

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

B E T W E E N:

AM-STAT CORPORATION

Applicant

- and -

6910 HWY7 INC. and 6910 HIGHWAY SEVEN LIMITED PARTNERSHIP

Respondents

FACTUM OF THE COURT-APPOINTED SALES OFFICER, ROSEN GOLDBERG INC.
(Sale Approval Motion returnable October 22, 2020 via zoom video conference at 10:00 am)

October 19, 2020

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FACTUM OF THE COURT-APPOINTED SALES OFFICER, ROSEN GOLDBERG INC.

PART I - OVERVIEW

1. This factum is filed in support of the Court-appointed Sales Officer's motion for, *inter alia*, an Order approving the Juniper APS and vesting the Debtors' right, title and interest in the Property in and to Juniper.

PART II – FACTS

Background

2. The Respondent, 6910 Hwy7 Inc. ("**Hwy7**"), is the registered owner of the property municipally known as 6910 and 6950 Hwy No. 7 East, in Markham (collectively, the "**Property**"), which it holds as a nominee for the benefit of the Respondent, 6910 Highway Seven Limited Partnership (the "**LP**" and together with Hwy7, the "**Debtors**").¹

3. The Property consists of two vacant parcels, which together comprise approximately 20 acres of valuable development land in Markham, Ontario, directly south of the Markham-Stouffville Hospital.²

4. The Applicant, Am-Stat Corporation ("**Am-Stat**"), holds a first-ranking charge over the Property in connection with a loan to the Debtors in the principal amount of \$24,163,000. As a result of the Debtors' failure to make interest payments to Am-Stat beginning on April 1, 2019, Am-Stat applied for Rosen Goldberg Inc.'s appointment as Sales Officer. Rosen Goldberg Inc.

¹ Sales Officer's Fourth Report dated October 15, 2020 ("**Fourth Report**") at para 4, Sales Officer's Motion Record ("**MR**"), Tab 2, p. 24.

² Fourth Report at para 5, MR, Tab 2, p. 24.

(the “**Sales Officer**”) was appointed as Sales Officer over the Property by Order of McEwen J. dated June 4, 2019.³

Initial Marketing and Sale Process

5. Pursuant to a Marketing and Sale Process Approval Order of McEwen J. dated August 27, 2019, the Sales Officer implemented a process to market and sell the Property. The Property was listed for sale with CBRE Limited (“**CBRE**”). The initial listing price was \$75 million.⁴

6. CBRE undertook the following marketing efforts:

- in conjunction with the Sales Officer, created a virtual data room containing due diligence information regarding the Property;
- prepared a promotional video in respect of the Property and nearby developments, amenities, transportation and road networks, featuring drone video footage and 3D animations;
- placed a 12’ by 12’ v-shaped sign on the Property;
- delivered an electronic individual campaign regarding the Property to 1,277 contacts in its database on September 16, 25, October 4, 9 and 16, 2019;
- delivered electronic weekly reports regarding all of its listings, including the Property, to 1,277 contacts in its database on September 17, 24, October 8, 15 and 22, 2019;
- placed a full page ad in the *Nova Res Urbis* (“NRU”) Toronto and GTA newsletter, a membership-only publication for developers, builders, investors, contractors, and other industry representatives, on September 25, 2019;
- placed a full page ad of all of its listings, including the Property, in the NRU Toronto and GTA newsletter on September 13 and 18, 2019;

³ Order of Justice McEwen dated June 4, 2019, **Appendix A**, Fourth Report at para 6, MR, Tab 2A, p. 35.

⁴ Order of Justice McEwen dated August 27, 2019, **Appendix C**, Fourth Report at paras 7-8, MR, Tabs 2 and 2C, pp. 24 and 58.

- advertised the Property on CBRE's website of available listings and on the website of the CBRE team responsible for listing the Property;
- prepared and sent 1,000 brochures regarding the Property to a targeted list of clients; and
- placed colour ads in the *Globe and Mail* on October 1 and 3, 2019.⁵

7. As a result of these efforts, 69 interested parties viewed or clicked on CBRE's electronic individual campaign, many of them on multiple occasions. Fifteen interested parties signed confidentiality agreements and were given access to the data room.⁶

8. As of October 23, 2019, three offers to purchase the Property were received by the Sales Officer, together with one letter of intent.⁷

Prior APS

9. As a result of the marketing and sale process described above, on November 18, 2019, the Sales Officer accepted an offer. Under the agreement of purchase and sale arising from the Sales Officer's acceptance (the "**Prior APS**"), the buyer's due diligence period was due to expire on January 3, 2020.⁸

10. The Prior APS lapsed on January 3, 2020 but was revived on January 13, 2020 and the buyer's due diligence period was extended to January 27, 2020. On January 27, 2020, the buyer

⁵ Fourth Report at para 9, MR, Tab 2, pp. 24-25.

⁶ Fourth Report at para 10, MR, Tab 2, p. 25.

⁷ Fourth Report at para 11, Tab 2, p. 25.

⁸ Redacted Prior APS and Prior APS, **Appendix E and Confidential Appendix 1**, Fourth Report at para 12, MR, Tabs 2, 2E and 2C1, pp. 26, 70 and 141.

notified the Sales Officer that its due diligence conditions had not been satisfied and terminated the APS.⁹

Cost Sharing Obligations

11. In connection with terminating the Prior APS, the buyer expressed concern to CBRE with the quantum of cost sharing obligations associated with the Property.¹⁰

12. The buyer shared an analysis performed by WSP Canada Group Limited (“WSP”), consulting engineers for the local landowners’ group, of the cost sharing obligations associated with the Property under certain costs sharing agreements to which the Property is subject. According to WSP, the cost obligations, including in particular the parkland obligations attributable to the Property, are significant by virtue of the density that a developer of the Property would seek to achieve.¹¹

13. The Sales Officer was considering its options including moving for advice and directions with respect to cost sharing and possibly moving to disclaim some or all of the cost sharing agreements as they affect the Property. In the meantime, although the Property had not been actively remarketed since the onset of the COVID 19 crisis, the Sales Officer had continuing discussions with CBRE regarding the appropriateness of remarketing the Property in the current economic climate.¹²

⁹ Fourth Report at paras 15 and 17-18, MR, Tab 2, pp. 26-27.

¹⁰ Fourth Report at para 19, MR, Tab 2, p. 27.

¹¹ Fourth Report at para 20, MR, Tab 2, p. 27.

¹² Fourth Report at paras 24-25 and 28, MR, Tab 2, pp. 28-30.

Relaunching of Marketing and Sale Process

14. In June of 2020, CBRE advised that, with the loosening of quarantine restrictions, there were signs of liquidity in the marketplace and recommended that marketing efforts be initiated as soon as possible. On June 18, 2020, Conway J. authorized the Sales Officer to re-market the Property for sale.¹³

15. The Property was re-listed for sale with CBRE for \$59 million. The listing price was determined with input from CBRE, having regard for the issue of cost sharing, the offers received during the initial marketing and sale process, and the impact of the pandemic on the market for development properties in the area.¹⁴

16. CBRE conducted a second robust marketing and sale process which included the following activities:

- delivered an electronic individual campaign regarding the Property to 1,470 contacts in its database on June 22, July 6, 20, 27, August 4, 10, 17, 25 and 31, 2020;
- delivered electronic weekly reports regarding all of its listings, including the Property, to 1,470 contacts in its database on June 23, 30, July 7, 14, 21, 28, August 4, 11 and 18, 2020; and
- placed colour ads in the *Globe and Mail* on August 18 and 20, 2020.¹⁵

¹³ Order of Justice Conway dated June 18, 2020, **Appendix H**, Fourth Report at paras 29-30, MR, Tab 2, p. 110.

¹⁴ Fourth Report at para 31, MR, Tab 2, p. 30.

¹⁵ Fourth Report at para 32, MR, Tab 2, pp. 30-31.

17. CBRE continued to maintain a virtual data room, use the promotional video that was previously prepared and advertised the Property on its website and on the website of the CBRE team responsible for listing the Property. The existing signage also remained on the Property.¹⁶

18. With respect to the cost sharing obligations, in view of the ongoing accrual of realty taxes and interest under Am-Stat's first charge, and the uncertainty associated with achieving a reduction in cost sharing, the Sales Officer, in consultation with its professional advisers, determined that the issue of cost sharing would be better left to a buyer.¹⁷

19. As a result of CBRE's efforts, 18 interested parties signed confidentiality agreements and were given access to the data room.¹⁸

20. On September 3, 2020, the Sales Officer received an unconditional offer from Juniper Capital Ltd. ("**Juniper**"). After some negotiation, the Sales Officer accepted Juniper's offer on September 8, 2020 and the parties entered into the agreement of purchase and sale (the "**Juniper APS**").¹⁹

21. Juniper's offer was the only offer received during the subsequent marketing and sale process.²⁰

¹⁶ Fourth Report at para 33, MR, Tab 2, p. 31.

¹⁷ Fourth Report at para 34, MR, Tab 2, p. 31.

¹⁸ Fourth Report at para 35, MR, Tab 2, p. 31.

¹⁹ Juniper APS with financial terms redacted and Juniper APS, **Appendix I and Confidential Appendix 2**, Fourth Report at para 36, MR, Tabs 2I and 2C2, MR, pp. 114 and 171.

²⁰ Summary of all offers, **Confidential Appendix 3**, Fourth Report at para 37, MR, Tab 2C3, p. 198.

22. The Juniper APS is subject to the Court approving the terms thereof and granting an order vesting the Debtors' right, title and interest in the Property in and to Juniper or its permitted assignee upon the closing of the transaction. Closing is to occur ninety days following Court approval.²¹

23. The purchase price payable under the Juniper APS is considerably lower than: (a) the opinions of value the Sales Officer obtained from all of the listing brokers that were invited to submit proposals to list the Property; (b) the appraised value of the Property, according to the independent July 19, 2019 appraisal which the Sales Officer obtained from PPCI; and (c) the most recent listing price of \$59 million. The Sales Officer nonetheless determined that the best course was to accept Juniper's offer and recommends that the Juniper APS be approved for the following reasons:

- the Property was widely exposed to the market in two robust marketing and sale processes by a reputable listing broker;
- the Sales Officer does not believe that the Property will generate a superior offer through continued marketing;
- the ongoing accrual of realty taxes and interest under Am-Stat's first charge, and the cost, time and uncertainty associated with trying to achieve a reduction in cost sharing, weigh in favour of realizing on the Property presently;
- the Juniper APS is not subject to due diligence conditions in favour of Juniper;
- the Sales Officer is holding a significant deposit from Juniper; and
- Am-Stat supports the Juniper Transaction.²²

²¹ Fourth Report at para 39, MR, Tab 2, p. 32.

²² Fourth Report at para 40, MR, Tab 2, p. 32.

PART III - ISSUE

24. The central issue on this motion is whether the Juniper APS should be approved.

PART IV – LAW AND ARGUMENT

25. The test to be applied in deciding whether a receiver has acted properly in the sale of property is set out in *Royal Bank v. Soundair Corp.* The factors to be considered are:

- (a) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;
- (b) the interests of all parties;
- (c) the efficacy and integrity of the process by which offers are obtained; and
- (d) whether there has been unfairness in the working out of the process.²³

26. Courts are reluctant to second-guess the considered business decisions made by a Court-appointed officer in arriving at its recommendations. Only in exceptional circumstances, such as where there seems to be some unfairness in the process or where there are substantially higher offers which would tend to show that the sale was improvident, will a court intervene and proceed contrary to the recommendation of a court-appointed officer.²⁴

27. A Court-appointed officer's conduct is to be reviewed in light of the (objective) information it had and not to with the benefit of hindsight. A Court-appointed officer's duty is

²³ [*Royal Bank of Canada v. Soundair Corp.*](#), 1991 CanLII 2727 (ON CA), at p. 9.

²⁴ [*Royal Bank of Canada v. Soundair Corp.*](#), 1991 CanLII 2727 (ON CA), at p. 9.

not to obtain the best possible price but to do everything reasonably possible in the circumstances with a view to obtaining the best price.²⁵

28. In the present case, each element of the *Soundair* test has been met:

- a) Sufficient Efforts to Obtain Best Price: The Sales Officer indicates that it does not believe further exposure of the Property will generate a superior offer through continued marketing. As noted above, the Property was widely exposed to the market in two robust marketing and sale processes by a reputable listing broker.
- b) The interest of all parties: The Sales Officer has reported to all interested parties throughout the marketing process with respect to its progress and all parties have had an opportunity to participate. It is also important to consider the interests of Juniper, who has invested time and money in the negotiation of the Juniper APS. Finally, it is in the best interest of all parties to finalize the sale of the Property promptly. The ongoing accrual of realty taxes and interest under Am-Stat's first charge, and the cost, time and uncertainty associated with trying to achieve a reduction in cost sharing, weigh in favour of realizing the Property presently.
- c) The efficacy and integrity of the process: There has been no unfairness in the process described in the Fourth Report. Further, there will be no unfairness caused as a result of the approval of the Juniper APS.

PART V - ORDER REQUESTED

29. The Sales Officer respectfully requests that its motion be granted and an Order issued approving the Juniper APS, and, upon completion of the transaction, vesting title to the Property in and to Juniper.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19th day of October, 2020.

²⁵ [*Skypharma PLC v. Hyal Pharmaceutical Cop.*](#), 1999 CanLII 15007 at para 4.

Per: 

David P. Preger, counsel for the
Sales Officer, Rosen Goldberg Inc.

SCHEDULE “A”

LIST OF AUTHORITIES

1. *Royal Bank of Canada v. Soundair Corp.*, 1991 CanLII 2727 (ON CA)
2. *Skyepharma PLC v. Hyal Pharmaceutical Corp.*, 1999 CanLII 15007

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

AM-STAT CORPORATION
Applicant

-and-

6910 HWY7 INC. et al
Respondents

Court File No. CV-19-619158-00CL

ONTARIO
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PROCEEDING COMMENCED AT TORONTO

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