File No. CI 15-01-98054

THE QUEEN'S BENCH

WINNIPEG CENTRE

IN THE MATTER OF: The Appointment of a Receiver pursuant to Section 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended, and Section 55 of *The Court of Queen's Bench Act*, C.C.S.M. c. C280

BETWEEN:

ROYAL BANK OF CANADA,

plaintiff,

- and -

KELLER & SONS FARMING LTD. and KELLER HOLDINGS LTD.,

defendants.

MOTION BRIEF OF THE RECEIVER, ERNST & YOUNG INC.
HEARING DATE: TUESDAY, JANUARY 26, 2016 at 2:00 p.m.

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I. LIST OF DOCUMENTS

1. Affidavit of Gary Ivany sworn October 2, 2015, filed October 6, 2015;

2. The First Report of the Receiver dated January 19, 2016, filed January 19, 2016;

3. The First Confidential Report of the Receiver dated January 19, 2016, filed January 19, 2016.

II. LIST OF AUTHORITIES

<u>Tab</u>

1. Part VIII of *The Corporations Act*, C.C.S.M. c. C225

2. Rules 2.03, 3.02, 16.08, 37 and 60.10 of the *Queen's Bench Rules*, M.R. 553/88, as amended

3. Section 77 of *The Court of Queen's Bench Act*, C.C.S.M. c. C280

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

5. *Histed v. Law Society (Manitoba)*, 2005 MBC 106

6. *Re Maxtech Manufacturing Inc.*, 2010 ONSC 1161

7. *Royal Bank v. Walker Hall Winery Ltd.*, 2011 ONSC 638

8. Excerpts from F Bennett, *Bennett on Receiveships*, 3d ed (Toronto: Thomson Reuters Canada Limited, 2011), p. 299

9. *Re SLMSoft Inc.*, 2003 CarswellOnt 4370 (Ont. S.C.J.)

10. *Re Shape Foods Inc.*, 2009 MBQB 171

11. *Royal Bank of Canada v. Penex Metropolis Ltd.*, 2009 CarswellOnt 5202 (Ont. S.C.J.)

12. *Merchants Consolidated Ltd. (Receiver of) v. Canstar Sports Group Inc.* (1994), 159 Man. R. (2d) 276 (Man. C.A.)

13. *Canadian Imperial Bank of Commerce v. Trapper John's Restaurant Ltd.* (1984), 52 C.B.R. (N.S.) 28 (B.C.S.C.)

III. POINTS TO BE ARGUED AND ARGUMENT

1. This motion has been by the Court-appointed receiver and manager of the defendants, Ernst & Young Inc. (the "Receiver"). The relevant background information for the purpose of considering the relief requested on behalf of the Receiver can be found in the First Report of the Receiver, dated January 19, 2016 (the "First Report").

2. The position of the Receiver on this motion is essentially reflected in the First Report. As such, the purpose of this Brief is simply to provide the Court with relevant authorities relating to certain of the relief sought by the Receiver.

3. At the outset, it is useful to note this Court has extremely broad powers in connection with Court-appointed receivers. By way of example, pursuant to section 95 of *The Corporations Act* (which applies in respect of the defendants, as Manitoba corporations), this Court is empowered to "make any order it thinks fit".

Part VIII of *The Corporations Act*, C.C.S.M. c. C225, Tab 1

<u>Service</u>

4. Notwithstanding the ordinary requirements of service under the *Queen's Bench Rules*, this Court has the authority to abridge the time requirements, validate defective service, or even dispense with service where necessary in the interests of justice. The initial receivership Order granted in this proceeding on October 8, 2015

(the "Receivership Order") also contemplates parties being served by email with respect to this proceeding. To the extent it may be necessary, the Receiver submits that service of the notice of motion and supporting materials ought to abridged and/or validated.

Rules 2.03, 3.02, 16.08 and 37 of the *Queen's Bench Rules*, M.R. 553/88, as amended, Tab 2

Sealing Order

5. Subsection 77(1) of *The Court of Queen's Bench Act* states:

> The court may order that a document filed in a civil proceeding is confidential, is to be sealed and is not a part of the public record of the proceeding.

Section 77 of *The Court of Queen's Bench Act*, C.C.S.M. c. C280, Tab 3

6. This provision should be read in the context of the decision of the Supreme Court of Canada in *Sierra Club of Canada v. Canada (Minister of Finance)*. In that case, the Supreme Court established a two-part test for determining when the public could be denied access to documents filed in a civil proceeding. The Court stated, at para. 53, that a confidentiality order should only be granted when:

(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 reasonable alternative measures will not prevent the risk; and

(b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

Sierra Club of Canada v. Canada (Minister of Finance), 2002 SCC 41, para. 53, Tab 4

7. Justice Steel of the Manitoba Court of Appeal, sitting in Chambers, followed *Sierra Club* in *Histed v. Law Society (Manitoba)*. In examining subsection 77(1) of *The Court of Queen's Bench Act*, Steel J.A. determined, "The reach of s. 77(1) goes beyond privileged communications and may be used in any exceptional case where it can be demonstrated that serious harm or injustice would result were the documents to remain open to the public" (para. 21).

Histed v. Law Society (Manitoba), 2005 MBCA 106, para. 21, Tab 5

8. The first part of the *Sierra Club* test considers necessity. In order to establish necessity, three elements must be proven:

(a) There must be a serious risk - "...the risk in question must be real and substantial, in that the risk is well-grounded in the evidence and poses a serious threat to the commercial interest in question"

(b) There must be an important commercial interest - "...the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality".

(c) There are no reasonable alternatives to a confidentiality order available - "...the judge [is required] to consider not only whether reasonable alternatives to a confidentiality order are available, but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question"

Sierra Club of Canada, supra, paras. 54, 55, 57, Tab 4

9. In applying the test of necessity, a Court must examine the nature of the confidential information. The Supreme Court determined that, for a confidentiality order to be granted, three criteria must be satisfied:

(a) The information must have "...been treated at all relevant times as confidential."

(b) "...on a balance of probabilities its proprietary, commercial and scientific interests could reasonably be harmed by the disclosure of the information."

(c) The information had "...been accumulated with a reasonable expectation of it being kept confidential."

Sierra Club of Canada, supra, para. 60, Tab 4

10. The Receiver submits that an order to seal the First Confidential Report of the Receiver (the "First Confidential Report") is necessary at this point. There is a real and substantial risk that an important commercial interest will be harmed if the appraisal information and other information relating to the defendants' assets is released to the public at this point. To allow prospective purchasers of the assets to obtain the information in the First Confidential Report would significantly compromise the sale process and likely limit the amount that might be recovered by the Receiver in respect of the sale of the assets. Obviously, it is in the general interest of stakeholders that the best price possible is obtained for the assets of the defendants. In the circumstances, the Receiver submits there is no reasonable alternative to a sealing order for the First Confidential Report, pending the ultimate closing of transactions for the assets.

11. The second part of the *Sierra Club* test considers proportionality. The Court must balance the potential benefits of granting a sealing order against its potential harmful effects. This test is to be applied in the context of examining the effect of a sealing order upon the open court principle and the core values that underlie freedom of expression.

12. Morawetz J. of the Ontario Superior Court of Justice recently considered two applications under section 243(1) of the *Bankruptcy and Insolvency Act* with respect to the sale of assets. In *Re Maxtech Manufacturing Inc.*, the Receiver in seeking approval of the sale of assets of an insolvent business also sought an order to seal certain appendices annexed to its Second Report. Morawetz J. followed *Sierra Club* and stated at paragraph 30:

> I reviewed the confidential appendices to the Second Report. I am satisfied that the appendices contain sensitive commercial information, the release of which could be prejudicial to the stakeholders. I am satisfied that it is appropriate to grant the requested sealing order.

Re Maxtech Manufacturing Inc., 2010 ONSC 1161, para. 30, Tab 6

13. In *Royal Bank v. Walker Hall Winery Ltd.*, the Receiver applied for an order to approve the sale of wine inventory, barrels and glasses and for an order sealing the appraisals, offers to purchase and the agreement to sell. Morawetz J. concluded that "...it is both necessary and appropriate to seal the appraisals, the offers and the Sale Agreement, pending the closing of the transaction or further order."

Royal Bank v. Walker Hall Winery Ltd., 2011 ONSC 638, para. 22, Tab 7

14. Based on the applicable authorities, it is the Receiver's submission that the conditions for a sealing order with respect to the Confidential Reports have been met in this case.

Sale Process and Auction

15. Under the Receivership Order, the Receiver is provided with the power to market the assets of the defendants. It is permissible for a court-appointed Receiver to seek approval of a proposed method and manner of sale of a debtor's assets.

F Bennett, *Bennett on Receiverships*, 3d ed (Toronto: Thomson Reuters Canada Limited, 2011) at p.299, Tab 8

Re SLMSoft Inc., 2003 CarswellOnt 4730 (Ont. S.C.J.), para. 1, Tab 9

16. The criteria to be considered in evaluating a sale of assets by a receiver are set out in the decisions of *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87 (Ont. H.C.J.) and *Royal Bank v. Soundair Corp.* (1991), 83 D.LR. (4^{th}) 76 (Ont. C.A.), both of which have been cited and applied by this Court.

Re Shape Foods Inc., 2009 MBQB 171, paras. 20, 21, Tab 10

17. The criteria are as follows:

(a) The court should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.

(b) The court should consider the interests of the parties.

(c) The court should consider the efficacy and integrity of the process by which the offers are obtained.

(d) The court should consider whether there has been any unfairness in the working out of the process.

Re Shape Foods Inc., supra, para. 20, Tab 10

18. In reviewing a receiver's conduct in connection with the sale of property, the court should place a great deal of confidence in the actions taken and the opinions formed by the receiver-manager. Unless the contrary is clearly shown, the court should assume the receiver-manager is acting property. In addition, the court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions of the receiver-manager.

Re Shape Foods Inc., supra, para. 21, Tab 10

19. The Receiver submits that the Sale Process as outlined in the First Report satisfies the criteria as set out in the *Re Shape Foods Inc.* and ought to be approved by this Court. Further, the Receiver submits that it ought to be authorized to conclude the proposed auction agreement with Ritchie Bros. Auctioneers (Canada) Ltd. relating to the farm and transportation equipment owned by the defendant Keller & Sons Farming Ltd.

<u>Termination of Lease Contract</u>

20. Under paragraph 3(c) of the Receivership Order, the Receiver is provided with the power to "cease to carry on all or any part of the business, or cease to perform any contracts of the defendants." This is a standard provision of the usual

receivership order, and is required to give meaning to the receiver's power to convey assets free and clear of other parties' interests.

Royal Bank of Canada v. Penex Metropolis Ltd., 2009 CarswellOnt 5202 (Ont. S.C.J.), para. 20, Tab 11

21. In the present case, the Receiver previously provided Shilo Farms Ltd. with an undertaking that it would not act to disclaim or terminate the Farm Lease between it and the defendants without first seeking approval of the Court to do so.

22. A receiver must exercise proper discretion prior to disclaiming or terminating an existing contractual arrangement of the debtor. The receiver is obligated to act honestly and in good faith and to deal with the debtor's property in a commercially reasonable manner. If a decision by a receiver is within the broad bounds of reasonableness, and if the receiver conducts itself fairly and considers the interests of all stakeholders, the receiver's business decisions will not be interfered with lightly by the Court.

Royal Bank of Canada v. Penex Metropolis Ltd., supra, paras. 21-27, Tab 11

Contempt Proceedings

23. It is well-established that deliberate interference with a court-appointed receiver amounts to contempt of court. The effectiveness of a court-appointed receiver is significantly compromised if other parties are permitted to turn the receiver

out of possession of the property of the debtor without first obtaining the consent of the receiver, or leave of the Court.

> *Merchants Consolidated Ltd. (Receiver of) v. Canstar Sports Group Inc.* (1994), 159 Man. R. (2d) 276 (Man. C.A.), paras. 12-14, Tab 12
>
> *Canadian Imperial Bank of Commerce v. Trapper John's Restaurant Ltd.* (1984), 52 C.B.R. (N.S.) 28 (B.C.S.C.), para. 25, Tab 13

24. For the reasons as set out in the First Report, the Receiver is of the view that Calidon Financial Services Inc. ("Calidon") acted in contempt of the Receivership Order. The Receiver's view is that in order to protect to overall integrity of the receivership process and respect for the rule of law, it is necessary sanction Calidon (and, as appropriate, its officers and directors) for its conduct.

25. The Receiver does not wish to delay its work in realizing upon the assets of the defendants as a result of dealing with a contempt motion as against Calidon. Further, the Receiver recognizes that prior to any sanctions being imposed, Calidon ought to be permitted with a full opportunity to respond and set out its position. In the circumstances, the Receiver is simply seeking the advice and

direction of the Court at this point as to moving forward with contempt proceedings against Calidon at a future date.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19 th day of January, 2016.

THOMPSON DORFMAN SWEATMAN LLP

Per: ____________________________
Ross A. McFadyen
Lawyers for the receiver and manager of the defendants, Ernst & Young Inc.