Court File No. CV-17-11779-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

BETWEEN:

ONTARIO SECURITIES COMMISSION

Applicant

- and -

CRYSTAL WEALTH MANAGEMENT SYSTEM LIMITED, CLAYTON SMITH, CLJ EVEREST LTD., 1150752 ONTARIO LIMITED, CRYSTAL WEALTH MEDIA STRATEGY, CRYSTAL WEALTH MORTGAGE STRATEGY, CRYSTAL ENLIGHTENED RESOURCE & PRECIOUS METALS FUND, CRYSTAL WEALTH MEDICAL STRATEGY, CRYSTAL WEALTH ENLIGHTENED FACTORING STRATEGY, ACM GROWTH FUND, ACM INCOME FUND, CRYSTAL WEALTH HIGH YIELD MORTGAGE STRATEGY, CRYSTAL ENLIGHTENED BULLION FUND, ABSOLUTE SUSTAINABLE DIVIDEND FUND, ABSOLUTE SUSTAINABLE PROPERTY FUND, CRYSTAL WEALTH ENLIGHTENED HEDGE FUND, CRYSTAL WEALTH INFRASTRUCTURE STRATEGY, CRYSTAL WEALTH CONSCIOUS CAPITAL STRATEGY, CRYSTAL WEALTH RETIREMENT ONE FUND and CHRYSALIS YOGA INC.

Respondents

APPLICATION UNDER SECTION 129 OF THE SECURITIES ACT
R.S.O. 1990, c. S.5, AS AMENDED

FACTUM OF THE RECEIVER
(Motion Returnable May 14, 2018)

Date: May 3, 2018

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TO: ATTACHED SERVICE LIST

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APPLICATION UNDER SECTION 129 OF THE SECURITIES ACT R.S.O. 1990, c. S.5, AS AMENDED

FACTUM OF THE RECEIVER

PART I – OVERVIEW AND THE FACTS

1. On April 26, 2017, this Court granted an order (the "**Appointment Order**") appointing Grant Thornton Limited as the receiver and manager (in such capacity, the "**Receiver**") of: (i) each of the Respondents except the Respondent, Chrysalis Yoga Inc. ("**Chrysalis Yoga**") (the Respondents except for Chrysalis Yoga being collectively referred to as the "**Crystal Wealth Group**"); and (ii) Receiver of the account of Chrysalis Yoga, No. 87296 00518 10 at Bank of Nova Scotia (the "**Chrysalis Account**").[1]

[1] Third Report of the Receiver dated May 3, 2018 (the "**Third Report**").

2. The Receiver was appointed as the Receiver of the Crystal Wealth Group on application of the Ontario Securities Commission under s. 129 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "**Securities Act**"), based in part on the Commission's concerns regarding potential breaches of the Securities Act by Crystal Wealth Management System Limited (the "**Company**") and its directing mind, Clayton Smith ("**Smith**").[2]

3. Paragraph 6(k)(iii) of the Appointment Order authorized the Receiver to sell, convey, transfer, lease or assign the Property of the Respondent, CLJ Everest, in which the consideration for the transaction exceeds $250,000, but only with approval of the Court.

4. CLJ Everest is the registered owner of the property municipally known at 5043 Mount Nemo Crescent in Burlington, Ontario (the "**Mount Nemo Property**"). Pursuant to a further Order of the Honourable Mr. Justice Newbould issued on April 26, 2017 (the "**Vesting Order**"), the Receiver was authorized to complete, on behalf of CLJ Everest, the sale transaction of the Mount Nemo Property to a purchaser named Martin McCready ("**McCready**") pursuant to and in accordance with an agreement of purchase and sale dated April 12, 2017 (the "**Initial Mount Nemo APS**"). McCready failed to complete the Initial Mount Nemo APS transaction, and the Receiver reserved its rights to claim damages from McCready as a result of his failure to complete the sale transaction.[3] To date, McCready has failed to respond to any of the Receiver's correspondence.

5. As is outlined in the Receiver's Third Report, after undertaking a thorough sales and marketing process with respect to the Mount Nemo Property, the Receiver has entered into an agreement of purchase and sale dated April 11, 2018 and an amendment thereto dated April 17,

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[2] First Report of the Receiver dated June 22, 2017, ("**First Report**"), paras. 5-6.
[3] Third Report, para. 3.

2018 with Daniel Palmer ("**Palmer**"), as purchaser (the "**Palmer APS**"), to sell the Mount Nemo Property to Palmer free and clear of any liens, claims, and encumbrances (the "**Transaction**").[4]

6. The Transaction is subject to approval by this Court pursuant to the terms of the Appointment Order and the Palmer APS. Accordingly, the Receiver now brings this motion, seeking, amongst other relief:

(a) an Order approving the Palmer APS, authorizing the transaction contemplated thereby, and vesting in Palmer the right, title and interest in the property which is the subject of the Palmer APS; and

(b) an order sealing the confidential appendices to the Third Report (the "**Confidential Appendices**") until the completion of the Transaction, given that they contain commercially-sensitive information relating to pricing, the public release of which would prejudice the Crystal Wealth Group's stakeholders if the Transaction does not close.

7. The Receiver further requests that this Court issue two Vesting Orders in connection with the Receiver's sale of the Geodata Participation and SSI Participation to Xynergy Medical Capital LLC ("**Xynergy**"), as purchaser, pursuant to the Geodata Sale Agreement and SSI Bill of Sale (the "**Xynergy Transactions**") (as such capitalised terms are defined in the Third Report). The Geodata Participation and SSI Participation are assets of the Crystal Wealth Medical Strategy (the "**Medical Fund**"), and the Receiver was authorized to sell such assets without further order of the Court pursuant to paragraph 6(k)(iii) of the Appointment Order.

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[4] Third Report, para. 40.

8. The Receiver nevertheless agreed as a term of the Geodata Sale Agreement and SSI Bill of Sale to obtain a Vesting Order from the Court, as permitted by paragraph 6(l) of the Appointment Order.[5]

PART II – THE ISSUES

9. The issues to be considered by this Honourable Court are:

(a) whether the Court should approve the Palmer APS and the Transaction contemplated thereby, and vest the property which is the subject of the Palmer APS in Palmer subject to the terms of the Palmer APS and the draft Approval and Vesting Order sought by the Receiver, as appended in draft at Tab A2 to the Receiver's Notice of Motion dated May 3, 2018;

(b) whether the Court should seal the Confidential Appendices to the Third Report until the completion of the Transaction; and

(c) whether the Vesting Orders requested with respect to the Xynergy Transactions ought to be issued.

PART III – LAW AND ARGUMENT

I. The Receiver Recommends that the Mount Nemo Transaction be Approved

10. In determining whether to approve a proposed sale of assets by a receiver, Ontario courts have consistently and uniformly applied the principles set out by the Ontario Court of Appeal in *Royal Bank v. Soundair*.[6]

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[5] Third Report, paras.57 and 67.

11. In reviewing a proposed sale of assets by a receiver, the Court must consider the following:

(a) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;

(b) whether the interests of all parties have been considered;

(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.[7]

12. Further, in *Soundair*, Galligan J.A. adopted as his own the following statements by Anderson J. in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87 (H.C.J.):

> This court should not proceed against the recommendations of its receiver except in special circumstances and where the necessity and propriety of doing so are plain. Any other rule or approach would emasculate the role of the receiver and make it almost inevitable that the final negotiation of every sale would take place on the motion for approval.
>
> ... It is equally clear, in my view, though perhaps not so clearly enunciated, that it is only in exceptional cases that the court will intervene and proceed contrary to the receiver's recommendations if satisfied, as I am, that the receiver has acted reasonably, prudently and fairly and not arbitrarily.[8]

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

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[6] *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.); Brief of Authorities of the Receiver ("Brief of Authorities"), Tab 1 [Soundair].
[7] *Soundair*, at page 6.
[8] *Soundair*, at page 16; *Crown Trust Co v. Rosenberg* (1984), 60 O.R. (2d) 87 at pages 109 and 111 (H.C.J.); Brief of Authorities, Tab 2.

(a) *Efforts to Obtain the Best Price*: As is detailed in paragraphs 17 to 35 of the Third Report, the Receiver undertook a thorough sales process for the listing of the Mount Nemo Property. Thereafter, the Receiver actively marketed the Mount Nemo Property for nearly 10 months to a wide audience, and through various media, utilizing the expertise of RE/MAX Aboutowne Realty Corp., Brokerage (the "**Initial Broker)** as listing agent and subsequently Sotheby's International Realty Canada ("**Sotheby's**"). Two price reductions to the listing price of the Mount Nemo Property occurred over time during this period. While other offers to purchase the Mount Nemo Property were received by the Receiver, none contained a purchase price as high as that contained in the Palmer APS, and the Receiver believes that its made efforts to obtain the best price possible, in light of the foregoing and the downturn in the real estate market for rural properties subsequent to the Receiver's appointment on April 26, 2017.

(b) *Interests of All the Parties*: In the circumstances, the Palmer APS is in the interests of all parties with an economic interest in the Mount Nemo Property. There is no evidentiary basis which would suggest that a preferable offer will be received if the Palmer APS is not completed. Furthermore, if the Palmer APS is not completed, the Receiver will continue to incur carrying costs associated with the Mount Nemo Property, which will reduce the net proceeds of an ultimate sale.

(c) *The Efficacy and Integrity of the Process*: As is detailed in paragraphs 17 to 35 of the Third Report, the Receiver's marketing process was widespread and was conducted with the assistance of, amongst others, the Initial Broker and Sotheby's as listing agents.

(d) *Whether the Process was Unfair*: For the reasons stated above, there was no unfairness in the process to market and sell the Mount Nemo Property. The Receiver's rationale for its acceptance of the Palmer APS, which was the subject of significant negotiation by the Receiver, has been documented.

14. Where a receiver has canvassed alternatives and chosen a transaction, that transaction will be approved. Only in exceptional circumstances will the Court intervene and proceed contrary to the recommendation of the receiver.[9]

15. In *Skyepharma PLC v. Hyal Pharmaceutical Corp.*, Farley J. commented:

> Provided a receiver has acted reasonably, prudently and not arbitrarily, a court should not sit as in an appeal from a receiver's decision, reviewed in detail every element of the procedure by which the receiver made the decision (so long as that procedure fits with the authorized process specified by the court if a specific order to that affect has been issued). To do so would be futile and duplicative. It would emasculate the role of the receiver and make it almost inevitable that the final negotiation of every sale would take place on the motion for approval. See *Royal Bank v. Soundair* at p. 14 and *Crown Trust Co. v. Rosenberg* at p. 109.[10]

16. As detailed above, the Receiver believes that the Transaction is the best avenue by which to effect the greatest recovery of the value of the Mount Nemo Property.

17. The Receiver respectfully submits that the principles in *Soundair* have been satisfied and that its marketing process was, and the Transaction is, commercially reasonable. It is respectfully submitted that this Honourable Court should approve and authorize the Palmer APS, and the Transaction contemplated therein, and order that the property which is subject of the Palmer APS

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[9] *Morgan Trust Co. of Canada v. Falloncrest Financial Corp.*, [1996] O.J. No. 3919 at para. 11, aff'd [1996] O.J. No. 4298 (C.A.), leave to appeal dismissed, [1997] S.C.C.A. No. 438l; Brief of Authorities, Tab 3.
[10] *Skyepharma PLC v. Hyal Pharmaceutical Corp.*, [1999] O.J. No. 4300, 12 C.B.R. (4th) 87 (Ont. S.C.J. [Commercial List]), at para. 7; aff'd (2000), 47 O.R. (3d) (Ont. C.A.) Brief of Authorities, Tab 4 [*Skyepharma*]; *Courts of Justice Act*, R.S.O. 1990, c. C-34, as amended, s. 100

be vested in Palmer in accordance with: (i) the terms of the Palmer APS; (ii) the draft Approval and Vesting Order filed; and (iii) the recommendations of the Receiver.

II. A Sealing Order is Appropriate with Respect to the Confidential Appendices Appended to the Third Report

18. A sealing order is required because the Confidential Appendices contain commercially-sensitive information concerning the Receiver's marketing and sale of the Mount Nemo Property, the release of which could prejudice the stakeholders of the Crystal Wealth Group should the Palmer APS Transaction not close.[11]

19. A Court may order that any document filed in a civil proceeding be treated as confidential and sealed and that it not form part of the public record.[12]

20. The well-known test for determining whether a sealing order ought to be granted in a commercial context was set out by the Supreme Court of Canada in *Sierra Club of Canada v. Canada (Minister of Finance)*.[13] Judges of the Commercial List frequently recognize 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 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.[14]

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[11] Third Report, para. 43.
[12] *Courts of Justice Act*, R.S.O. 1990, c. C-34, as amended, s. 137(2).
[13] *Sierra Club of Canada v. Canada (Minister of Finance),* [2002] S.C.R. 522 at para. 53 [*Sierra Club*], Brief of Authorities, Tab 5.
[14] *Ron Handelman Investments Ltd. v. Mass Properties Inc.* (2009), 55 C.B.R. (5th) 271 (Ont. S.C.J. [Commercial List]) at para. 26; Brief of Authorities, Tab 6.

21. In the present case, a sealing order is appropriate for the following reasons:

(a) it would be prejudicial to the interests of the stakeholders of the Crystal Wealth Group if the Confidential Appendices were not sealed and the Transaction does not close, since other potential purchasers would have a comparative advantage in any subsequent bidding process in respect of the Mount Nemo Property; and

(b) there is no other reasonable alternative associated with preventing the Confidential Appendices from becoming public.

22. The Receiver respectfully submits that the principles in *Sierra Club* have been satisfied and that the sealing of the Confidential Appendices is necessary to ensure the integrity of the sales process of the Mount Nemo Property and to avoid any prejudice to stakeholders in the event that the Palmer APS Transaction does not close and a new purchaser of the Mount Nemo Property is sought.

III. The Vesting Orders Requested with Respect to the Xynergy Transactions

23. The Receiver requests that this Court issue two Vesting Orders in connection with the Xynergy Transactions. As indicated, the Geodata Participation and SSI Participation are assets of the Medical Fund, and accordingly, the Receiver was authorized to sell such assets without further order of the Court pursuant to paragraph 6(k)(iii) of the Appointment Order.

24. The Receiver agreed as a term of the Geodata Sale Agreement and SSI Bill of Sale[15] to obtain a Vesting Order from the Court for each transaction, as permitted by paragraph 6(l) of the Appointment Order. The Receiver recommends the issuance of the Vesting Orders requested,

[15] Third Report, paras. 57 and 67.

which are appended in draft at Tabs A3 and A4 of the Receiver's Notice of Motion, as if the Vesting Orders do not issue, the Receiver will be required to return the purchase price funds already received from Xynergy in the sum of US $906,433.74, as required by the terms of the Geodata Sale Agreement and SSI Bill of Sale.[16]

PART IV – CONCLUSION AND ORDER REQUESTED

25. Based on the foregoing and the details provided in the Third Report, the Receiver respectfully requests that this Honourable Court grant the relief sought in the Receiver's Notice of Motion dated May 3, 2018.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Date: May 3, 2018

Steven L. Graff (LSUC # 31871V)

Mark van Zandvoort (LSUC #59120U)

Lawyers for Grant Thornton Limited, in its capacity as Receiver and Manager of the Crystal Wealth Group

[16] Third Report, paras. 58 and 67.

Tab A

SCHEDULE "A"
LIST OF AUTHORITIES

Jurisprudence

1. *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.); **Brief of Authorities, Tab 1**

2. *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87 (H.C.J.); **Brief of Authorities, Tab 2**

3. *Morgan Trust Co. of Canada v. Falloncrest Financial Corp.*, [1996] O.J. No. 3919, aff'd [1996] O.J. No. 4298 (C.A.), leave to appeal dismissed, [1997] S.C.C.A. No. 438 (S.C.C.); **Brief of Authorities, Tab 3**

4. *Skyepharma PLC v. Hyal Pharmaceutical Corp.*, [1999] O.J. No. 4300, 12 C.B.R. (4th) 87 (Ont. S.C.J. [Commercial List]); **Brief of Authorities, Tab 4**

5. *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 (S.C.C.); **Brief of Authorities, Tab 5**

6. *Ron Handelman Investments Ltd. v. Mass Properties Inc.* (2009), 55 C.B.R. (5th) 271 (Ont. S.C.J. [Commercial List]); **Brief of Authorities, Tab 6**

Tab B

SCHEDULE "B"
RELEVANT STATUTES

Courts of Justice Act, R.S.O. 1990, c. C-34

100. Vesting orders
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.

137(2) Sealing documents
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.

Securities Act, R.S.O. 1990, c. S.5

129.
129(1) Appointment of receiver, etc
The Commission may apply to the Superior Court of Justice for an order appointing a receiver, receiver and manager, trustee or liquidator of all or any part of the property of any person or company.

129(2) Grounds
No order shall be made under subsection (1) unless the court is satisfied that,

(a) the appointment of a receiver, receiver and manager, trustee or liquidator of all or any part of the property of the person or company is in the best interests of the creditors of the person or company or of persons or companies any of whose property is in the possession or under the control of the person or company or the security holders of or subscribers to the person or company; or

(b) it is appropriate for the due administration of Ontario securities law.

ONTARIO SECURITIES COMMISSION **and** **CRYSTAL WEALTH MANAGEMENT SYSTEM LIMITED, *ET AL.***

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FACTUM

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