Court File No.: CV-15-11146-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

BANK OF MONTREAL

Applicant

- and -

THANE INTERNATIONAL, INC., THANE DIRECT, INC., THANE DIRECT COMPANY, THANE DIRECT MARKETING INC. WEST COAST DIRECT MARKETING, INC., THANE DIRECT CANADA INC. AND TDG, INC.

Respondents

Application under Section 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended, and under Section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C-43

FACTUM OF THE APPLICANT
(Returnable October 23, 2015)

October 21, 2015

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FACTUM OF THE APPLICANT

PART I –OVERVIEW

1. This is an application by Bank of Montreal ("**BMO**") in its capacity as agent ("**Agent**") to the Lenders (defined below) for Orders:

(a) appointing Richter Advisory Group Inc. ("**Richter**") as receiver ("**Receiver**") of the assets, undertakings and properties (the "**Business**") of the (the "**Respondents**") pursuant to s. 243 of the *Bankruptcy and Insolvency Act*[1] and s. 101 of the *Courts of Justice Act*[2];

1 *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended [**BIA**]
2 *Courts of Justice Act*, R.S.O. 1990, c. C-43

(b) appointing the Receiver as representative of the Debtors (defined below) for the purposes of seeking recognition of orders made in this Application from a court of competent jurisdiction exercising jurisdiction under the U.S. Bankruptcy Code in the District of Delaware;

(c) authorizing the Receiver to make assignments in bankruptcy for the Respondents;

(d) approving the sale transaction (the "**Proposed Transaction**") contemplated by an offer to purchase (the "**Sale Agreement**") made to the Receiver by 9472541 Canada Inc. ("**New Thane Holdco**"), 9472550 Canada Inc., 635427, Inc. and 652134 Limited as purchasers (together, the "**New Thane Purchasers**") dated October 16, 2015;

(e) authorizing and directing the Receiver to enter into the Sale Agreement and providing for the vesting in the New Thane Purchasers the right, title and interest in and to the assets of the Respondents to be sold pursuant to, and as described in the Sale Agreement (the "**Assets**");

(f) authorizing and directing the distribution to the Lenders (defined below) of the cash purchase price for the Assets as part of the closing of the Transaction;

(g) sealing certain confidential information in a report to be filed by Richter and in the Affidavit of Paul Findlay sworn October 16, 2015 (the "**Findlay Affidavit**"); and

(h) for such further relief as may be required in the circumstances this Honourable Court deems just and equitable.

2. The Proposed Transaction, known as a quick flip or pre-packed transaction, involves the appointment of the Receiver for the immediate consummation of the Proposed Transaction. Although quick flip transactions are subject to heightened scrutiny from the court, in these circumstances granting the orders sought is demonstrably just and reasonable.

3. The appointment of the Receiver is just and convenient due to the contractual rights of the Lenders under the security agreement, the extended insolvency of the Thane Group and the necessity of a court appointed Receiver so that assets of these insolvent companies held in the United States may be dealt with.

4. The Proposed Transaction is fair and reasonable. The Proposed Transaction:

(a) was arrived at after a thorough sales process failed to obtain any acceptable offers,

(b) is for purchase price consideration that exceeds the value of the Assets, either on an enterprise basis or a liquidation basis,

(c) is consented to by the Lenders,

(d) is recommended by the Proposed Receiver, and

(e) provides the best available outcome for the stakeholders of the Thane Group.

PART II – FACTS

The Parties

The Lenders

5. The applicant, Bank of Montreal ("**BMO**") is agent for a syndicate of lenders composed of BMO, National Bank of Canada and HSBC Bank Canada (collectively, the "**Lenders**").

The Thane Group

6. Thane Direct Company ("**Thane Canada**") and Thane Direct, Inc. ("**TDI**" or "**Thane U.S.**"), Thane Direct Marketing, Inc. ("**TDMI**"), Thane International, Inc., West Coast Direct Marketing Inc. ("**West Coast**"), TDG, Inc., and Thane Direct Canada Inc. ("**TDCI**"), along with

other affiliated entities (the "**Thane Group**") operate a business (the "**Thane Business**") developing, marketing and selling products with a relatively short economic lifespan – examples include the X-5 Steam Mop and Abtronic exercise product.[3]

7. The Thane Group has a somewhat complex corporate structure which is described in detail in the Affidavit of Paul Findlay. Below is a summary of the critical Thane Group companies and their jurisdictions of incorporation and head office locations:[4]

Thane Group Company	**Jurisdiction of Incorporation**	**Head Office Location**
Thane International, Inc.*	Delaware	El Segundo, California
Thane Direct, Inc.*	Delaware	Toronto
Thane Direct Company*	Nova Scotia (ULC)	Toronto
Thane Direct Marketing Inc.*	Ontario	Toronto
West Coast Direct Marketing, Inc.*	California	Canton, Ohio
TDG, Inc.*	Delaware	Canton, Ohio
Thane Direct Canada Inc.*	Ontario	Toronto
Thane Direct U.K. Ltd.	England	London
TVNS Scandinavia AB	Sweden	Malmo, Sweden
Grupo Mejor Compra SAPI de CV	Mexico	Mexico City
Danoz Direct Pty. Ltd.	Australia	Sydney

8. Thane has significant assets in both Canada and the United States. However, the head office for the Thane Group is located in Mississauga, Ontario and the mind and management of the Thane Business reside in Canada.[5]

3 Affidavit of Paul Findlay, sworn October 16, 2015 at paras 9-13 [**Findlay Affidavit**]
4 *Ibid* at para 20.
5 *Ibid* at para 8.

9. At an operational level, the executives of the Thane Business maintain their presence in the head office of the business and the critical members of the Thane Group, including Thane Direct, Inc. and Thane Direct Company, carry on their businesses from the Mississauga location. Further, the Credit Facilities provided by the Lenders to the Thane Group were negotiated and are administered by the Lenders in Toronto.[6]

10. Aside from the agreements with the Lenders, the Thane Group has very limited indebtedness to finance companies and ordinary course obligations to its non-unionized employees, government authorities, and suppliers.[7]

11. The Thane Group is current on all required payments in respect of employee wages, vacation pay and benefits that are material; all amounts that are required to be remitted to governmental authorities, either by way of source deductions, commodity tax or otherwise; and, is paying suppliers in the ordinary course, in accordance with past practice.[8]

The Proposed Receiver

12. Richter was previously retained by the Thane Group to act as a financial advisor to assist in providing strategic advice on the Proposed Transaction and reviewing the SISP (defined below).[9]

13. Richter is licensed as a trustee in bankruptcy in Canada and has consented to act as Receiver in these proceedings.[10]

The Purchasers

14. The New Thane Purchasers are companies incorporated in Canada, Delaware and the United Kingdom to acquire the Assets.[11]

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6 *Ibid* at paras 20, 55.
7 *Ibid* at para 25.
8 *Ibid* at para 25.
9 Report of the Proposed Receiver dated October 19, 2015 at para 2 [**Report**]
10 Report at para 3

Lenders' Credit Agreement and Security

15. On September 28, 2012, the Lenders, and BMO in its capacity as their agent, entered into a credit agreement (as amended, the "**Credit Agreement**") with Thane Canada and Thane U.S. (together the "**Borrowers**"). The current total amount of the indebtedness under the Credit Agreement is in excess of $96.7 million plus interests and costs (the "**Indebtedness**").[12]

16. Direct Marketing Holdings, Inc., Thane International, Inc., West Coast, TDG, Inc., TDCI and Thane Dutch Holdings Cooperatief E.A., are guarantors of the Indebtedness under the Credit Agreement (the "**Guarantors**" and together with the Borrowers, the "**Debtors**").

17. The Indebtedness is secured by, *inter alia*:

(a) security agreements or general security agreements (the "**Security**") from West Coast, TDG, Inc., TDI, Thane International, Inc., Thane Canada, TDMI, TDCI and Direct Marketing Holdings (individually a Securing Party and together the "**Securing Parties**"); and

(b) share pledges from the relevant Thane Group parent companies of the shares of Thane Netherlands, Thane U.K., as to 65% of the issued shares, Thane Canada and Thane Mexico (as to the 80% of the issued shares of Thane Mexico owned by TDI).[13]

18. The security interests created by the security were registered as required in the applicable registration systems for the relevant jurisdictions and perfected as against the collateral to which the said security interests apply. Richter has received independent legal opinions from:

(a) Borden Ladner Gervais LLP in Canada;

(b) Goulton & Storrs P.C. in respect of Delaware and New York; and

(c) Jackson DeMarco Tidus and Peckenpaugh P.C. in respect of California,

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11 Findlay Affidavit at para 44.
12 *Ibid*, at Exhibit "C" [**Credit Agreement**]
13 *Ibid*, at para 22 and Exhibit "D" [**Security**]

confirming the validity and enforceability of the Security in their various jurisdictions.[14]

Financial Difficulties and Default

19. The Thane Group experienced significant financial success from approximately 2010-2014 due to the popularity of products such as the X-5 Steam Mop and the Abtronic exercise product. Due to this success a dividend recapitalization initiative was undertaken. In September of 2012 the shareholders were paid approximately $70 million under this dividend initiative. This payment on account of equity had the effect of increasing the senior secured indebtedness owed to the Lenders to more than US$100 million in the aggregate.[15]

20. As a result of the limited economic lifespan of the products sold by the Thane Group, sales from the peak period were not sustainable. In the period from April 1, 2013 to March 31, 2014, earnings fell from approximately $41 million in the prior period to $16 million.[16]

21. In the Fall of 2013, the Borrowers notified the Lenders that they would be in breach of certain covenants under the Credit Agreement.[17]

22. On or about October 31, 2013 the Borrowers failed to make a required installment payment under the Credit Agreement. This failure constitutes a default under the Credit Agreement.[18]

23. Since November 12, 2013, the Agent, the Lenders and the Thane Group have entered into various forbearance arrangements and the Thane Group credit facilities have been subject to such forbearance arrangements. After two years of forbearance the Thane Group remains insolvent.[19]

The SISP

24. As a term of the forbearance arrangements put in place, the Thane Group undertook a sale and investor process ("**SISP**").[20]

14 Report at para 88.
15 Findlay Affidavit at paras 28, 29.
16 *Ibid* at para 30.
17 *Ibid* at para 30.
18 *Ibid* at para 30.
19 *Ibid* at paras 31-34.

25. SSG Capital Advisors ("**SSG**"), an independent professional investment advisor, canvassed the market for sale and/or refinancing options as part of the SISP in consultation with Ernst & Young Inc. (the Lenders' financial advisor) and the Lenders. Parties who entered into non-disclosure agreements ("**NDAs**") were then provided with a Confidential Information Memorandum ("**CIM**") describing the details of the Thane Business.[21]

26. SSG identified 180 potential buyers, of which 71 were strategic buyers, 20 were direct competitors and 89 were financial buyers. The 180 potential buyers were contacted by SSG beginning July 2014, and were solicited to sign NDAs. A total of 48 parties executed NDAs, 10 being strategic buyers, 3 being direct competitors and 35 being financial buyers. Each potential buyer that signed this NDA was sent a copy of the CIM that provided an overview of the acquisition opportunity.[22]

27. The SISP resulted in six letters of intent, all of which were expressed to be non-binding and valued the Thane Business at significantly less than the Indebtedness.[23]

28. The value of the Thane Group, which was based on a trailing 12-month calculation of EBITDA, continued to decline over the period of the SISP. Due to the declining value of Thane, the absence of any bids with value greater than the Indebtedness and in the face of the closing risks associated with the various bids, the Agent and Lenders entered into discussions with Amir Tukulj and Russel Orelowitz on behalf of themselves and other members of the senior management of the Thane Group (the "**Management Shareholders**") for the sale and purchase of the Thane Business.[24]

29. Ultimately, the Agent and Lenders and the Management Shareholders reached an agreement in principle for the sale and purchase of the Thane Business.[25]

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20 *Ibid* at para 35.
21 *Ibid* at para 35.
22 Report at para 61-62.
23 Findlay Affidavit at paras 38-40.
24 *Ibid* at para 41.
25 *Ibid* at para 42.

The Proposed Transaction

30. The New Thane Purchasers have offered to purchase the Thane Business for a purchase price of approximately US$50 million, together with the assumption of most of the existing contractual and trade creditor liabilities of the Thane Group and the payment of certain transaction costs.[26] The New Thane Group also intends to assume any outstanding liabilities for continuing employees.

31. The Purchase of the Thane Business will be effected through the purchase of both shares and assets held by the Respondents. Details of the assets being purchased are set out in the Findlay Affidavit at paragraphs 45-46.

32. Those companies in the Thane Group whose shares and assets are not sold will be wound down following the completion of the Proposed Transaction.

33. The Proposed Transaction and the Sale Agreement with the New Thane Purchasers are conditional upon obtaining this Court's approval of the Transaction and ancillary relief from the U.S. Bankruptcy Court exercising its powers of recognition under Chapter 15 of the U.S. Bankruptcy Code with regard to property owned by those Respondents incorporated in and resident in the U.S.

34. The ultimate parent of the New Thane Purchasers is New Thane Holdco, whose shares will be owned, on terms agreed to in a shareholders agreement, in the following manner:

(a) by BMO and National Bank of Canada, through an intermediary holding company, as to a minority interest; and

(b) The Management Shareholders as to a majority interest.

35. Under the Sale Agreement, the purchase price for the Transaction is to be funded by way of financing to be provided to New Thane Holdco by the Lenders, and the cash proceeds of the

26 New Thane Co will not be assuming liability for outstanding lawsuits or for liabilities associated with contracts specifically excluded from the transaction under the terms of the Sale Agreement.

transaction are to be immediately distributed by the Receiver and applied in reduction of the existing indebtedness owed by Thane Canada and Thane U.S. to the Lenders.

36. The Indebtedness significantly exceeds the recovery under the Proposed Transaction and it is intended that this distribution be achieved by way of directions to be given on closing, which will have the effect of making the purchase a form of partial credit bid, as a practical matter.

Confidential Information

37. The Confidential Information consists of:

(a) The unredacted version of the Affidavit of Paul Findlay; and

(b) The unredacted version of the report filed by Richter in relation to the Application.

38. The Confidential Information contains sensitive commercial information concerning the valuation of the Thane Business.

39. Public disclosure of this information could negatively affect the Receiver's ability to maximize realizations on the Thane Business and severely prejudice the interests of the creditors of the Thane Group, should the Proposed Transaction not close.

PART III – ISSUES, LAW AND ARGUEMENT

ISSUES:

40. This application raises the following issues:

(a) Should Richter be appointed as Receiver?

(b) Should Richter be recognized as a foreign representative?

(c) Should the Appointment Order authorize the Receiver to make assignments in Bankruptcy?

(d) Should the Proposed Transaction contemplated in the Sale Agreement be approved and the Receiver be authorized to execute the Sale Agreement and implement the Proposed Transaction?

(e) Should the Confidential Appendices be sealed?

OVERVIEW

41. The order sought, authorizing and directing the receiver to enter into a transaction immediately upon being appointed, is referred to as a "quick flip" or "pre-packed" transaction. In *Montrose Mortgage Corporation v. Kingsway Arms Ottawa ("**Montrose**").*

> "Quick flip" or "pre-pack" transactions are becoming more common in the Ontario distress marketplace. In certain circumstances, a "quick flip" involving the appointment of a receiver and then immediately seeking court approval of a "pre-packaged" sale transaction may well represent the best, or only, commercial alternative to a liquidation. In such situations the court still will assess the need for a receiver and the reasonableness of the proposed sale against the standard criteria set out in decisions such as *Bank of Nova Scotia v. Freure Village on Clair Creek* and *Royal Bank v. Soundair Corp.*, respectively. However, courts will scrutinize with especial care the adequacy and the fairness of the sales and marketing process in "quick flip" transactions:
>
> > Part of the duty of a receiver is to place before the court sufficient evidence to enable the court to understand the implications for all parties of any proposed sale and, in the case of a sale to a related party, the overall fairness of the proposed related-party transaction. As stated by Morawetz J. in the *Tool-Plas* case:
> >
> > > [T]he Court should consider the impact on various parties and assess whether their respective positions and the proposed treatment that they will receive in the quick flip transaction would realistically be any different if an extended sales process were followed.[27]

27 *Montrose Mortgage Corporation v. Kingsway Arms Ottawa*, 2013 ONSC 6905 at para 10.

42. BMO submits that the evidence before the court satisfies the above test and that it is just and appropriate in these circumstances that this Honourable Court grant the orders sought.

A. RICHTER SHOULD BE APPOINTED AS RECEIVER

43. In *Bank of Nova Scotia v. Freure Village on Clair Creek*[28], the court reviewed the factors to be taken into account in considering a request to appoint a receiver:

> The Court has the power to appoint a receiver or receiver and manager where it is "just or convenient" to do so: the *Courts of Justice Act*, R.S.O. 1990, c. 43, s. 101. In deciding whether or not to do so, it must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered but so, in such circumstances, is the question of whether or not an appointment by the Court is necessary to enable the receiver-manager to carry out its work and duties more efficiently…It is not essential that the moving party, a secured creditor, establish that it will suffer irreparable harm if a receiver-manager is not appointed…
>
> While I accept the general notion that the appointment of a receiver is an extraordinary remedy, it seems to me that where the security instrument permits the appointment of a private receiver - and even contemplates, as this one does, the secured creditor seeking a court appointed receiver - and where the circumstances of default justify the appointment of a private receiver, the "extraordinary" nature of the remedy sought is less essential to the inquiry. Rather, the "just or convenient" question becomes one of the Court determining, in the exercise of its discretion, whether it is more in the interests of all concerned to have the receiver appointed by the Court or not. This, of course, involves an examination of all the circumstances which I have outlined earlier in this endorsement, including the potential costs, the relationship between the debtor and the creditors, the likelihood of maximizing the return on and preserving the subject property and the best way of facilitating the work and duties of the receiver-manager.[29]

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28 *Bank of Nova Scotia v Freure Village on Clair Creek*, [1996] OJ No. 5088, 1996 CarswellOnt 2328 (OCJ – Gen. Div [Commercial List])
29 *Ibid* at paras 11, 13.

44. In this instance the relevant facts are as follows:

(a) The Lenders are entitled to appoint a receiver over the Assets that make up the Thane Business under the terms of the Security which has been entered into by the Securing Parties and is valid and enforceable on its terms.

(b) The Borrowers defaulted on their obligations to the Lenders in the fall of 2013 and have remained in default, subject to certain forbearance arrangements, for two years.

(c) There are assets of the Thane Business in both Canada and the United States which will be affected by the Proposed Transaction.

(d) it is a condition of the successful completion of the Proposed Transaction that court approval be obtained in both Canada and the United States to deal with the Thane Business.

45. Accordingly, in these circumstances it is just and reasonable that Richter be appointed as Receiver.

B. THE RECEIVER SHOULD BE AUTHORIZED TO MAKE ASSIGNMENTS IN BANKRUPTCY

46. The Proposed Transaction includes the purchase of various assets and shares of the Thane Group, however there will be some members of the Thane Group with minimal assets that are not being acquired. As well, the Respondent companies will have minimal assets if the Proposed Transaction is approved and implemented. It is the intention of the Lenders as well as the parties of the Proposed Transaction that these companies be wound up following the completion of the Proposed Transaction, if approved.

47. Since these Thane Group companies not being transferred will be shells after the Proposed Transaction but will carry approximately $50 million of secured debt, it is important in the circumstances that the Receiver be empowered to assign these companies into bankruptcy.

This will allow any remaining claims (of which there will be few apart from those of the Lenders) to be dealt with within the statutory scheme set out in the *BIA*.

C. RICHTER SHOULD BE RECOGNIZED AS A FOREIGN REPRESENTATIVE

48. BMO seeks a declaration and order that the Receiver be appointed as a foreign representative for the purpose of seeking recognition of the orders of this Honourable Court by the United States Bankruptcy Court in the District of Delaware.

49. Under the UNCITRAL Model Law for International Insolvencies, which has been adopted by Canada in Part XIII in the *BIA*, and by the United States in Chapter 15 of the United States Bankruptcy Code a "foreign representative" means a person or body, including one appointed on an interim basis, who is authorized, in a foreign proceeding in respect of a debtor, to:

> (a) administer the debtor's property or affairs for the purpose of reorganization or liquidation; or
>
> (b) act as a representative in respect of the foreign proceeding.

50. Receivers have been recognized as appropriate foreign representatives by this Court on occasions.[30]

51. This proceeding is appropriately commenced in Toronto as the management of the Thane Group resides in Canada, and Thane is operationally managed from its head office located in Mississauga, Ontario. Furthermore, The Lenders are Canadian institutions and the Credit Agreement was negotiated in Toronto and is governed by the laws of Ontario.

52. As noted above, a receiver is necessary in these proceedings, *inter alia*, because the Thane Group owns U.S. assets which form a significant portion of the Thane Business. The Receiver, if appointed, intends to deal with these assets in the Proposed Transaction, if approved and it is a condition precedent of the Proposed Transaction that the orders of this court be recognized and approved by a court of competent jurisdiction in the United States.

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30 *Re Bilrite Rubber (1984) Inc.*, 2009 CarswellOnt 9475 (SCJ [Commercial List]).

53. Accordingly, BMO submits that it is appropriate that this Court order and declare that the Receiver is a foreign representative for the purpose of having the orders of this Honourable Court recognized in the United States.

D. THE SALE AGREEMENT SHOULD BE APPROVED

Test for Approval of a Sale

54. In *Royal Bank of Canada v. Soundair Corp.*[31], the Ontario Court of Appeal summarized the factors to be considered by the Court in approving an asset sale outside the ordinary course of business in an insolvency proceeding (collectively, the "**Soundair Principles**"):

(a) whether sufficient effort has been made to obtain the best price and the applicant has not acted improvidently;

(b) the interests of all parties;

(c) the efficacy and integrity of the process by which offers were obtained; and

(d) whether there has been unfairness in the process.[32]

55. Absent a violation of the *Soundair* principles, the Court should place particular weight on the court appointed officer's recommendation for the Proposed Transaction.[33]

Process was Reasonable in the Circumstances

56. BMO submits that the proposed transaction satisfies the Soundair Principles because:

(a) The SISP was a thorough and fair process to obtain bids;

(b) No offers received under the SISP would be sufficient to pay the Lenders' Indebtedness;

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31 *Royal Bank of Canada v. Soundair Corp.* [1991] O.J. No. 1137 (C.A.)
32 *Ibid* at para 16.
33 *Re Eddie Bauer of Canada Inc*., [2009] O.J. No. 3784 at para. 22 (S.C.J. [Commercial List]).

(c) Valuation evidence indicates that the value of the Thane Business, even on an enterprise basis, is significantly less than the Purchase Price under the Proposed Transaction;

(d) The Proposed Transaction will permit the Thane Business to continue and its suppliers and employees to have the benefit of continuing contracts and jobs; and

(e) Unsecured creditors will benefit from the Proposed Transaction as the bulk of unsecured claims against the Thane Group will be assumed by the New Than Group

57. Prior to entering into the Proposed Transaction, SSG conducted the SISP in a fair, reasonable and thorough manner to ensure the fairness and efficacy of the process and that the final sale would represent the best price for the assets. The Proposed Transaction was only entered into after it became clear that no better result could be achieved through the SISP.

58. In *Montrose*[34] this Honourable Court noted that:

> The application materials described in detail the efforts Jenson undertook to market the properties, which included advertisements, direct contact with potential purchasers, the preparation of a confidential information memorandum and granting access to data to those who made serious expressions of interest. Few offers resulted. Most offers, if accepted, would have resulted in a significant shortfall on the debt.[35]

59. Ultimately, due to the lack of commercially reasonable bids, the senior secured creditor of Montrose credit bid for the assets of the debtor. On the basis of the evidence set out above the Court ultimately held:

> The record revealed a professional and prolonged effort to elicit interest in the properties from third party purchasers, but it appeared that market conditions were such that interest could not be generated at a level which would cover the senior secured indebtedness. As to the reasonableness of the credit bid, the appraisals provided the independent evidence necessary to

34 *Montrose Mortgage Corp. V Kingsway Arms Ottawa Inc.*, 2013 ONSC 6905.
35 *Ibid* at para 7.

> conclude that the proposed sale price was reasonable in the circumstances. Finally, the proposed sale agreement gave proper treatment to claims in priority to that enjoyed by Montrose.
>
> Given those circumstances, I concluded that it was just and convenient to appoint GTL as receiver of the Debtors and to approve the proposed sale.[36]

60. The facts before the Court in this instance are remarkably similar.

61. The SISP canvassed a broad range of potential bidders and provided them all with a fair and equal opportunity to participate and bid on the Assets. This included the preparation of teasers, direct contact with potential purchasers, and the provision of the CIM for those parties who signed NDAs and the preparation of a data room.

62. None of the letters of intent received in the SISP offered a purchase price that was close to the value of the Indebtedness to the Lenders.

63. The Lenders, Proposed Receiver, and SSG are all confident that the SISP effectively tested the market and that the Proposed Transaction represents the highest and best offer for the Thane Business.

Proposed Transaction is reasonable in the circumstances

64. As noted above, the Proposed Transaction is the result of a thorough and fair process and provides for the best result for stakeholders of the Thane Group.

65. Neither a liquidation nor any alternative going concern sale of the Thane Business would come close to providing value sufficient to retire the Lenders' properly perfected senior secured loans and a liquidation would be likely to significantly increase the Lenders' losses on their existing senior secured debt. Indeed, appraisals of the value of the Thane Group, even on an enterprise valuation, are significantly lower than the Purchase Price under the Proposed Transaction.

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36 *Ibid* at paras 11- 12.

66. Under the Proposed Transaction, any obligations and liabilities to continuing employees and in respect of other claims by governmental authorities in relation to continuing employees which are not fulfilled at the time of closing shall be assumed by the New Thane Purchasers.

67. By permitting a seamless transition of the business to new ownership and what amounts to a consensual compromise of the Indebtedness owed to the Lenders, the Transaction will cause minimum disruption to the business if approved.

68. For these reasons BMO submits that the *Soundair* Principles militate in favour of this Court approving the Sale Agreement and the Proposed Transaction and authorizing and directing the Receiver to execute the Sale Agreement and perform the terms of the Proposed Transaction.

E. THE SEALING ORDER SHOULD BE GRANTED

69. BMO seeks an order that the unredacted affidavit of Paul Findlay of as well as the unredacted report of Richter containing valuation information about the Thane Group be sealed until the Receiver's Certificate is filed upon the closing of Proposed Transaction under the Sale Agreement, or upon further order of the Court.

70. Subsection 137(2) of the *Courts of Justice Act*[37] provides this Court with the statutory jurisdiction to order that any document filed in a civil proceeding, be treated as confidential, sealed and not form part of the public record.

71. In *Sierra Club of Canada v. Canada (Minister of Finance)*[38], a decision of the Supreme Court of Canada interpreting the sealing provisions of the Federal Court Rules, Iacobucci J. adopted the following test to determine when a sealing order should be made:

> A confidentiality order under Rule 151 should only be granted when:

37 *Courts of Justice Act*, RSO 1990, c. C-34.
38 *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41

> (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.[39]

72. 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 the 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.[40]

73. 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.*[41], 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.[42]

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39 *Ibid* at para 53.
40 *Ibid* at paras 54-57.
41 *Ron Handelman Investments Ltd. v Mass Properties Inc.* (2009), 55 CBR (5th) 271, 2009 CarswellOnt 4257 (Ont SCJ [Commercial List]).
42 *Ibid* at para 26.

74. The Confidential Information includes the value of the Assets. Protecting the valuation information, the disclosure of which will cause harm to the creditors of the Thane Group and to the Sale Process, itself, is an important commercial interest that should be protected. There is no other reasonable alternative to sealing that will prevent the Confidential Information from becoming public. BMO respectfully submits that the principles in Sierra Club have been satisfied.

75. Accordingly, BMO respectfully requests that the Court grant an Order sealing the unredacted affidavit of Paul Findlay and the Confidential Appendices until Closing or further Order of the Court.

PART IV – RELIEF REQUESTED

76. The Receiver respectfully requests that this Honourable Court grant the Appointment Order substantially in the form of the draft Order attached as Schedule "A" to the Notice of Application, and the Approval, Vesting and Distribution Order in the form of the draft Order attached as Schedule "B" to the Notice of Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of October, 2015.

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SCHEDULE "A"

LIST OF AUTHORITIES

1. *Montrose Mortgage Corp. V Kingsway Arms Ottawa Inc.,* 2013 ONSC 6905.

2. *Bank of Nova Scotia v Freure Village on Clair Creek,* [1996] OJ No. 5088, 1996 CarswellOnt 2328 (OCJ – Gen. Div [Commercial List])

3. *Re Bilrite Rubber (1984) Inc.,* 2009 CarswellOnt 9475 (SCJ [Commercial List])

4. *Royal Bank of Canada v. Soundair Corp.,* [1991] O.J. No. 1137 (C.A.)

5. *Re Eddie Bauer of Canada Inc.,* [2009] O.J. No. 3784 (SCJ [Commercial List])

6. *Sierra Club of Canada v Canada (Minister of Finance),* 2002 SCC 41

7. *Ron Handelman Investments Ltd. v Mass Properties Inc.* (2009), 55 CBR (5th) 271 (Ont SCJ [Commercial List])

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

Bankruptcy and Insolvency Act, RSC 1985, c B-3

Court may appoint receiver

243. (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

(a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

(b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or

(c) take any other action that the court considers advisable.

Courts of Justice Act, RSO 1990, c C-43.

Injunctions and receivers

101. (1) In the Superior Court of Justice, an interlocutory or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

137.

Sealing documents

(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.

United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency with Guide to Enactment

Article 2. Definitions

...

(d) "Foreign representative" means a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding;

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B E T W E E N:

BANK OF MONTREAL - and - **THANE INTERNATIONAL, INC., THANE DIRECT, INC., THANE DIRECT COMPANY, THANE DIRECT MARKETING INC., WEST COAST DIRECT MARKETING, INC., THANE DIRECT CANADA INC. AND TDG, INC.**

Applicant Respondents

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

(PROCEEDING COMMENCED AT TORONTO)

FACTUM OF THE APPLICANT
(Returnable October 23, 2015)

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