

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**B E T W E E N:**

**2403177 ONTARIO INC.**

Applicant

- and -

**BENDING LAKE IRON GROUP LIMITED**

Respondent

**FACTUM OF THE RECEIVER, A. FARBER & PARTNERS INC.  
(Motion returnable December 10, 2015)**

December 4, 2015

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**FACTUM OF THE RECEIVER, A. FARBER & PARTNERS INC.**

**PART I – OVERVIEW**

1. A. Farber & Partners Inc. in its capacity as the Court-appointed receiver (the “**Receiver**”) of the assets, undertakings and properties (the “**Property**”) of Bending Lake Iron Group Limited (the “**Debtor**”) seeks an order (an “**Approval and Vesting Order**”), *inter alia*, (a) approving the sale transaction (the “**Transaction**”) contemplated by an Asset Purchase Agreement dated November 27, 2015 (the “**Sale Agreement**”) between the Receiver and Legacy Hill Resources Ltd. (“**Legacy Hill**”), as assigned by Legacy Hill to 1053895 B.C. Ltd. (the “**Purchaser**”) and appended to the Third Report of the Receiver dated November 30, 2015 (the “**Third Report**”), and (b) vesting in and to the Purchaser the Debtor’s and Receiver’s right, title and interest, if any, in and to the assets described in the Sale Agreement (the “**Purchased Assets**”).

2. The Receiver is also seeking an order (a) authorizing the Receiver to redact from the Third Report the commercially sensitive information contained therein, including the unredacted

version of the Sale Agreement, and (b) sealing the unredacted version of the Third Report from the public record until after the closing of the Transaction or further Court Order.

3. This factum is filed in support of the Receiver's above-described motion.

## **PART II – THE FACTS**

### **(A) Overview**

4. The Debtor is an early-stage iron ore mine development company whose major asset is a mine site (the “**Mine Site**”) located northwest of Thunder Bay, Ontario.<sup>1</sup>

5. C. Stuart Livingston and James MacLean (collectively the “**Secured Lenders**”), through 2403177 Ontario Inc. (the security agent) made a series of advances (the “**Loans**”) to the Debtor pursuant to and under the terms of a loan agreement dated November 2, 2011, as amended (the “**Loan Agreement**”). The Loans were advanced on a secured basis.<sup>2</sup>

6. Soon after the Loans were advanced, the Debtor was in default of the Loan Agreement for failing to make any payments of principal and interest. As of October 31, 2015 the Secured Lenders were owed in excess of \$3.5 million.<sup>3</sup>

7. Upon the application of the Secured Lenders, pursuant to an order of this Honourable Court dated September 11, 2014, as amended, (the “**Receivership Order**”), the Receiver was appointed as receiver pursuant to section 243(1) of the *Bankruptcy & Insolvency Act*, R.S.C.

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<sup>1</sup> Third Report to the Court of A. Farber & Partners Inc. in its capacity as Court-Appointed Receiver of Bending Lake Iron Group Limited, dated November 30, 2015, para 7 [Third Report].

<sup>2</sup> Third Report, para 14.

<sup>3</sup> Third Report, paras 15 & 18.

1985, c. B-3 and Section 101 of the *Courts of Justice Act*, R.S.O. 1990, over all of Property of the Debtor.<sup>4</sup>

**(B) The Sales and Investment Solicitation Process**

8. On November 27, 2014, this Honourable Court granted an order (the “**SISP Order**”) authorizing the Receiver to conduct the sale and investment solicitation process (the “**SISP**”) in respect of the Property.<sup>5</sup>

9. The Receiver undertook the SISP in accordance with the SISP Order.<sup>6</sup>

10. Pursuant to the timelines initially outlined in the SISP, interested parties had until 4:00 p.m. Eastern Standard Time on Friday, February 27, 2015 (the “**Bid Deadline**”) to submit a binding offer or proposal.<sup>7</sup>

11. As the SISP progressed, the depressed state of the iron ore mining sector made attracting interested purchasers and investors very challenging. Since the commencement of the receivership in September 2014 through to the end of March 2015, the market price for a dry metric ton of iron ore declined from \$82.27 to \$56.94.<sup>8</sup>

12. The SISP Order provided the Receiver with discretion to extend the Bid Deadline for a period of up to 30 days. In consultation with legal counsel and the Secured Lenders, the Receiver

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<sup>4</sup> Third Report, para 1.

<sup>5</sup> Third Report, para 2.

<sup>6</sup> Third Report, para 25.

<sup>7</sup> Third Report, para 26.

<sup>8</sup> Third Report, para 26.

extended the Bid Deadline to 4:00 p.m. on March 27, 2015 (the “**Extended Bid Deadline**”) to afford greater opportunity to interested parties to conduct due diligence.<sup>9</sup>

13. Although discussions were ongoing with a number of parties at the time of the Extended Bid Deadline, no offers or proposals were submitted by the Extended Bid Deadline.<sup>10</sup>

14. After the expiry of the Extended Bid Deadline, the Receiver continued ongoing negotiations with interested parties with a view to determining if *bona fide* proposals or offers would be forthcoming. Over this period, the mining sector and, in particular, the iron ore market, continued to face a sustained slump.<sup>11</sup>

#### (c) **The Sale Agreement**

15. After undertaking significant due diligence activities commencing in March, 2015, on September 30, 2015 Legacy Hill entered into a letter of intent (the “**Letter of Intent**”) with the Receiver. Although certain parties indicated to the Receiver that they were on the precipice of submitting an offer, no other viable offers were received in respect of the Property over this time period.<sup>12</sup>

16. Ongoing negotiations between the Receiver and Legacy Hill culminated in the Receiver and Legacy Hill entering into the Sale Agreement on November 27, 2015. The Sale Agreement contemplates the sale of substantially all of the Property to the Purchaser.<sup>13</sup>

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<sup>9</sup> Third Report, para 28.

<sup>10</sup> Third Report, para 29.

<sup>11</sup> Third Report, para 30.

<sup>12</sup> Third Report, paras 32 & 35.

<sup>13</sup> Third Report, paras 34 & 48.

17. At the time of execution of the Sale Agreement, the offer from Legacy Hill was the only concrete proposal and expression of interest received by the Receiver since the commencement of the SISP.<sup>14</sup>

18. One of the conditions to closing set out in the Sale Agreement is the issuance of an Approval and Vesting Order approving the Transaction and vesting in and to the Purchaser all of the Debtor's and Receiver's right, title and interest, if any, in and to the Purchased Assets, free and clear of encumbrances. The closing date is scheduled for January 11, 2016.<sup>15</sup>

### **PART III – ISSUES**

19. There are two main issues before this Honourable Court:

- (a) Whether to approve the Sale Agreement and grant the Approval and Vesting Order; and
- (b) Whether to seal the unredacted Third Report from the public record until after the closing of the Transaction.

20. The Receiver respectfully requests that this Honourable Court approve the Sale Agreement, vest the Purchased Assets in and to the Purchaser and issue a sealing order.

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<sup>14</sup> Third Report, para 35.

<sup>15</sup> Third Report, para 48.

## PART IV – THE LAW AND ARGUMENT

### (A) The Sale Agreement and Transaction should be approved

21. Pursuant to the Receivership Order, the Court determined that the Debtor was insolvent and the Receiver was:

- (a) appointed in respect of the Property; and
- (b) authorized and empowered to, among other things:
  - (i) market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof, and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate; and
  - (ii) apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property.<sup>16</sup>

22. Pursuant to Section 100 of the *Courts of Justice Act* (Ontario), this Honourable Court may by order vest in any person an interest in real or personal property that the Court has authority to order be disposed of, encumbered or conveyed.<sup>17</sup>

23. The following principles are to be considered when determining whether to approve a sale transaction in a receivership context (collectively, the “**Soundair Principles**”):

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<sup>16</sup> Receivership Order, paras 3(i) and (g).

<sup>17</sup> *Courts of Justice Act*, R.S.O. 1990, c. C-43, s. 100.

- (a) whether the receiver made a sufficient effort to obtain the best price and has not acted improvidently;
- (b) the interests of all parties;
- (c) the efficacy and integrity of the process by which the offers are obtained; and
- (d) whether the working out of the process was unfair.<sup>18</sup>

24. Underlying these considerations are the principles which apply when reviewing a sale by a court appointed receiver. The court will place a great deal of confidence in the actions taken and in the opinions formed by the receiver. It should assume that the receiver is acting properly unless the contrary is clearly shown. The court should be reluctant to second-guess the considered business decisions made by its receiver.<sup>19</sup>

25. A court is to grant deference to the recommendation of a receiver to sell a debtor's assets and, provided the Receiver has acted reasonably, prudently and not arbitrarily, a court should not sit as in an appeal from a receiver's decision. Only in exceptional circumstances will a court intervene and proceed contrary to the recommendation of its officer, the receiver.<sup>20</sup>

26. The evidence set out in the Third Report demonstrates that each of the Soundair Principles has been satisfied.

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<sup>18</sup> *Royal Bank of Canada v. Soundair Corp.*, 1991 CarswellOnt 205 (C.A.), para 16, Receiver's Brief of Authorities, Tab 1 [*Soundair*].

<sup>19</sup> *Soundair*, para 14; *Regal Constellation Hotel Ltd.*, 2004 CarswellOnt 2653 (C.A.), para. 23, Receiver's Brief of Authorities, Tab 2, [*Royal Constellation*].

<sup>20</sup> *Soundair*, para 21; *Skyepharmaceutical PLC v. Hyal Pharmaceutical Corp.*, 1999 CarswellOnt 3641, para. 7, 12 C.B.R. (4th) 87 (S.C.J. [Commercial List]), affirmed (2000), 47 O.R. (3d) 234 (C.A.), Receiver's Brief of Authorities, Tab 3 [*Skyepharmaceutical*].



(a) ***The Receiver made a Sufficient Effort to Obtain the Best Price and Has Not Acted Improvidently***

27. Commencing in November, 2014 through to September, 2015, the Receiver undertook an extensive and lengthy marketing process with a view to obtaining the best price for the Property.

28. As a result of the SISP, over 120 interested parties were contacted or notified by the Receiver. Twelve (12) of those parties executed confidentiality agreements, were provided with access to the virtual data room set up by the Receiver and undertook varying levels of due diligence.<sup>21</sup>

29. Although no offers were received prior to the Extended Bid Deadline, the Receiver exercised its judgment and continued to market the Property throughout 2015.<sup>22</sup>

30. In the Receiver's view, the SISP, as extended by the Receiver, adequately canvassed the market for prospective purchasers of the Property in what was, and continues to be, a very challenging and difficult market for iron ore.<sup>23</sup>

31. All parties interested in making an offer in respect of the Property, including any of the Debtor's directors, officers and shareholders, were given ample opportunity to review the opportunity, conduct due diligence and make an offer.

32. In the event that the Debtor is of the view that the Property is worth more than the debt owing to its creditors, it was always open to the Debtor to take appropriate steps to redeem the

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<sup>21</sup> Third Report, para 29.

<sup>22</sup> Third Report, paras 29 & 30.

<sup>23</sup> Third Report, para 49.

debt owing to the Secured Lenders and seek various remedies, inclusive of seeking the termination of the receivership proceedings. It has not done so.

33. The Receiver has acted reasonably and not improvidently. It undertook the SISP in good faith and when offers for the Property were not forthcoming, continued discussions with interested parties after the Extended Bid Deadline in an effort to obtain a suitable offer. These efforts resulted in the Sale Agreement which, in the Receiver's view, represents the best and highest offer for the Property.<sup>24</sup>

***(b) The Transaction is in the Interests of All Parties***

34. The Sale Agreement and the Transaction is in the best interests of all parties with a real economic interest in these proceedings.

35. Although the Receiver owes a duty to all stakeholders, its primary task is to maximize the return for the creditors.<sup>25</sup>

36. The Secured Lenders are in favour of the Transaction and have approved the Sale Agreement. Without the Transaction, it may be impossible for the Secured Lenders to otherwise recover a significant portion of their debt.<sup>26</sup>

37. The support of a secured creditor with an economic interest in the proceeds of a sale transaction is an important factor in determining whether a sale transaction should be approved.

Where it is clear the highest price attainable will not result in recovery for the other creditors or

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<sup>24</sup> Third Report, para 49.

<sup>25</sup> *Soundair*, para 39; *National Trust Company v. 1117387 Ontario Inc.*, 2010 ONCA 340, 2010 Carswell Ont 2869, para. 77, Receiver's Brief of Authorities, Tab 4 [*National Trust*]; *Skyepharm*, para 6.

<sup>26</sup> *National Trust*, para 79; Third Report, para 49.

shareholders, as such a return is not always economically feasible, the wishes of the interested creditors (ie. those who are “in-the-money”) should be very seriously considered by the receiver.<sup>27</sup>

38. The Transaction is also in the best interests of the Purchaser. The Purchaser has spent considerable time and resources over the course of many months conducting due diligence and negotiating the Letter of Intent and Sale Agreement. If the Transaction is not approved, the Purchaser will have expended such resources for nothing.<sup>28</sup>

39. The Sale Agreement and the Transaction is also in the best interests of the local communities, including local First Nations. It results in greatly improved prospects for the future of the Mine Site, which for many years faced an uncertain outlook.<sup>29</sup> An operating mine, as opposed to the current dormant state mine, will provide jobs and many other economic benefits for the North West Ontario region.

***(c) The Efficacy and Integrity of the Process***

40. The Receiver undertook the SISP pursuant to the SISP Order. Unfortunately, despite the Receiver’s extensive marketing efforts, with the increasingly depressed market conditions for iron ore, no offers were received prior to the Extended Bid Deadline.<sup>30</sup>

41. The Receiver exercised its business judgment and continued to market the Property throughout 2015. During that time period, all prospective purchasers, including the Debtor and

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<sup>27</sup> *Soundair*, para 73; *National Trust*, para 77.

<sup>28</sup> *Soundair*, para 40; Third Report, paras 32-34

<sup>29</sup> Third Report, para 49.

<sup>30</sup> Third Report, para 29.

the Debtor's shareholders, were free to submit an offer in respect of a restructuring or sale of the Property.<sup>31</sup> No parties, other than Legacy Hill, made any concrete proposals or viable offers to the Receiver over the fourteen (14) months of the receivership proceedings.

42. The Receiver conducted the marketing process in a transparent manner. Discussions were entered into with various parties over the period from April to September, 2015. These discussions included discussions with Henry Wetelainen, the CEO, President and major shareholder of the Debtor. Mr. Wetelainen ultimately communicated to the Receiver that he could not raise sufficient funds or capital to submit a proposal as part of the SISP.<sup>32</sup>

43. No other parties put forward a concrete proposal for a sale or restructuring of the Debtor from April to September 2015, and the Receiver entered into negotiations with Legacy Hill in good faith.<sup>33</sup>

44. Mr. Wetelainen was initially kept apprised of the Receiver's discussions with Legacy Hill and developments in their due diligence process. Mr. Wetelainen attended meetings with Legacy Hill and Legacy Hill consulted him at various stages of their due diligence process.<sup>34</sup>

45. Any reopening of the process to permit other bidders to submit offers now would jeopardize the efficiency and integrity of the sale process.<sup>35</sup>

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<sup>31</sup> Third Report, para 30.

<sup>32</sup> Third Report, para 35.

<sup>33</sup> Third Report, paras 34 - 35.

<sup>34</sup> Third Report, paras 32, 33 & 36.

<sup>35</sup> *Soundair*, para 43.

46. Purchasers should know that if they act in good faith, bargain seriously and enter into an agreement with a receiver, the Court will not lightly interfere with the commercial judgement of the receiver.<sup>36</sup>

47. Even if a higher bid is submitted after execution of the Sale Agreement, subject to court approval, the Receiver's decision to enter into the Sale Agreement should not be set aside if that decision was reasonable and sound in the circumstances then existing. Setting aside an agreement simply because a later higher bid is made would "literally create chaos in the commercial world and receivers and purchasers would never be sure they had a binding agreement."<sup>37</sup>

48. Accordingly, the Receiver recommends the approval of the Sale Agreement as the acceptance of any alternative bid at this stage would threaten the integrity of the sales process.

**(d) *The Process was Fair***

49. The process undertaken by the Receiver was fair and reasonable. The Receiver undertook the SISP, as approved by the SISP Order, and continued discussions with other parties and Legacy Hill after the Extended Bid Deadline had passed.<sup>38</sup>

50. In *Business Development Bank of Canada v. Devine Brokers & Appraisal Ltd.*, the receiver continued its negotiations with a bidder after the expiry of the deadline to submit offers.

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<sup>36</sup> *Soundair*, para 46.

<sup>37</sup> *Cameron v. Bank of Nova Scotia*, 1981 Carswell NS 47 (S.C.), para 36, Receiver's Brief of Authorities, Tab 4 [*Cameron*]; *Soundair*, para 43.

<sup>38</sup> Third Report, paras 30 - 31.

The Court was not concerned that the receiver continued to negotiate beyond the deadline since, similar to this case, there was only one bidder for the property.<sup>39</sup>

51. No parties were prejudiced by the Receiver continuing negotiations with interested parties after the expiry of the Extended Bid Deadline. The Receiver conducted the SISP in a transparent and open manner and did not mislead any party with respect to the status of the opportunity.

52. The Receiver has had purview over the Property for over fourteen (14) months. Any other prospective bidders for the Property have had ample opportunity to submit offers or proposals in respect of the Property.

53. Accordingly, the Receiver recommends that this Honourable Court approve the Sale Agreement and the Transaction.

**(B) Sealing Order**

54. Section 137(2) of the *Courts of Justice Act* provides as follows with respect to the issuance of a sealing order:<sup>40</sup>

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

55. The Supreme Court of Canada in *Sierra Club of Canada v. Canada (Minister of Finance)* adopted the following test to determine when a sealing order should be made:<sup>41</sup>

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<sup>39</sup> *Business Development Bank of Canada v. Devine Brokers & Appraisal Ltd.*, 2013 NSSC 435, 2013 CarswellNS 1058 para. 33, Receiver's Brief of Authorities, Tab 6.

<sup>40</sup> *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 137(2).

- (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.

56. In the insolvency context, it is standard practice for the Court to seal those portions of a report from a court-appointed officer, including a receiver, filed in support of a motion to approve a sale of assets which disclose, among other things, the purchase price and other commercially sensitive information.<sup>42</sup>

57. The unredacted Third Report, including the unredacted Sale Agreement attached as Confidential Appendix “1”, contains sensitive commercial information, including the purchase price. If the Transaction does not close, the disclosure of the unredacted Third Report would significantly weaken the Receiver’s ability to bargain with other third parties who may later express an interest in purchasing the Property.

58. Disclosure of this type of information in the context of a sale process could be harmful to stakeholders by undermining the integrity of the sale process.<sup>43</sup>

59. The salutary effects of maintaining the confidential nature of the unredacted Third Report until the closing of the Transaction greatly outweigh the deleterious effects.

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<sup>41</sup> *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522, para 53, Receiver’s Brief of Authorities, Tab 7.

<sup>42</sup> *GE Canada Real Estate Financing Business Property Co. v. 1262354 Ontario Inc.*, 2014 ONSC 1173, 2014 CarswellOnt 2113, para 32, Receiver’s Brief of Authorities, Tab 8 [*GE Canada*].

<sup>43</sup> *Re SkyPower Corp.*, 2009 CarswellOnt 9415 (S.C. J. [Commercial List]), para 14, Receiver’s Brief of Authorities, Tab 9; *GE Canada*, paras 33-34.

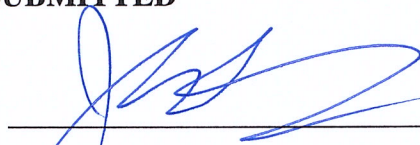
60. It is therefore submitted that this Honourable Court ought to issue the requested sealing order.

**PART V – ORDERS SOUGHT**

61. For the reasons set forth herein and in the Third Report, the Receiver respectfully requests an Order in the form contained in the Receiver's motion record.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

December 4, 2015



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Lawyers for A. Farber & Partners Inc.



**SCHEDULE “A”  
LIST OF AUTHORITIES**

1. *Royal Bank of Canada v. Soundair Corp.*, 1991 CarswellOnt 205, 4 O.R. (3d) 1 (C.A.).
2. *Regal Constellation Hotel Ltd., Re*, 2004 CarswellOnt 2653, 50 C.B.R. (4th) 258 (C.A.).
3. *Skyepharm PLC v. Hyal Pharmaceutical Corp.*, 1999 CarswellOnt 3641, 12 CBR (4th) 87(Ont. S.C.J. [Commercial List]), affirmed (2000), 47 OR 93d) 234 (Ont. C.A.), 1999 CarswellOnt 3641.
4. *Cameron v. Bank of Nova Scotia*, 1981 CarswellNS 47 (S.C.).
5. *National Trust Company v. 1117387 Ontario Inc.*, 2010 ONCA 340, 2010 Carswell Ont 2869.
6. *Business Development Bank of Canada v. Devine Brokers & Appraisal Ltd.*, 2013 NSSC 435, 2013 CarswellNS 1058.
7. *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522.
8. *GE Canada Real Estate Financing Business Property Co. v. 1262354 Ontario Inc.*, 2014 ONSC 1173, 2014 CarswellOnt 2113.
9. *Re SkyPower Corp.*, 2009 CarswellOnt 9415 (S.C. J. [Commercial List]).

**SCHEDULE “B”  
RELEVANT STATUTES**

***Courts of Justice Act, R.S.O. 1990, c. C.43, s. 100.***

100. A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed

***Courts of Justice Act, R.S.O. 1990, c. C.43, s. 137(2).***

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.

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