

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

BETWEEN:

ROYAL BANK OF CANADA

Applicant

- and -

**UNIFORM CUSTOM COUNTERTOPS INC., UNIFORM CUSTOM
COUNTERTOPS LTD., UNIFORM SURFACES INC., MILOS BEZOUSKA
AND KAREN BEZOUSKA**

Respondents

**FACTUM OF THE RECEIVER
(Motion returnable November 13, 2020)**

November 11, 2020

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Solicitors for the Receiver,
msi 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 Approval and Vesting Order, substantially in the form attached to the Notice of Motion at Schedule "B", *inter alia*, approving the transaction (the "**Transaction**") contemplated by the Agreement of Purchase and Sale between North Park Holdings Inc. (the "**Purchaser**") and the Receiver dated August 28, 2020 (the "**Sale Agreement**") for the sale of the real property known municipally as 7250 Keele Street, Unit 368, Vaughan, Ontario, and described legally in PIN No. 29842-0368 (LT), and registered in the name of Uniform Surfaces Inc. ("**USI**") (the "**Keele Property**"), and vesting all of the right, title and interest in and to the Keele Property of USI absolutely in the Purchaser free and clear of and from any security, charge or other restriction other than any Permitted Encumbrances (as defined in the Approval and Vesting Order).;
 - b) An Ancillary Order, substantially in the form attached to the Notice of Motion at Schedule "C", *inter alia*, approving the Receiver's Second Report to the Court dated November 3, 2020 (the "**Second Report**"), and sealing the Confidential Appendices to the Second Report (the "**Confidential Appendices**"), and other ancillary relief; and
 - c) Such further and other relief as counsel may request and this Honourable court may permit.
2. It is the position of the Receiver that the Transaction should be approved, and the ancillary relief granted, for the following reasons (all capitalized terms as set out herein):
 - a) It is the Receiver's position that the Sale Agreement represents a commercially reasonable transaction which will maximize the recovery from the sale of the Keele Property;
 - b) The Receiver states that it, with Intercity, conducted an extensive Sales Process for the sale of the Keele Property, which widely exposed the Keele Property to the public.

- c) The value of the Keele Property was negatively impacted by the COVID-19 pandemic due to the Keele Property's location within a shopping centre. It is the Receiver's position that the offers received accurately represent the current value and appeal of the Keele Property on the open market;
- d) Royal Bank of Canada, as senior secured creditor of the Debtors, supports the Transaction;
- e) It is the Receiver's position that a Sealing Order should be granted over the Confidential Appendices until the Transaction is complete, to avoid the negative impact that the dissemination of the confidential information contained therein would have if the sale of the Keele Property is not completed; and,
- f) It is the Receiver's position that the actions of the Receiver as set out in the Second Report, including the Transaction, the Interim Statement of Receipts and Disbursements, and the fees and disbursements of the Receiver and its counsel, Harrison Pensa LLP, are reasonable and should be approved by this Honourable Court.

PART II - THE FACTS

Appointment and Background – The Keele Property

1. On May 4, 2020, and upon application of Royal Bank of Canada (the "**Bank**"), an order was made by the Honourable Justice Hainey (the "**Appointment Order**") appointing the Receiver over the Property (as defined in the Appointment Order) of USI, Uniform Custom Countertops Inc. ("**UCCI**"), and Uniform Custom Countertops Ltd. ("**UCCL**") (together with UCCI and UCCL, the "**Debtors**"), including the Keele Property, legally described as:
 - a) UNIT 368, LEVEL 1, YORK REGION STANDARD CONDOMINIUM PLAN NO. 1311 AND ITS APPURTENANT INTEREST; SUBJECT TO AND TOGETHER WITH EASEMENTS AS SET OUT IN SCHEDULE A AS IN YR2466166; CITY OF VAUGHAN (PIN 29842-0368 LT).

Second Report, paras 1-4 and Appendix "1" thereto

2. Each of the Debtors are Ontario corporations which carried on business in and around the areas of Concord, Vaughan, and Nepean Ontario, and which ceased operations prior to the Appointment Order.

Second Report, paras 1-4

3. The Keele Property consists of a condominium unit located in a shopping centre. The Keele Property was previously used by UCCI and UCCL as a product showroom prior to their cessation of operations. Royal Bank of Canada (“**RBC**”) is the senior secured creditor of USI and the other Debtors, and holds a first charge over the Keele Property.

Second Report, paras 3, 17, and 27, and Appendix “6” thereto

Sales Process and Transaction

4. The Receiver obtained two appraisals of the Keele Property, and sought listing proposals from several potential agents, retaining Intercity Realty Inc. (“**Intercity**”) on or about August 10, 2020.

Second Report, paras 16-18, Appendices “3” to “4” thereto, and Confidential Appendices “1” to “3” thereto

5. Both appraisals stated that the reliability of any appraised values were uncertain, due to the extraordinary and still-developing impact of the COVID-19 Pandemic on the real estate market, as well as the appraisers’ necessary reliance on pre-COVID market conditions and data in coming to their conclusions.

Second Report, Confidential Appendices “1” (at page 3) and “2” (at pages 58-59) thereto

6. Intercity undertook a comprehensive marketing process to expose the Keele Property to the market, including the use of electronic social media marketing flyers, e-blasts to agent networks, signage on the Keele Property, and in-person showings to potential buyers (the “**Sales Process**”).

Second Report, para 20, Appendix “5” thereto, and Confidential Appendix “5” thereto

7. The value of the Keele Property was negatively impacted by the COVID-19 pandemic. There was little interest expressed in the Keele Property.

Second Report, para 23 and Confidential Appendices Appendix "5", page 125 and 126

8. As a result of the Sales Process, the Receiver received two offers to purchase the Keele Property.

Second Report, paras 20-21, and Confidential Appendix "6" thereto

9. Ultimately, the Receiver did accept the offer received from the Purchaser, on or about September 17, 2020, as the best of the two offers received.

Second Report, para 22, and Confidential Appendix "7" thereto

10. The Receiver determined that the offer received from the Purchaser would result in the best and highest net return to the Debtors' estates, as a result of the following factors:

- a) The Receiver's agent undertook an extensive marketing process in relation to the Keele Property;
- b) The Keele Property is located in an indoor shopping centre, and foot traffic within this centre has been significantly and adversely impacted by the COVID-19 pandemic, which in turn reduced the interest in the Keele Property, as well as the value of the Keele Property on the open market;
- c) The offer received from the Purchaser was the best of the two offers received by the Receiver;
- d) The Transaction was completed on a cash-in-hand basis and contained no conditions with the exception of the Receiver's obligation to obtain the Approval and Vesting Order sought herein; and,
- e) The Transaction is supported by RBC as senior secured creditor of the Debtors, and of USI in particular.

Second Report, paras 18, 23-25

11. It is the Receiver's position that the Transaction is commercially reasonable in the circumstances, and represents the best and highest return to USI's estate, and ultimately to RBC and the other stakeholders of the Debtors.

Other Actions of the Receiver

12. Since its First Report to the Court dated August 7, 2020, the Receiver has completed the following actions, aside from the sale of the Keele Property, as set out in the Second Report:
 - a) The Receiver has completed the closing of the Auction Agreement, as defined in the Second Report, and which was the subject of a previous motion before this Honourable Court;
 - b) The Receiver has continued its efforts to collect on the outstanding Accounts Receivable of UCCI and UCCL. It is the Receiver's position that it has reasonably completed the collection of Accounts Receivable in relation to ICCL, and is continuing this process in relation to UCCI;
 - c) The Receiver has vacated the leased premises utilized by UCCL and UCCI; and,
 - d) The Receiver continues to quantify the claims of employees of the Debtors under the Wage Earner Protection Program.

Second Report, paras 11-14

13. It is the Receiver's position that its actions are reasonable and should be approved by this Honourable Court.

Sealing Order

14. Until such time as the Transaction is complete, or until further order of this Court, the Receiver is of the view that the information and documentation contained in the Confidential Appendices 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 Keele Property is not completed.

Second Report, para 32

Fees and Disbursements

15. The current fees and disbursements of the Receiver, inclusive of HST and disbursements, total \$66,381.11 as at October 31, 2020, and which fees and disbursements are allocated amongst the Debtors as set out in the Second Report.

Second Report, para 33 and Appendix "8" thereto

16. The current Fees and Disbursements of Harrison Pensa LLP, as counsel for the Receiver total \$18,264.41 inclusive of disbursements and HST, and which fees and disbursements are allocated amongst the Debtors as set out in the Second Report.

Second Report, paras 34-35 and Appendix "9" thereto

17. 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.
18. The Receiver's Interim Statements of Receipts and Disbursements is also appended to the Second Report, and it is the Receiver's position that such receipts and disbursements are reasonable and should be approved.

Second Report, para 36 and Appendix "10" thereto

PART III - ISSUES, LAW AND ARGUMENT

A. The Receiver's Activities

19. 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. It is respectfully submitted that the Receiver's activities should therefore be approved by this Court.

20. 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*](#)

21. 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.
22. The Receiver therefore respectfully submits that its activities to date should be approved by this Court.

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

23. 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. 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 sell the Keele Property via the Sale Agreement.

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

[*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*](#)

24. 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*](#)

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

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

[*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*](#)

26. 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

27. Further, the impact of the COVID-19 pandemic on the interest in, and market value of, the Keele Property must not be underestimated, and the appraisals obtained by the Receiver should be considered in this context. As stated by Tzimas, J. in *Stanbarr Services Limited et al v. Reichert et al*, “the real proof in the pudding lies with actual offers, it does not lie with the appraisals; they are just estimates”. Given the uncertainty as to when these conditions will abate, and given that the Debtors’ insolvency was not generated by the COVID-19 Pandemic, the Receiver should not be required to halt or postpone its Sale Process, while the Debtors’ obligations to the Bank remain unpaid.

[*Stanbarr Services Limited et al v. Reichert et al, 2014 ONSC 6435, Tab 7 at para 15*](#)

[*Choice Properties Limited Partnership v. Penady \(Barrie\) Ltd., 2020 ONSC 3517, Tab 8 at para 35*](#)

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

- a) It is the Receiver's position that the Sale Agreement represents a commercially reasonable transaction which will maximize the recovery from the sale of the Keele Property;
- b) The Receiver states that it, with Intercity, conducted an extensive Sales Process for the sale of the Keele Property, which widely exposed the Keele Property to the public, for a period of approximately 30 days.
- c) The value of the Keele Property was significantly and negatively impacted by the COVID-19 pandemic due to the Keele Property's location within a shopping centre. It is the Receiver's position that the offers received accurately represent the current value and appeal of the Keele Property on the open market, and that the sale price under the Sale Agreement is comparable to similar properties sold within the same time period.

Confidential Appendix "6" to the Second Report,

- d) Royal Bank of Canada, as senior secured creditor of the Debtors, supports the Transaction.

C. The Sealing Order

- 29. It is just, appropriate and necessary to the integrity of these receivership proceedings and the Sale Process for the Keele Property that the Confidential Appendices be sealed by this Court until the Transaction has closed.

Jurisdiction

- 30. 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\(2\), Tab 9.](#)

31. 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. TDL Group Corp. \(2010\), 100 O.R. \(3d\) 510 \(ONSC\), Tab 10, at para. 34.](#)

Discretion

32. The leading case on sealing orders is the Supreme Court of Canada’s decision in *Sierra Club of Canada v. Canada (Minister of Finance)*, which was decided under the federal rules of court but has been widely applied to provincial cases. *Sierra Club* holds that a sealing order is discretionary and should only be granted when (*emphasis added*):

- a. such an order is necessary in order to prevent a serious risk to an important interest, *including a commercial interest*, in the context of litigation because reasonably alternative measures will not prevent the risk; and
- b. the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

[*Sierra Club of Canada v. Canada \(Minister of Finance\)* \[2002\] 2 S.C.R. 522 \(SCC\) \(“*Sierra Club*”\). Tab 11 at para. 53.](#)

33. Three elements are subsumed under the first branch of the test:

- a) the risk in question must be real and substantial, in that the risk is well grounded in evidence, and poses a serious threat to the commercial interest in question;
- b) in order to qualify as an “important commercial interest”, the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in maintaining confidentiality; and

- c) the Court must consider not only whether reasonable alternatives to a confidentiality order are available, but must also restrict the order as much as is reasonably possible while preserving the commercial interest in question.

***Sierra Club, supra*, at paras 54-57.**

34. Judges sitting on the Commercial List have recognized the usual and customary practice of seeking a sealing order in the context of a sale approval motion. In *Ron Handelman Investments Ltd, v. Mass Properties Inc.*, Madam Justice Pepall (as she then was) 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.

[Ron Handelman Investments Ltd. v Mass Properties Inc. \(2009\), 55 CBR \(5th\) 271, 2009 CarswellOnt 4257 \(ONSC \[Commercial List\]\) Tab 12 at para 26.](#)

35. Sealing orders are routinely granted in receiverships where the *Sierra Club* test is met. For example, appendices to a receivers report were sealed where they contained sensitive commercial information, the release of which could be prejudicial to stakeholders, a copy of an executed sale agreement was sealed when submitted to the court as part of a sale approval motion, and bids made in a sales process have been sealed.

[Maxtech Manufacturing Inc., Re \(2010\), 64 C.B.R. \(5th\) 239 \(ONSC \[Commercial List\]\), Tab 13 at paras. 29 & 30.](#)

36. The Confidential Appendices contain an unredacted version of the Sale Agreement and includes the purchase price of the Keele Property, as well as appraisals of the Keele Property. The Confidential Appendices also include unredacted versions of the Listing Proposal and Marketing Report provided by Intercity to the Receiver, which contain commercially sensitive information regarding the value of the Keele Property. Should the Transaction fail to close for any reason, the information contained within the Confidential Appendices could cause a reduction in any future sale of the Keele Property, and harm the creditors of the Debtors if made available to the public.

37. 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 the Confidential Appendices from becoming public. The Receiver respectfully submits that the principles in *Sierra Club* have been satisfied.

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

38. The Receiver respectfully submits that the fees and disbursements of the Receiver and its counsel, Harrison Pensa LLP, as detailed in the Second Report should be approved.

39. 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 14 at paras 33 and 45.](#)

40. 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.

PART IV - ORDER REQUESTED

41. The Receiver requests the following Orders:

- a) That the Transaction and the Sale Agreement 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.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of November, 2020.



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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. *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. *Stanbarr Services Limited et al v. Reichert et al*, 2014 ONSC 6435
7. *Choice Properties Limited Partnership v. Penady (Barrie) Ltd.*, 2020 ONSC 3517
8. *Fairview Donut Inc. v. TDL Group Corp.* (2010), 100 O.R. (3d) 510 (ONSC)
9. *Sierra Club of Canada v. Canada (Minister of Finance)* [2002] 2 S.C.R. 522 (SCC)
10. *Ron Handelman Investments Ltd. v Mass Properties Inc.* (2009), 55 CBR (5th) 271, 2009 CarswellOnt 4257 (ONSC [Commercial List])
11. *Maxtech Manufacturing Inc., Re* (2010), 64 C.B.R. (5th) 239 (ONSC [Commercial List])
12. *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*
2. *Courts of Justice Act (Ontario), R.S.O. 1990, c. C-43, s. 137(2)*

ROYAL BANK OF CANADA

Applicant

-and-

UNIFORM CUSTOM COUNTERTOPS INC. et al.

Respondents

Court File No. CV-20-00640197-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at
Toronto, Ontario

FACTUM OF THE RECEIVER

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