IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

IN BANKRUPTCY AND INSOLVENCY

JUDICIAL DISTRICT OF FREDERICTON

IN THE MATTER OF THE RECEIVERSHIP OF:

Gray's Aqua Management Ltd., Gray Aqua Farms Ltd., Gray Aqua Group Ltd., Butter Cove Aqua Farms Ltd., Goblin Bay Aqua Farms Ltd., Jervis Island Aqua Farms Ltd., Pass-My-Can Aqua Farms Ltd., Gray Aqua Processing Ltd., M. Gray Holdings Ltd., 608672 N.B. Ltd., 608690 N.B. Ltd., 608691 N.B. Ltd., 608715 NB Limited and 608716 NB Limited

-and-

PURSUANT TO Section 33 of the *Judicature Act*, R.S.N.B. 1973, Ch. J-2, Rule 41 Rules of Court, New Brunswick and Section 243 of the *Bankruptcy and Insolvency Act* R.S.C. 1985 c. B-3

BETWEEN: **CALLIDUS CAPITAL CORPORATION**

APPLICANT

-and-

GRAY'S AQUA MANAGEMENT LTD., GRAY AQUA FARMS LTD., GRAY AQUA GROUP LTD., BUTTER COVE AQUA FARMS LTD., GOBLIN BAY AQUA FARMS LTD., JERVIS ISLAND AQUA FARMS LTD., PASS-MY-CAN AQUA FARMS LTD., GRAY AQUA PROCESSING LTD., M. GRAY HOLDINGS LTD., 608672 N.B. LTD., 608690 N.B. LTD., 608691 N.B. LTD., 608715 NB LIMITED and 608716 NB LIMITED

RESPONDENTS

BRIEF OF THE APPLICANT

COURT OF QUEEN'S BENCH
FREDERICTON, NB
RECEIVED AND FILED

FEB 0 8 2017

COUR DU BANC DE LA REINE
FREDERICTON, N-B
REÇU ET DÉPOSÉ

John Stringer Q.C.
McInnes Cooper
1300-1969 Upper Water Street
Halifax, Nova Scotia
PO Box 730
B3J 2V1
902.444.8608
John.stringer@mcinnescooper.com

Solicitor for the Applicant

PART I: OVERVIEW OF APPLICATION

1. We are the solicitors for the Applicant, Ernst & Young Inc. (the "**Receiver**"), in its capacity as Receiver of all of the property, assets and undertakings of each of Gray's Aqua Management Ltd., Gray Aqua Farms Ltd., Gray Aqua Group Ltd., Butter Cove Aqua Farms Ltd., Goblin Bay Aqua Farms Ltd., Jervis Island Aqua Farms Ltd., Pass-My-Can Aqua Farms Ltd., Gray Aqua Processing Ltd., M. Gray Holdings Ltd., 608672 N.B. Ltd., 608690 N.B. Ltd., 608691 N.B. Ltd., 608715 NB Limited and 608716 NB Limited (collectively, the "**Companies**").

2. The Receiver was appointed by way of a Receivership Order issued by this Honourable Court on April 25, 2016.

3. We have scheduled to be heard a Motion seeking an Order approving the sale to Marine Harvest ASA, or its designate (the "**Purchaser**") by the Receiver, of the Receiver's and Companies' right, title and interest in certain property of the Companies (the "**Purchased Property**") described in an Agreement of Purchase and Sale dated as of December 15, 2016, as supplemented on January 16, 2017 (the "**Transaction**").

4. The Motion also seeks, in addition to the approval of the sale of the Purchased Property, the issuance of a vesting Order, as is customary where assets are conveyed by a Receiver, and Approving the contents of the Second Report of the Receiver dated February 6, 2017 (the "**Receiver's Second Report**") and the conduct and activities of the Receiver to date, as described therein, and such further and other relief as this Honourable Court may deem just. The Receiver had previously reported to this Honourable Court on August 31, 2016, and all materials filed by the Receiver in respect of this matter are available on the Receiver's website, www.documentcentre.eycan.com.

5. The Receiver's Second Report and its appendices, together with the Affidavit of Ben Durnford sworn on February 3, 2017 have been filed in support of the Receiver's Motion.

6. Copies of the Receiver's Motion materials and this pre-hearing memorandum have been served upon the Companies and affected stakeholders in accordance with Section 6 of the *Bankruptcy and Insolvency Act General Rules*, and also upon other parties with known interests in the Purchased Property as set out in the Receiver's Notice of Motion.

7. Please accept the following as the Receiver's pre-hearing memorandum.

PART II: FACTS

8. The Receiver's Second Report and the material on file with this Honourable Court in respect of the Receivership of the Companies, including the Receiver's August 31, 2016 Report, disclose the following background facts:

9. The Companies and their predecessors have been in business for over three decades, and at all times were engaged in the business of salmon aquaculture.

10. Traditionally, the Companies (in particular, Gray Aqua Farms Ltd.) operated a smolt hatchery in Northampton, New Brunswick at which facility salmon eggs were grown into smolt and reared for eventual sale third parties.

11. In recent years the Gray family, members of which are the principals of all of the Companies, diversified operations to include offshore salmon aquaculture in both New Brunswick and Newfoundland and Labrador. The company ultimately responsible for the marine grow-out operations is Gray Aqua Group Ltd., however various licences and marine leaseholds are held by the four site-specific companies, Jervis Island Aqua Farms Ltd., Pass-My-Can Aqua Farms Ltd., Goblin Bay Aqua Farms Ltd., and Butter Cove Aqua Farms Ltd.

12. Gray Aqua Processing Ltd. was the entity with primary responsibility for the processing of the fully reared salmon, which it did from a plant in Hermitage, Newfoundland and Labrador.

13. For several years therefore, the Gray family operated a vertically integrated aquaculture operation from sites in two provinces, which enabled the rearing of salmon from eggs to marketable salmon weighing several kilograms.

14. M. Gray Holdings Ltd. is a company incorporated in the Province of Newfoundland and Labrador. This company, together with the various numbered companies operated by the Gray family (all New Brunswick corporations), respectively own shares in Gray Aqua Farms Ltd. and Gray Aqua Processing Ltd.

15. Notwithstanding the presence of a significant portion of the Gray family's business in the Province of Newfoundland and Labrador, the hub of the Companies' operation was at all times and remains the corporate headquarters in Northampton, New Brunswick, where the Companies' management and nucleus of its employees was most recently situated.

16. During the Spring of 2013, the Gray sites at Goblin Bay and Pass-My-Can Newfoundland and Labrador were affected by an outbreak of Infectious Salmon Anemia, which ultimately led to the issuance by the Minister of Agriculture and Agri-Foods and the Canadian Food Inspection Agency ("**CFIA**") of depopulation orders directing that all salmon contained at these sites be immediately destroyed. The fish destroyed were expected to comprise the entirety of the inventory which was to be marketed between September 2013 and October 2014, and thus the loss was catastrophic.

17. As a result of the depopulation order, uncertainty as to a recovery plan, and disputes with CFIA as to the appropriate amount of loss compensation payment due and payable to the Companies, the then senior secured lender to the Companies, HSBC Bank Canada issued a demand upon the Companies for the immediate payment of some $24 million in secured indebtedness.

18. Certain of the Companies' operational components responded to the demand by filing a Notice of Intention to Make a Proposal pursuant to the *Bankruptcy and Insolvency Act* ("**BIA**"), with Ernst & Young Inc. serving as Proposal Trustee, which Proposal was approved by creditors and this Honourable Court and eventually performed.

19. In November 2013, Callidus Capital Corporation ("**Callidus**") negotiated with HSBC and certain of the Companies for the acquisition of the HSBC debt and security in respect of the Companies, which were assigned to Callidus on or about December 11, 2013.

20. Callidus also agreed to, and eventually did, provide working capital financing to those of the Companies subject to the BIA Proposal upon their emergence from that process, which full Proposal performance did result on September 25, 2014.

21. As part of the financial support offered to the various constituents of the Companies, Callidus entered into a Credit Agreement on December 11, 2013 with certain of the Companies, as guaranteed by Tim Gray, Rob Gray and Jeff Gray, principals of the Companies. The Credit Agreement was subsequently amended by agreement on each of June 9, 2014, February 3, 2015 and August 14, 2015. The Callidus advances were fully secured against the real and personal property of the Companies, subject to an Intercreditor Agreement entered into among Callidus, Business Development Bank of Canada and the Companies on March 2, 2015.

22. By agreement, the various credit facilities extended by Callidus were to be repaid by the Companies bound to the Credit Agreement by or before January 31, 2016, however for the reasons set forth below this did not occur.

23. During July 2015, the Companies discovered high levels of sea lice at various Newfoundland and Labrador marine sites, most notably at the Indian Tea Point site. This had the effect of compromising the yield from that site, which had previously been the subject of optimistic forecasting. Specifically, the Companies estimated generated sales revenue from Indian Tea Point of between $16 million and $19 million, but as a result of the sea lice outbreak, the total harvest at that location only generated roughly $3,500,000.

24. The resulting default under the Credit Agreement related to the catastrophic loss at Indian Tea Point (a borrowing base default in the approximate amount of $12,173,000), was a central driver of the failure to repay the Callidus credit facilities on January 31, 2016.

25. Further complicating matters, in March 2016, the Companies were ordered to destroy approximately 380,000 smolt in the Northampton hatchery facility due to an outbreak of bacterial kidney disease.

26. On April 4, 2016, Callidus, through its counsel, issued a demand letter and Notice of Intention to Enforce Security pursuant to Section 244 of the *BIA* on the Companies, claiming therein the sum of $54,987,322.59.

27. On April 8, 2016, the Companies consented to the immediate enforcement by Callidus of its security, and on April 25, 2016, this Honourable Court appointed the Receiver.

28. The Receiver acted swiftly to identify the challenges posed by the live inventory presently housed in multiple sites in New Brunswick and Newfoundland and Labrador, and engaged an industry consultant to assist in the preservation of these inventories for ultimate realisation.

29. As articulated in the Receiver's Second Report under the heading Expedited Sales Process, the Receiver contacted two entities with the potential resources, infrastructure and industry knowledge to acquire the assets of the Companies (including live smolt in Northampton and juvenile salmon in marine sites in New Brunswick and Newfoundland and Labrador) and in May of 2016 achieved a state of advanced negotiations with one of

these entities for the sale of the Companies' assets *en bloc*, however a deal could not be concluded.

30. A decision was made by the Receiver to offer the Companies' assets for sale by way of a public tender process, which was launched on October 26, 2016 as reflected in a Tender Information Package which was published by the Receiver on its website on even date and distributed in the manner described in the Receiver's Second Report.

31. The Tender Information Package informed potential offerors that they had until Wednesday November 30, 2016 to make an offer for the Companies' assets, be it an offer for individual parcels thereof or an *en bloc* offer.

32. At the expiry of the stipulated deadline the Receiver's staff opened the sealed tender envelopes which had been received and commenced the assessment of the offers they contained.

33. Three competitive *en bloc* bids were made, and in a further effort to achieve the highest possible realization price for the subject assets, the Receiver contacted all three proponents and asked them to put their best possible improved offer forward within ten further days, likewise on a "blind" basis, as no proponent was given any insight into the nature or extent of any competitive offers.

34. As a result of this follow up process, one of the three proponents, the Purchaser, put forth an improved offer and as described within the Receiver's Second Report, a decision was reached by the Receiver to accept the offer submitted by the Purchaser.

35. For the reasons set forth below, we submit the Transaction reached between the Receiver and the Purchaser was the best available in the circumstances presenting, and accords with the principles applied by the Courts in assessing asset sales in this context.

36. As will be discussed in greater detail below, following the expiry of the applicable bid submission deadline, and after the Receiver had accepted the Purchaser's bid, one of the original three proponents subsequently put forth a further bid, which was higher than the Purchaser's accepted bid. This late offer, non-compliant as it was with the stipulated rules of the sales process, was rejected by the Receiver.

PART III: ISSUE

It is submitted the issue before the Court can be stated as follows:

Should the Court approve the sale of the Purchased Property to the Purchaser together with appropriate vesting provisions, and approve the Receiver's Second Report and the conduct and actions of the Receiver described therein?

PART IV: LAW AND ARGUMENT

(a) Service and Notice

37. The approval of the Transaction is incidental to the Receiver's mandate pursuant to Section 243 of the *Bankruptcy and Insolvency Act* ("**BIA**")). This is therefore a

proceeding referable to the *Bankruptcy and Insolvency General Rules,* Can Reg. 368, C.R.C. 1978 (the "**BIA Rules**").

38. Service of affected secured creditors and stakeholders shall be effected through electronic means, in accordance with the BIA Rules.

39. Section 6 of the BIA Rules provides as follows:

> "6(1) Unless otherwise provided in the Act or these Rules, every notice or other document given or sent pursuant to the Act or these Rules must be served, delivered personally, or sent by mail, courier, facsimile or electronic transmission.
>
> (2) Unless otherwise provided in these Rules, every notice or other document given or sent pursuant to the Act or these Rules
>
> (a) must be received by the addressee at least four days before the event to which it relates, if it is served, delivered personally, or sent by facsimile or electronic transmission; or
>
> (b) must be sent to the addressee at least 10 days before the event to which it relates, if it is sent by mail or by courier." (emphasis added)

40. Immediately after filing the within Motion materials, the Receiver will cause these materials to be sent electronically to those parties listed in the Notice of Motion.

41. It is therefore envisaged that the intended recipients shall have received the electronic versions of the materials no later than four days before the hearing date in accordance with s. 6(2)(a) of the BIA Rules.

42. An Affidavit of Service shall be filed in advance of the scheduled hearing. It is respectfully submitted the giving of notice and the manner of service were adequate and proper in the circumstances.

(b) Approval of the Transaction

43. Paragraph 3(l) through (n) of the Receivership Order in this matter authorize the Receiver to market and sell the assets of the Companies, including the Purchased Property, providing the following specific powers:

> "(l) to 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;
>
> (m) to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business,
>
> (i) without the approval of this Court in respect of any transaction not exceeding $100,000, provided that the aggregate consideration for all such transactions does not exceed $1,000,000; and

(ii) with the approval of this Court in respect of any transaction in which the purchase price or the aggregate purchase price exceeds the applicable amount set out in the preceding clause;

and in each such case notice under section 59 of the *Personal Property Security Act* (New Brunswick) shall not be required.

(n) to 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."

44. As is described in detail in the Receiver's Second Report and as set out below, in the exigent circumstances presenting immediately after its April 25, 2016 appointment, the Receiver conducted a brief and targeted, albeit effective marketing process involving the known aquaculture industry players with the wherewithal to acquire and sustain the Purchased Property, including preservation of the Companies' live inventory.

45. Despite the Receiver's best efforts, and while the Receiver successfully averted certain environmental catastrophe through various inventory depopulations, no private sale transaction for the Purchased Property was concluded during the Spring of 2016, and the Receiver was thus tasked with looking further afield in its efforts to maximize return to the estate.

46. The subsequently operated tender process, and the three proponent "playoff" supplemental bidding which followed, was the result of the re-consideration of the initial approach, and we submit has resulted in a satisfactory realization outcome.

47. In considering the appropriateness of a proposed sale in the receivership context, modern jurisprudence confirms that the Court should be mindful of the principles set forth by the Ontario Court of Appeal in ***Royal Bank of Canada v. Soundair Corp.*** [1991] O.J. No. 1137 (Ont. C.A.) ("***Soundair***").

48. In ***Bank of Montreal v. Sportsclick Inc***, 2009 NSSC 354 (N.S.S.C.), Duncan J. of the Nova Scotia Supreme Court referenced Soundair in articulating the factors to be considered by the Court in evaluating the sale of assets by a Receiver, and stated (at paras. 32-33)

> "In *Royal Bank v. Soundair Corp., supra*, Galligan J.A. set out at paragraph 16, the duties which a court must perform when deciding whether a Receiver who sold a property acted properly, which duties he summarized as follows:
>
> 1. It should consider whether the Receiver has made a sufficient effort to get the best price and has not acted improvidently.
>
> 2. It should consider the interests of all parties.
>
> 3. It should consider the efficacy and integrity of the process by which offers are obtained.

4. It should consider whether there has been unfairness in the working out of the process.

Certain principles have been enunciated by the courts in consideration of these points:

- The decision must be assessed as a matter of business judgment on the elements then available to the Receiver. That is the function of Receiver and "... to reject [such] recommendation... in any but the most exceptional circumstances... would materially diminish and weaken the role and function of the Receiver both in the perception of receivers and in the perception of any others who might have occasion to deal with them." see, Anderson J. in *Crown Trust Co. v. Rosenberg* (1986), 60 O. R. (2d) 87 (Ont. H.C.), at 112;

- the primary interest is that of the creditors of the debtor although that is not the only nor the overriding consideration. The interests of the debtor must be taken into account. Where a purchaser has bargained at some expense in time and money to achieve the bargain then their interest too should be taken into account. *see*, *Soundair* at para 40;

- the process by which the sale of a unique asset is achieved should be consistent with commercial efficacy and integrity. In *Crown Trust Co. v. Rosenberg, supra,* at page 124, Anderson J. said:

While every proper effort must always be made to assure maximum recovery consistent with the limitations inherent in the process, no method has yet been devised to entirely eliminate those limitations or to avoid their consequences. Certainly it is not be found in loosening the entire foundation of the system. Thus to compare the results of the process in this case with what might have been recovered in some other set of circumstances is neither logical nor practical.

- a court should not reject the recommendation of Receiver except in certain circumstances where the necessity and propriety of doing so is plain. *see, Crown Trust Co., supra.*"

49. It is respectfully submitted that the proposed Transaction between the Purchaser and the Receiver was the culmination of a process which satisfies the applicable ***Soundair*** requirements, referenced by Justice Duncan in ***Re: Sportsclick Inc.***, *supra*. A public tender has long been regarded as a robust and, from the perspective of would be proponents, fair method of selling a significant amount of assets such as those under the Receiver's control. The Receiver's duty is to do everything deemed in its commercial judgment to be necessary to maximize realization, and in the prevailing circumstances of this matter, the Receiver has done an admirable job in extracting for the assets under his administration the highest possible return.

50. The Court ought to be deferential to the business judgment of its own officer, and should not interfere with this discretion absent compelling reasons to do so.

51. Justice Galligan in ***Soundair*** observed (at paragraph 21)

> "When deciding whether a receiver had acted providently, the court should examine the conduct of the receiver in light of the information the receiver had when it agreed to accept an offer. In this case, the court should look at the receiver's conduct in the light of the information it had when it made its decision on March 8, 1991. The court should be very cautious before deciding that the

> receiver's conduct was improvident based upon information which has come to light after it made its decision. To do so, in my view, would derogate from the mandate to sell given to the receiver by the order of O'Brien J. I agree with and adopt what was said by Anderson J. in Crown Trust v. Rosenberg, supra, at p. 112 O.R., p. 551 D.L.R.:
>
> Its decision was made as a matter of business judgment on the elements then available to it. It is of the very essence of a receiver's function to make such judgments and in the making of them to act seriously and responsibly so as to be prepared to stand behind them.
>
> If the court were to reject the recommendation of the Receiver in any but the most exceptional circumstances, it would materially diminish and weaken the role and function of the Receiver both in the perception of receivers and in the perception of any others who might have occasion to deal with them. It would lead to the conclusion that the decision of the Receiver was of little weight and that the real decision was always made upon the motion for approval. That would be a consequence susceptible of immensely damaging results to the disposition of assets by court-appointed receivers." (emphasis added)

52. And later, at paragraph 47, Galligan J.A. cited ***Crown Trust Co. v. Rosenberg*** (1986), 60 O.R. (2d) 87 (Ont. H.C.J.), for the following proposition:

> "The court ought not to sit as on appeal from the decision of the Receiver, reviewing in minute detail every element of the process by which the decision is reached. To do so would be a futile and duplicitous exercise."

53. After concluding that the receiver's decision to market the unusual asset as it did was a sound one in the circumstances, the Ontario Court of Appeal in ***Soundair*** moved on to an assessment of the reasonableness of the price obtained. After reviewing several authorities involving situations where higher offers were received by a receiver after an offer was accepted, including ***Crown Trust v. Rosenberg*** *supra*; ***Re Selkirk*** (1986), 58 C.B.R. (N.S.) 245 (Ont. Bkcy.); and ***Re Beauty Counsellors of Canada Ltd.*** (1986), 58 C.B.R. (N.S.) 237 (Ont. Bkcy.), the Court concluded (paragraphs 30 and 31):

> "What those cases show is that the prices in other offers have relevance only if they show that the price contained in the offer accepted by the receiver was so unreasonably low as to demonstrate that the receiver was improvident in accepting it. I am of the opinion, therefore, that if they do not tend to show that the receiver was improvident, they should not be considered upon a motion to confirm a sale recommended by a court-appointed receiver. If they were, the process would be changed from a sale by a receiver, subject to court approval, into an auction conducted by the court at the time approval is sought. In my opinion, the latter course is unfair to the person who has entered bona fide into an agreement with the receiver, can only lead to chaos, and must be discouraged.
>
> If, however, the subsequent offer is so substantially higher than the sale recommended by the receiver, then it may be that the receiver has not conducted the sale properly. In such circumstances, the court would be justified itself in entering into the sale process by considering competitive bids. However, I think that that process should be entered into only if the court is satisfied that the receiver has not properly conducted the sale which it has recommended to the court." (emphasis added)

54. The applicable judicial review criteria respecting a receiver's decision to sell assets from ***Soundair*** have been routinely applied in the years since the decision was rendered (see

for example ***Skyepharma PLC v. Hyal Pharmaceutical Corp.***[1999] O.J. No. 4300 (Ont. S.C.J.) (***"Skyepharma"***); ***230 Travel Plaza Inc. (Re)*** [2002] O.J. No. 5006 (Ont. S.C.J.); ***Bakemates International Inc. (Re)*** [2003] O.J. No. 3191 (Ont. S.C.J.); ***Cansugar Inc. (Re)*** [2006] N.B.J. No. 273 (N.B.Q.B.); and ***Re 1730960 Ontario Ltd.*** [2009] O.J. No. 3038 (Ont. S.C.J.). The ***Soundair*** principles have been made to apply both in situations involving tender sales and in situations where a decision was taken to refrain from public advertisement (see ***Fund 321 Limited Partnership (c.o.b. Wellington-Financial Fund II) v. SAMSys Technologies inc.*** [2006] O.J. No. 1695 (Ont. S.C.J.), see paras 36 et seq).

55. As supported by the contents of the Receiver's Second Report, and as shall be set forth in the paragraphs to follow, it is respectfully submitted this Honourable Court has no cause to second guess the prudent decision of the Receiver to conclude the Transaction, and the Receiver has acted prudently in the circumstances and has achieved a commercially reasonable agreement in the circumstances with the entity to which these assets bear the most value.

56. We also submit the Court has a duty to respect the interests of the Purchaser, who has laboured in good faith toward the consummation of the Transaction and has an expectation that the bargain it has struck with the Receiver, as reflected in the Agreement of Purchase and sale it has executed conditional upon this Honourable Court's approval, will be honoured.

57. We respectfully submit a review of the process described in the Receiver's Second Report, supports the conclusion that it is a reasonable, equitable, transparent and commercially efficacious means of maximizing return for the benefit of the Companies' creditors. In the circumstances presenting, against which logistical challenges the Receiver's actions must be measured, we submit the Receiver has at all times acted prudently and defensibly in the exercise of its mandate.

58. Secured creditor Callidus, which after applicable super-priority encumbrances such as municipal taxes are met would appear to be the creditor which stands to benefit most from this asset sale, anticipated a recovery of sales proceeds in this approximate order of magnitude and is supportive of it. Indeed, Callidus gave the Receiver its approval of the bid before it was accepted.

59. The Receiver advertised the Companies' assets for sale by public tender, and prepared a detailed information memorandum for the benefit of parties expressing interest in the assets subject to the Receivership Order.

60. The deadline for submissions of offers was November 30, 2016, and the rules extended to all proponents were uniform. The opportunity to purchase the subject assets was therefore brought to the attention of a very wide audience, and every opportunity existed for parties to come forward with their best offer and/or to perform required due diligence investigations in the ample time provided to parties.

61. We submit the tender process was conducted with all due commercial efficacy and integrity, and was for its would-be bidders operated in a fair manner. The process elicited competitive offers, which after a brief supplemental process extended to the three emerging proponents, generated a favourable offer for the Companies' assets.

62. The offer received from the Purchaser, which was ultimately accepted, was the highest bid received for the subject assets, and thus represents maximal return.

63. The Receiver has exercised its professional business judgment, and has concluded that the offer from the Purchaser represents a favourable result for the creditors as regards the sale of the Purchased Property and submits that this transaction is worthy of this Honourable Court's approval.

64. We respectfully submit the Receiver has carefully reviewed the merits of possible alternatives to the Transaction (including a private sale) and has found no alternative which would more effectively, equitably and efficiently meet the objective of obtaining the highest and best realization result in the most transparent and broadly advertised manner. Liquidation of the Companies' assets is necessary at this juncture, and the Transaction is the most viable means in the circumstances to achieve the highest possible return.

65. In sum, we submit:

(a) The Receiver has made sufficient effort to maximize the realization on the assets under its administration and, in hosting a robust public tender process (after exploring private sale options to targeted prospective buyers) has not acted improvidently, in view of the first of the ***Soundair*** factors;

(b) Consistent with the second ***Soundair*** factor, the Receiver has considered the interests of all affected stakeholders, in this case including but not limited to the interests of the Companies in receivership, senior secured creditor Callidus which is most affected by the realization efforts, as well as the prospective Purchaser, which has worked in good faith with the Receiver in this matter and has performed costly due diligence with a view to concluding the Transaction;

(c) The efficacy and integrity of the sealed public tender bidding process has long been regarded as strong, and in the context of a receivership this method is widely regarded as being the most effective and fair process available. Prior to the initiation of the public tender process, the Receiver also fully canvassed other alternatives, including private sale scenarios; and

(d) Consistent with the final ***Soundair*** criterion, this Court should have no concerns with respect to the fairness in the working out of the process, as exhibited by the Receiver and its staff. The sale was run in a manner so as to give any would-be proponent an equal and fair opportunity to put their best bid forward.

66. We therefore submit the Transaction is worthy of this Honourable Court's approval pursuant to paragraph 3(m)(ii) of the Receivership Order and the aforementioned jurisprudence on the subject.

Late-Presented Amended Offer of Kelly Cove Salmon Limited ("KCS")

67. Although at present it is unclear whether or not KCS intends to appear at the hearing and present its position in the matter, we wish to draw the Court's attention to a recent development in the matter.

68. As noted in the Receiver's Second Report, after the final deadline for proponents to submit improved offers had expired (with the three proponents emerging in the process then having each submitted bids), and after the Receiver had communicated to the Purchaser that its revised offer was accepted by the Receiver, KCS submitted a further bid which was roughly $2,000,000 higher than that submitted by the Purchaser, and which was over twice as large as the offer KCS had submitted before the stipulated deadline.

69. At the time it submitted this most recent bid, KCS would have been in position to know the magnitude of the Purchaser's bid, as the Purchaser (being a public corporation) was required to publicly disclose details of the agreement it had reached with the Receiver, and had done this.

70. The Receiver, having agreed to accept the Purchaser's offer, refused the KCS offer, which was considered non-compliant with the stated rules of the sales process, as this process had evolved.

71. The Receiver understands that KCS, which formerly held registered security against the Gray Aqua group of companies (which has since expired), may intend to challenge the requested Sale Approval and Vesting Order on the basis that the higher offer submitted after the close of bids should be approved, over that which was received from the Purchaser and accepted.

72. While the Receiver will abide by any direction given by the Court, and sees this largely as a matter to be contested between the Purchaser and KCS, as an officer of the Court the Receiver feels obliged to make the following points.

73. It would appear that any opposition which might be advanced by KCS in this matter would have less to do with alleged tender sale process defects or inherent unfairness, than it would with KCS's commercial disappointment at having not been selected the successful proponent. Indeed, without demonstrating any fatal procedural flaws, it has been routinely held by Canadian Courts that a disappointed bidder in the context of a Receivership sales process has no standing to contest a Motion to have the result of that sale approved.

74. In ***Re Skyepharma*** (2000) CarswellOnt 466 (Ont. C.A.), the Ontario Court of Appeal concluded that an unsuccessful proponent in a Receiver's tender sale process, holding nothing more than a commercial interest in the outcome of that process, had no standing to oppose the sale approval Motion brought by the Receiver. The Ontario Court of Appeal's findings were supported by several case authorities, including ***British Columbia Development Corp. v. Spun Cast Industries Ltd.*** (1977), 26 C.B.R. (N.S.) 28 (B.C. S.C.), and the intervention of the unsuccessful proponent was dealt with as follows (at paras. 24 *et seq*):

> "24 Although the issues considered in these cases are not identical to the case at bar, the reasoning applies to the issue raised on this appeal. If an unsuccessful prospective purchaser does not acquire an interest sufficient to warrant being added as a party to a motion to approve a sale, it follows that it does not have a right that is finally disposed of by an order made on that motion.
>
> 25 There are two main reasons why an unsuccessful prospective purchaser does not have a right or interest that is affected by a sale approval order. First, a

prospective purchaser has no legal or proprietary right in the property being sold. Offers are submitted in a process in which there is no requirement that a particular offer be accepted. Orders appointing receivers commonly give the receiver a discretion as to which offers to accept and to recommend to the court for approval. The duties of the receiver and the court are to ensure that the sales are in the best interests of those with an interest in the proceeds of the sale. There is no right in a party who submits an offer to have the offer, even if the highest, accepted by either the receiver or the court: *Crown Trust v. Rosenberg, supra.*

26 Moreover, the fundamental purpose of the sale approval motion is to consider the best interests of the parties with a direct interest in the proceeds of the sale, primarily the creditors. The unsuccessful would be purchaser has no interest in this issue. Indeed, the involvement of unsuccessful prospective purchasers could seriously distract from this fundamental purpose by including in the motion other issues with the potential for delay and additional expense.

27 In making these comments, I recognize that a court conducting a sale approval motion is required to consider the integrity of the process by which the offers have been obtained and to consider whether there has been unfairness in the working out of that process. *Crown Trust v. Rosenberg, supra*; *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.). The examination of the sale process will in normal circumstances be focussed on the integrity of that process from the perspective of those for whose benefit it has been conducted. The inquiry into the integrity of the process may incidentally address the fairness of the process to prospective purchasers, but that in itself does not create a right or interest in a prospective purchaser that is affected by a sale approval order.

...

29 In limited circumstances, a prospective purchaser may become entitled to participate in a sale approval motion. For that to happen, it must be shown that the prospective purchaser acquired a legal right or interest from the circumstances of a particular sale process and that the nature of the right or interest is such that it could be adversely affected by the approval order. A commercial interest is not sufficient.

30 There is a sound policy reason for restricting, to the extent possible, the involvement of prospective purchasers in sale approval motions. There is often a measure of urgency to complete court approved sales. This case is a good example. When unsuccessful purchasers become involved, there is a potential for greater delay and additional uncertainty. This potential may, in some situations, create commercial leverage in the hands a disappointed would be purchaser which could be counterproductive to the best interests of those for whose benefit the sale is intended.

31. ... Having regard to the facts in the case, it is not clear to me that *Cameron* stands for the proposition asserted by Bioglan, that an unsuccessful would be purchaser, without more, has a right that is finally determined by an order approving a sale. If it does, I would, with respect, disagree.

32 In the result, I conclude that the fact that Bioglan made an offer to purchase Hyal's assets did not give it a right or interest that was affected by the sale approval order. It was not entitled to standing on the motion on that basis nor is it now entitled to bring this appeal on that basis." (emphasis added)

75. See also ***Cobrico Developments Inc. v. Tucker Industries Inc.*** (2000) CarswellAlta 1211 (Ab. Q.B.), and ***Royal Bank v. Fracmaster Ltd.*** (1999), 209 W.A.C. 93 (Alta. C.A.) approving (1999), 245 A.R. 138 (Alta. Q.B.).

76. The Receiver ran a transparent process with uniform rules for all. KCS participated in every round of that process. Each party receiving notice of the tender process was free at any stage to register any procedural or other objection they might have with the Receiver, but no such objection was made. Any opposition by KCS therefore, would spring from the *outcome of the process,* not the process itself.

77. The essence of a fair sealed tender process is that the proponents do not know who else might be bidding and what amount those parties might bid. Such conditions are favourable for generating maximal return because proponents know that they must make their best attempt in order to succeed, without knowing where the competitive bar has been set. Parties take a calculated risk in such circumstances that their bids will be surpassed by others.

78. Although KCS (upon the request of its counsel) has been provided notice of the Receiver's Motion as a courtesy, should the Court form the view that the substance of the KCS opposition in this matter is rooted in its *disappointment as to the results of this contest, and nothing more*, it is submitted this Court is free to dismiss the opposition of KCS for want of standing.

79. Irrespective of the Court's conclusion on the issue of standing, the Receiver stands behind both the tender process it has developed and run in this matter, and its decision to accept the Marine Harvest bid, being the highest bid received within the stipulated parameters of that competitive sales process. Were the Receiver to abandon the process it has run, it would offend principles 3 and 4 articulated in ***Soundair,*** *supra*, namely undermining the efficacy and the integrity of the process under which bids were submitted and considered; and promoting unfairness in the working out of said process.

80. In the case of ***Northland Bank (Liquidator of) v. Kuperman*** (1989) CarswellMan 25 (Man. C.A.), the Manitoba Court of Appeal had occasion to review the generally well understood principle that a Receiver is within its rights, after running a fair sale process, to accept the highest bid received (at paras 16 et seq):

> "16 It is certainly true that the principal function of the court is to obtain as high a price as possible in a liquidation as in a receivership. Nevertheless, where, as in this case, a process is set up with the consent of the major creditors to have a sale procedure which will normally result in the highest price being obtained, it is not reasonable that court discretion should be withheld or that an auction sale should be carried on by the court.
>
> 17 The matter was discussed with respect to receivers in *Cameron v. Bank of N.S.* (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.)...
>
> 18 Concurring in the result, Macdonald J.A. said, again according to the headnote:
>
> If the decision of the receiver to enter into an agreement of sale, subject to court approval, is reasonable and sound under the circumstances existing at the time, it should not be set aside simply because a later and higher bid is made. Once a receiver puts a deadline on bids, then he and other interested parties are entitled to

assume that bids received after such deadline are not relevant. The receiver can safely accept the highest bid received before the deadline expires and enter into a binding agreement of sale subject to court approval. Such approval should not be refused simply because some person, after the close of bids, makes a higher offer.

19 The dicta of Macdonald J.A. in *Cameron* were considered by Saunders J. of the Ontario Supreme Court [In Bankruptcy] in *Re Selkirk* (1986), 58 C.B.R. (N.S.) 245 . Saunders J. [at p. 246] quoted Macdonald J.A. [at p. 11] as follows:

In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances at the time existing it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a binding agreement. On the contrary, they would know that other bids could be received and considered up until the application for court approval is heard — this would be an intolerable situation.

Saunders J. said [at p. 246]:

While those remarks may have been made in the context of a bidding situation rather than a private sale, I consider them to be equally applicable to a negotiation process leading to a private sale. Where the court is concerned with the disposition of property, the purpose of appointing a receiver is to have the receiver do the work that the court would otherwise have to do.

20 In a later case in *Re Selkirk* (1987), 64 C.B.R. (N.S.) 140 (Ont. S.C.), McRae J. also followed what was said by Macdonald J.A. He said [at p. 142]:

The court will not lightly withhold approval of a sale by the receiver, particularly in a case such as this where the receiver is given rather wide discretionary authority as per the order of Mr. Justice Trainor and, of course, where the receiver is an officer of this court. Only in a case where there seems to be some unfairness in the process of the sale or where there are substantially higher offers which would tend to show that the sale was improvident will the court withhold approval. It is important that the court recognize the commercial exigencies that would flow if prospective purchasers are allowed to wait until the sale is in court for approval before submitting their final offer. This is something that must be discouraged.

21 In the case before us now it is true there are substantially higher offers but these do not tend to show that the sale was improvident on 8th December. On the contrary, all the evidence supports the view that the sale was for the highest consideration that could be obtained at the time and in the light of circumstances then existing." (emphasis added)

81. The tender process is an essential tool at the disposal of a Receiver which must be defended by this Honourable Court lest it lose its hard won legitimacy as a fair and commercially reasonable means to maximize estate realizations. Permitting the sound business judgment of a Receiver to be usurped at the approval stage must be reserved for only the clearest of cases where the necessity and propriety of doing so are plain. To do otherwise would be to compromise the role of Receiver, tending to discourage *bona fide* tender participation by would-be bidders in future insolvent realization processes. (see ***Amalgamated Dairies Ltd. v. Prince Edward Island Development Agency*** (1991) CarswellPEI 13 (P.E.I. S.C.); ***Crown Trust Co. v. Rosenberg*** (1986), 39 D.L.R.

(4th) 526 (Ont. H.C.); and ***Bank of Montreal v. Maitland Seafoods Ltd.*** (1983) CarswellNS 43 (N.S.S.C.).

82. Notwithstanding the late-filed KCS offer therefore, the Receiver recommends to the Court the offer which has been accepted, being the highest offer which complied with the terms and timelines of the sales process which the Receiver conducted.

(c) Vesting Order

83. Within the draft Order approving the Transaction, the Receiver seeks a vesting order pursuant to paragraph 3(n) of the Receivership Order. As with any proposed vesting, the proceeds of the Purchased Assets would stand in lieu of the assets conveyed, with the interests of registered encumbrancers following these proceeds, thus permitting a free and clear sale without disrupting the equities.

84. The Receiver submits that this Honourable Court has the authority to issue a vesting Order enabling the Purchaser to acquire the Purchased Property free and clear of any registered encumbrances (see ***Meridian Credit Union Ltd. v. 984 Bay Street Inc.,*** [2006] O.J. No. 3169 (Ont. S.C.J.); ***Romspen Investment Corporation v. Woods Property Development Inc.,*** [2011] O.J. No. 1163, (Ont. S.C.J.) (***"Romspen"***)).

85. In ***Romspen***, Justice Wilton-Siegel considered the authority of the Court to issue a vesting order, in a situation involving a leasehold encumbrance. At paragraphs 64-66, the Court noted:

> **"64** Home Depot relies on the following cases in support of its position that the Court cannot order the Receiver to sell the Property free and clear of the interest of Home Depot in the Home Depot Lands and, in particular, free and clear of the Ground Lease: *Coast Capital Savings Credit Union v. 482451 B.C. Ltd.,* [2004] B.C.J. No. 46 at paras. 12-14 (S.C.); *Capital Funds (I.A.C.) Ltd. v. Park Marine Apartments Ltd. et al.,* [1967] B.C.J. No. 132 at paras. 9-10 (S.C.); and *Winick v. 1305067 Ontario Ltd.* [2008] O.J. No. 695 at para. 15 (Sup. Ct. J.).
>
> **65** These decisions do not articulate an absolute and unqualified rule that the Court lacks the authority to vest out a leasehold interest. Instead, they mandate that a receiver take into consideration the equities of the positions of the various parties involved. The principle is well summarized by Ground J. in *Meridian Credit Union Ltd. v. 984 Bay Street Inc.* [2006] O.J. No. 3169 at para. 19 (Sup. Ct. J.) as follows:
>
> I think the law is clear that, if Meridian had proceeded by way of power of sale, it could have sold the Property to a purchaser free and clear of the leasehold interest of BW Health and Integrated on the basis that the subordination provision contained in the leases clearly subordinate the rights of the tenants to the rights of Meridian under the Meridian Charge and on the basis that none of the leases was registered on title to the property. This sale is, however, being conducted by a court-appointed receiver and, when seeking to convey title to assets free and clear of the interest of other parties, a receiver must apply to the court for a vesting order. In *New Skeena Products Inc.* v. *Kitwanga Lumber Co.*, [2005] B.C.J. No. 546, 251 D.L.R. (4th) 328, the British Columbia Court of Appeal clearly states that, in determining whether to issue a vesting order terminating in the interests of parties in a property, the court must

> review the equitable considerations supporting the respective positions of the parties.
>
> The same conclusion was expressed by Gill J. in *Capital Funds, supra* in his reference to the fiduciary obligation of a court-appointed receiver to all the parties involved in a contest.
>
> **66** Accordingly, I have proceeded on the basis that the Court has the authority to grant the relief requested provided it is appropriate to do so after reviewing the equitable considerations supporting the respective positions of the parties." (emphasis added)

86. Vesting Orders are routinely given in New Brunswick, and are a vital tool available to Receivers to promote maximal realizations of secured real and personal property (see ***St.-Anne Nackawic Pulp Co. (Re)*** 2005 NBQB 304; ***Cansugar Inc. (Re)*** 2006 NBQB 201; and ***Farm Credit Canada v. Ocean Legacy Inc.*** 2011 NBQB 194).

87. In the circumstances, while there are various registered security interests as against the Purchased Property, such interest holders have continuing recourse against proceeds generated by the sale, subject to the prior right of the Receiver's Indemnity Charge and any Receiver's Certificated borrowings. These proceeds shall stand in lieu of the Purchased Property, and thus the Purchaser would be free to acquire them without regard to these interests, if so ordered, with the secured creditors then being at liberty to participate in a subsequent distribution hearing to be scheduled by the Receiver, on due notice.

(d) Approval of the Receiver's Second Report and the Receiver's Conduct and Actions to Date

88. By way of a separate Order, the Receiver seeks this Honourable Court's approval of the contents of the Receiver's Second Report, together with this Honourable Court's endorsement and approval of the Receiver's conduct and activities to date, as described therein.

89. While traditionally customary at the conclusion of a Receiver's mandate, for instance at the time of taxation of fees and discharge, it has recently become customary for Receivers to seek interim approval of their conduct as set forth in formal reporting (see ***Azura Management (Hemlock) Corp. v. Hemlock Valley Resorts Inc.*** [2007] B.C.J. No. 2628 (B.C.S.C.), per Curtis J.; ***GE Canada Equipment Finance G.P. v. Northern Sawmills Inc.*** [2012] O.J. No. 5633 (Ont. S.C.J.), per Newbould J.; and ***Re AMS Homecare Canada Inc.*** [2012] B.C.J. No. 287 (B.C.S.C.) per Savage J.).

90. We respectfully submit the Receiver has conducted itself prudently and in a commercially reasonable manner since its appointment, and has preserved and protected the value of the Companies' assets and facilitated difficult and time-sensitive arrangements for the responsible management and protection of highly perishable salmon inventory in the skilful and diligent manner befitting an officer of this Honourable Court.

91. The Receiver diligently pursued sensitive negotiations with respect to live salmon inventories, managed incidences of infection and other natural perils, avoided potentially catastrophic environmental losses, maintained the currency of permits and active applications for same, and successfully mediated on behalf of the Companies with

respect to compensation payable by the Minister of Agriculture and Agri-Foods Canada pursuant to the Health of Animals Act.

92. In liquidating the Companies' assets, the Receiver likewise took a prudent approach and after exhausting other alternatives, achieved the result which was the best available in the presenting circumstances.

93. In this case, while the Receiver was not operating the Companies' business with a view to continuation as a going concern, the Receiver was duty bound to preserve and protect the potential marketability of the salmon inventory, equipment and infrastructure of the Companies, along with the integrity of the Receiver's office, and has done so.

94. We respectfully submit the conduct of the Receiver as set forth in the Receiver's Second Report speaks for itself, and is worthy of approval by this Honourable Court.

95. As such, we humbly request an Order be issued in this matter, in the draft form submitted herewith.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 7th DAY OF FEBRUARY, 2017.

JOHN STRINGER, Q.C.

Counsel for the Applicant