advise the Receiver of the location of all Property and Records (all as defined in the Appointment Order);
 - e) Directing the Debtors and the Principals (as defined below) to immediately produce and deliver the Records (as defined in the Appointment Order), including the List of Information (as defined in the First Report) and all documents in relation to the Account Receivable Variance (as defined in the First Report) to the Receiver;
 - f) An Order authorizing and directing the Receiver to execute a Listing Agreement between the Receiver and Avison Young Commercial Real Estate Services LP ("**Avison**") for the sale of the Real Property (as defined below) and to take such

steps as the Receiver deems necessary or advisable to carry out the terms thereof;

- g) An Order authorizing and directing the Receiver, with Avison as its real estate consultant, to carry out the sale process (the “**Sale Process**”), as described in the First Report and to take such steps and execute such documentation as the Receiver considers necessary or desirable in carrying out its obligations thereunder, subject to prior approval of this Court being obtained before completion of any transaction under the Sale Process;
 - h) An Order sealing the Confidential Appendices to the First Report (the “**Confidential Appendices**”) until the completion of the Sale Process and the sale of the Real Property, or until a further order of this Court; and,
 - i) An Order for certain ancillary relief, including approval of the fees and disbursements of the Receiver and the Receiver’s legal counsel, Harrison Pensa LLP.
2. It is the position of the Receiver that the actions of the Receiver, as well as the Sale Process, should be approved and that the relief requested should be granted, for the following reasons:
- a) The Sale Process will be conducted in conjunction with an experienced real estate agency, and will encourage a competitive environment for the solicitation of offers; and
 - b) Meets the “Soundair” principals as detailed below.
3. The Receiver is no longer seeking the relief in relation to the Northwest Lease and the Real Property as vacant possession of same has been provided.

THE FACTS

The Debtors and the Real Property

4. Spergel was appointed as Receiver over the property of the Debtors including the Real Property (as defined below), pursuant to the Appointment Order.

First Report to the Court Submitted by the Receiver in its capacity as receiver of the Debtors dated April 3, 2024 (the "First Report"), para 7 and Appendix "2" thereto.

5. Ten 4 was primarily engaged in the business of logistics and trucking. The director of Ten 4 is Nasir Mahmood ("**Nasir**").

First Report, para 2.

6. Both 321 Ontario and 550 Ontario are primarily engaged in the business of holding real estate. The President of each of 321 Ontario and 550 Ontario is Nasir. The Secretary of each of 321 Ontario and 550 Ontario is Rupinder Taggar (together with Nasir, the "**Principals**").

First Report, para 3.

7. 321 Ontario is the owner of the real property located in Ayr, Ontario and legally described as Part Lot 28, Concession 11, being Part 1, Plan 58R15460, North Dumfries (the "**321 Real Property**"). 550 Ontario is the owner of adjoining lands legally described as Part Lot 28, Concession 11, North Dumfries (together with the 321 Real Property, the "**Real Property**").

First Report, para 4.

The Records of the Debtors

8. Pursuant to the Appointment Order, all Persons (as defined in the Appointment Order) are obligated to advise the Receiver of the existence of any Property and Records (both as defined in the Appointment Order) in such Person's possession or control, and to

deliver and give access to such Property and Records to the Receiver upon the Receiver's request.

First Report, Appointment Order, Appendix "2", at paras 4, 5 and 6.

9. Since October 18, 2023, the Receiver's counsel has made several requests for the Property and Records. The Debtors and the Principals have not provided any meaningful books and records for the Respondents and have only provided internally prepared Ten4 Financial Statements (as defined in the First Report) in relation to Ten 4, which contain materially different information as to what was previously provided to the court.

First Report, paras 21-33 and Appendix "9" thereto.

10. Given the Receiver's various unsuccessful attempts seeking that the Debtors and Principals provide the Property of Ten 4 and the Records for the Debtors, the Receiver believes that in the circumstances it is appropriate for an Order, as set out above, in relation to same.

First Report, para 35.

Account Receivable Variance

11. The Nasir Supplementary Affidavit filed by the Respondents in response to RBC's application to appoint a receiver indicated a substantially higher accounts receivable of Ten4 as at September 30, 2023 (the "**September 2023 AR**") as compared to the accounts receivable of approximately \$110,000 reported in the Ten4 2023 BS¹.

First Report, para 35.

12. This significant variance needs to be investigated by the Receiver to determine what accounts receivable exist and are collectible. The Records are required to complete this investigation.

¹ Found at Appendix 9, PDF page 119 of the Receiver's Motion Record

The Proposed Sale Process

13. Pursuant to the Appointment Order, the Receiver is empowered and authorized to obtain appraisals of and to market any or all of the property of the Debtors, including the Real Property, including advertising and soliciting offers in respect of the property of the Debtors.

First Report, Appendix "2", at paras 3(j), (k), and (l).

14. The Receiver engaged the services of Wagner, Andrews & Kovacs Ltd. and Colliers International ("**Colliers**") to attend at and conduct full narrative appraisals of the Real Property.

First Report, para 54 and Confidential Appendices "1" to "2" thereto.

15. The Receiver obtained listing proposals from Avison and Colliers in relation to the Real Property.

First Report, para 55 and Confidential Appendices "3" to "4" thereto.

16. Following a review of the listing proposals, the Receiver recommends and requests that it be authorized to retain Avison and entering into a listing agreement for Avison to market the Real Property for the following reasons:

- a) the commission structure payable is favourable; and,
- b) Avison is extremely familiar with the area where the Real Property is located.

First Report, para 56.

17. The Receiver recommends the approval of the proposed Sale Process for the following reasons:

- a) The Sale Process is a fair, open and transparent sale process;
- b) The Sale Process is intended to canvass the market on an efficient basis to interested parties; and,

- c) Prospective interested parties can make an offer to purchase the Real Property as individual parcels of land or together as one contiguous parcel.

First Report, paras 57 and 58.

18. The Receiver is of the view that, in the circumstances, the proposed Sale Process represents the best opportunity to identify a potential sale for the Real Property and to maximize value for the benefit of stakeholders.

First Report, para 59.

Debtors' Counsel

19. By way of e-mail dated January 24, 2024 to Receiver's counsel, counsel for the Debtors advised that it no longer represented the Debtors in any capacity. Counsel to the Debtors has not obtained an Order from the Court removing itself from the record.

First Report, paras 66 and 67.

20. Further to the March 25th Endorsement, Receiver's Counsel sent emails with a copy of the March 25th Endorsement to counsel for the Debtors and to counsel for the guarantors of the RBC debt.

First Report, para 69.

Statement of Receipts and Disbursements

21. The Receiver's Interim Statement of Receipts and Disbursements as at March 31, 2024 are appended to the First Report, and it is the Receiver's position that such receipts and disbursements are reasonable and should be approved.

First Report, para 75 and Appendix "24" thereto.

Professional Fees and Disbursements

22. The current fees and disbursements of Spergel, in its capacity as Receiver, inclusive of HST, total \$83,693.22 as at February 29, 2024, as detailed in the First Report.

First Report, para 72 and Appendix "22" thereto.

23. The current fees and disbursements of Harrison Pensa LLP, as counsel for the Receiver, inclusive of HST, total \$36,489.37 as at April 2, 2024.

First Report, para 73 and Appendix "23" thereto.

24. It is the position of the Receiver that such fees and disbursements as set out above are reasonable and necessary and should be approved by this Honourable Court.

First Report, para 74.

Sealing Order

25. The Receiver is of the view that the information and documentation contained in the Confidential Appendices contain commercially sensitive information and should be sealed in order to avoid the negative impact that the dissemination of the confidential information contained therein would have if the sale of the Real Property is not completed. As a result, the Receiver is seeking a sealing order in respect of the Confidential Appendices until such time as a sale is complete, or until further order of this Court.

First Report, para 60.

ISSUES, LAW AND ARGUMENT

The Court's Procedural Powers

26. The Court may, by order, extend or abridge any time prescribed by the Rules on such terms as are just. Further, the Court may dispense with compliance with any Rule at any time where and as necessary in the interest of justice. Finally, the Court may

dispense with service where it is impractical to effect prompt service and/or it may validate service where it is satisfied that the document came to the notice of the person to be served.

[Rules 2.03, 3.02, 16.04 and 16.08, Rules of Civil Procedure, R.R.O. 1990, Reg. 194](#)

The Receiver's Activities

27. 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 Debtors' stakeholders, and this Court has the inherent jurisdiction to approve such activities.

Bank of America Canada v. Willann Investments Ltd. (1993) 20 C.B.R. (3d) 223 (ONSC), at paras 3 and 4, referenced in the Receiver's Book of Authorities at Tab 1.

28. 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.
29. The Receiver therefore respectfully submits that the First Report, and its activities to date as set out therein, should be approved by this Court.

The Books and Records

30. In the Receiver's view, the Appointment Order clearly and unequivocally states at paragraphs 4 through 6 what must be done by the Debtors and Principals in relation to the Property and Records, as defined in the Appointment Order.
31. However, to avoid any misunderstanding as to what is required by the Debtors and Principals in relation to the Property and Records, the Receiver seeks an additional Order as to what is to be provided.

32. Section 243(1)(c) of the BIA has been interpreted as giving judges the broadest possible mandate in insolvency proceedings to enable them to react to any circumstances that may arise in relation to court ordered receiverships.

[Peace River Hydro Partners v. Petrowest Corp., 2022 SCC 41 \(CanLII\) at para. 148.](#)

33. The Receiver therefore respectfully requests that in the current circumstances this Honourable Court use its authority to grant the Order sought by the Receiver in relation to the Property and Records.

Approval of the Proposed Sale Process

34. 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.

[Integrated Building Corp. v. Bank of Nova Scotia, 1989 ABCA 114 \(CanLII\).](#)

[Battery Plus Inc., Re, 2002 CanLII 49569 \(ON SC\) at paras 2-3, 19, 22-23, 34-35.](#)

35. There are four factors the court should consider in exercising its discretion whether to authorize a sale process. The factors are:

- a) Is the sale transaction warranted at this time;
- b) Will the sale benefit the “economic community”;
- c) Do any of the creditors have a bona fide reason to object to the sale of the business or assets; and
- d) Is there a better viable alternative.

[Crate Marine, 2015 ONSC 1062 \(CanLII\), at para 14.](#)

36. After the court is satisfied that it is appropriate to approve a sale process, when reviewing a sale process proposed by a receiver a court should consider the following factors:

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

[CCM Master Qualified Fund v. blutip Power Technologies, 2012 ONSC 1750 \(CanLII\), at para 6.](#)

37. Although the decision to approve a particular form of sales process is distinct from the approval of a proposed sale, the reasonableness and adequacy of any sales process proposed by a court-appointed receiver must be assessed in light of the factors which a court will take into account when considering the approval of a proposed sale. Those factors were identified by the Court of Appeal in its decision in *Royal Bank v. Soundair*:
- i. whether the receiver 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 CanLII 2727 \(ON CA\), at para 16.](#)

[CCM Master Qualified Fund v. blutip Power Technologies, 2012 ONSC 1750 \(CanLII\), at para 6.](#)

38. In reviewing a receiver's decisions and recommendations, the court exercises considerable caution and grants considerable deference to the receiver. As the Court of Appeal in *Regal Constellation Hotel Limited* stated:

Although the courts will carefully scrutinize the procedure followed by a receiver, they rely upon the expertise of their appointed receivers, and are reluctant to second-guess the considered business decisions made by the

receiver in arriving at its recommendations. The court will assume that the receiver is acting properly unless the contrary is clearly shown.

[Regal Constellation Hotel Ltd., Re, 2004 CanLII 206 \(ON CA\), at para 23.](#)

39. The Sale Process recommended by the Receiver is a reasonable, robust and transparent sale process, designated to realize the fair value for the Real Property, and satisfies the criteria for approval.
40. Based on the foregoing, it is respectfully submitted that this Honourable Court should approve the Sale Process. It is the Receiver's position that any sale resulting from the Sale Process would be in accordance with the *Soundair* principles, for the following reasons:
 - a) The Sale Process includes reasonably lengthy marketing periods to expose the Real Property to the open market;
 - b) The Receiver has engaged an experienced real estate brokerage firm in Avison, which is familiar with the area where the Real Property is located; and
 - c) The Sale Process will provide all interested parties with an equal opportunity to bid on the sale of the Real Property.

First Report, paras 56 to 59.

41. The Receiver respectfully submits that the Sale Process should be approved.

The Sealing Order Should be Granted

42. It is submitted that it is just, appropriate and necessary to the integrity of this receivership proceeding that the Confidential Appendices be sealed by this Court. The Confidential Appendices contain sensitive information, the release of which prior to the completion of the sale of the Real Property could be prejudicial to the stakeholders of the Debtors.

Jurisdiction

43. The Court's jurisdiction to seal documents filed with it is found in s. 137(2) of the *Courts of Justice Act* (Ontario):

137(2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form a part of the public record.

[*Courts of Justice Act \(Ontario\), s. 137\(2\).*](#)

44. In addition to statutory jurisdiction, the Court also has inherent jurisdiction to issue sealing orders: "there is no doubt that the court has inherent jurisdiction, and jurisdiction under s. 137(2) of the *Courts of Justice Act*, to seal a portion of the court file."

[*Fairview Donut Inc. v. The TDL Group Corp., 2010 ONSC 789 \(CanLII\), at para 34*](#)

Discretion

45. Sealing Orders are granted regularly in the context of Court-appointed receiverships where court openness may pose a risk to the public interest in enabling stakeholders in an insolvency to maximize the realization of a debtor's assets. In this context, such an order is necessary in order to prevent a serious risk to an important commercial interest; and the salutary effects of the sealing order outweigh its deleterious effects, which in this context includes the public interest in open and accessible court proceedings.

[*Sierra Club of Canada v. Canada \(Minister of Finance\), 2002 SCC 41 \(CanLII\), \[2002\] 2 SCR 522, at paras 53-57.*](#)

[*Sherman Estate v. Donovan, 2021 SCC 25 \(CanLII\), at para 38.*](#)

46. The Receiver submits that there are no reasonable alternative measures to a sealing order which would fulfill the twin purposes of (i) allowing this Court to review the reasonableness of the proposed Sale Process; and (ii) ensuring that the commercially-sensitive information contained within the Confidential Appendices is not available to the public prior to the completion of any sale of the Real Property.

[*Sherman, supra, at para. 38.*](#)

47. Ontario Courts have recognized the customary practice of seeking a sealing order in the context of a sale approval motion, to which this motion is analogous. In *Ron Handelman Investments Ltd. v. Mass Properties Inc.*, Madam Justice Pepall stated:

[a]s is customary in sale approval motions, the Receiver seeks an order sealing the appraisal until the transaction is completed. This ensures the integrity of the process and avoids any prejudice to stakeholders in the event that the transaction does not close and a new purchaser must be sought.

[B&M Handelman Investments Limited v. Mass Properties Inc., 2009 CanLII 37930 \(ON SC\), at para 26.](#)

[Maxtech Manufacturing Inc. \(Re\), 2010 ONSC 1161 \(CanLII\), at paras 29 and 30.](#)

48. The Confidential Appendices contain sensitive commercial information. Should the sale of the Real Property not proceed, the information contained within the Confidential Appendices could cause a reduction in any future sale of the Real Property, and harm the creditors of the Debtors if made available to the public. Protecting the information contained within the Confidential Appendices is an important commercial interest that should be protected. There is no other reasonable alternative to sealing that will prevent Confidential Appendices from becoming public.
49. it is the Receiver's opinion that the Confidential Appendices should remain sealed until the completion of the sale of the Real Property, or an Order by this Court.

The Fees and Disbursements of the Receiver and the Receiver's Counsel Should Be Approved

50. The Receiver respectfully submits that the Professional Fees of the Receiver and the Receiver's Counsel, as detailed in the First Report, should be approved.
51. 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 (CanLII), at [paras. 33](#) and [45](#).

52. 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 and by its counsel in connection with the receivership.

ORDER REQUESTED

53. The Receiver requests the relief as set forth in the Notice of Motion and the related Orders.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of April, 2024.



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SCHEDULE "A"
LIST OF AUTHORITIES

1. *Bank of America Canada v. Willann Investments Ltd.* (1993) 20 C.B.R. (3d) 223 (ONSC)
2. *Bank of Nova Scotia v. Diemer*, 2014 ONCA 851 (CanLII)
3. *Battery Plus Inc., Re*, 2002 CanLII 49569 (ON SC)
4. *B&M Handelman Investments Limited v. Mass Properties Inc.*, 2009 CanLII 37930 (ON SC)
5. *CCM Master Qualified Fund v. blutip Power Technologies*, 2012 ONSC 1750 (CanLII)
6. *Crate Marine*, 2015 ONSC 1062 (CanLII)
7. *Fairview Donut Inc. v. The TDL Group Corp.*, 2010 ONSC 789 (CanLII)
8. *Integrated Building Corp. v. Bank of Nova Scotia*, 1989 ABCA 114 (CanLII)
9. *Maxtech Manufacturing Inc. (Re)*, 2010 ONSC 1161 (CanLII)
10. *Regal Constellation Hotel Ltd., Re*, 2004 CanLII 206 (ON CA)
11. *Royal Bank of Canada v. Soundair Corp.*, 1991 CanLII 2727 (ON CA)
12. *Sherman Estate v. Donovan*, 2021 SCC 25 (CanLII)
13. *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 (CanLII), [2002] 2 SCR 522
14. *Peace River Hydro Partners v. Petrowest Corp.*, 2022 SCC 41 (CanLII)

**SCHEDULE "B"
RELEVANT STATUTES**

Rules 2.03, 3.02, 16.04 and 16.08, Rules of Civil Procedure, R.R.O. 1990, Reg. 194.

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.

EXTENSIONS OR ABRIDGMENT

General Powers of Court

3.02(1) Subject to subrule (3), the court may by order extend or abridge any time prescribed by these rules or an order, on such terms as are just.

(2) A motion for an order extending time may be made before or after the expiration of the time prescribed.

Times in Appeals

(3) An order under subrule (1) extending or abridging a time prescribed by these rules and relating to an appeal to an appellate court may be made only by a judge of the appellate court.

Consent in Writing

(4) A time prescribed by these rules for serving, filing or delivering a document may be extended or abridged by filing a consent.

SUBSTITUTED SERVICE OR DISPENSING WITH SERVICE

Where Order May be Made

16.04 (1) Where it appears to the court that it is impractical for any reason to effect prompt service of an originating process or any other document required to be served personally or by an alternative to personal service under these rules, the court may take an order for substituted service or, where necessary in the interest of justice, may dispense with service.

Effective Date of Service

(2) In an order for substituted service, the court shall specify when service in accordance with the order is effective.

(3) Where an order is made dispensing with service of a document, the document shall be deemed to have been served on the date of the order for the purpose of the computation of time under these rules.

VALIDATING SERVICE

16.08 Where a document has been served in a manner other than one authorized by these rules or an order, the court may make an order validating the service where the court is satisfied that,

(a) The document came to the notice of the person to be served; or

(b) The document was served in such a manner that it would have come to the notice of the person to be served, except for the person's own attempts to evade service.

Section 137(2) Courts of Justice Act, R.R.O. 1990, Reg. 194.

SEALING DOCUMENTS

137(2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

ROYAL BANK OF CANADA

v.

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Applicant

Respondents

Court File No. CV-23-00705869-00CL

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FACTUM OF THE RECEIVER

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