Clerk’s stamp:

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| COURT FILE NO. | 1901-12274 |
| COURT | COURT OF QUEEN’S BENCH OF ALBERTA |
| JUDICIAL CENTRE | CALGARY |
| PLAINTIFF | ATB FINANCIAL (FORMERLY ALBERTA TREASURY BRANCHES) |
| DEFENDANT | 1963843 ALBERTA LTD., PENHOLD CROSSING PLAZA LTD., ASHWANI AWASTHI, SWARNJIT SINGH KOONER, SUKHBIR NAIN, OM ACAYOT ABHOY, AND ANURAG SUMAN |
| DOCUMENT | **WRITTEN SUBMISSIONS OF THE RECEIVER AND MANAGER ERNST & YOUNG INC.** |
| ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT | Dentons Canada LLP<br>Bankers Court<br>15th Floor, 850 – 2nd Street SW<br>Calgary, Alberta T2P 0R8<br><br>Attn: Derek Pontin/John Regush<br>Ph. (403) 268-6301/7086<br>Fx. (403) 268-3100<br>File No.: 131079-102 |

**Written Submissions of Ernst & Young Inc., Court-appointed Receiver and Manager in respect of the Application to be heard by the Honourable Justice Feth on December 10, 2021 at 2:00 p.m.**

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## I. INTRODUCTION

1. These written submissions are provided on behalf of Ernst & Young Inc. ("**EY**" or the "**Receiver**") in its capacity of court appointed Receiver and Manager of 1963843 Alberta Ltd. ("**196**") and Penhold Crossing Plaza Ltd. ("**Penhold**" and collectively, the "**Debtors**") in respect of the Receiver's application seeking approval of the agreement of purchase and sale with 1676556 Alberta Ltd. ("**167 AB Ltd.**") referred to as the "**Penhold Crossing and 196 PSA**" and related relief (the "**SAVO Application**").

2. These written submissions provide the Court with a brief overview of the legal principles applicable to the Receiver's determination to proceed with the SAVO Application notwithstanding a new offer received from 2319456 Alberta Ltd. ("**231 AB Ltd.**") less than 2 hours prior to the SAVO Application (the "**December 6 231 PSA**") and a further new offer received from 231 AB Ltd. on December 7, 2021 (the "**December 7 231 PSA**", collectively the "**231 Offers**").

3. It is respectfully submitted that in consideration of the surrounding circumstances and context, it is fair, commercially reasonable, and most likely to enhance the recoveries in the Debtors' estates to proceed with the SAVO Application seeking approval of the Penhold Crossing and 196 PSA.

## II. FACTS

4. A detailed background of the Debtors and the Receiver's activities leading up to the SAVO Application, including the sales process, are more fully described in the Fifth Reports of the Receiver, dated November 29, 2021 and the Confidential Supplements thereto.

5. Further information pertaining to the 231 Offers and the surrounding circumstances is included in Supplements to the Receiver's Fifth Reports. As certain of the information in the 231 Offers is commercially sensitive, and as the Receiver's analysis necessarily discusses sensitive information, the Receiver has also provided Second Confidential Supplements to the Fifth Report, which it is seeking to have temporarily sealed.

## III. ISSUES

6. Should this Honourable Court approve the SAVO Application recommended by the Receiver?

## IV. LAW AND ARGUMENT

7. The applicable test in determining whether to grant approval of a sale is the *Soundair* test, which asks the Court to consider:

   i. Whether the Receiver has made a sufficient effort to get the best price and has not acted improvidently;

   ii. Whether the interests of all parties have been considered, not just the interests of the creditors of the debtor;

   iii. The efficacy and integrity of the sale process by which offers are obtained; and

iv. Whether there has been unfairness in the working out of the process.[1]

8. The Alberta Court of Appeal provided recent guidance on the approach to be taken by a Court in reviewing a sale recommended by a Receiver:

> A court approving a sale recommended by a receiver is not engaged in a perfunctory, rubberstamp exercise. But neither should a court reject a receiver's recommendation on sale absent exceptional circumstances: *Soundair* at paras 21, 58. A receiver plays the lead role in receivership proceedings. They are officers of the court; their advice should therefore be given significant weight. To otherwise approach the proceedings would weaken the receiver's central purpose and function and erode confidence in those who deal with them: *Crown Trust Co v Rosenberg*(1986), 39 DLR (4th) 526, 60 OR (2d) 87 (ONSC) at p 551.[2]

9. Courts must ensure that the process was fair, but should avoid delving "into the minutia of the process or of the sell strategy adopted by the Receiver."[3]

10. The Receiver's decision to accept an offer must be assessed in light of the facts at the time, and "[c]hallenges to a sale process based on after-the-fact information should generally be resisted."[4]

11. The Court should also consider that failing to accept an offer that has been negotiated with the Receiver in good faith would generally undermine the integrity of receivership proceedings:

> I have decided this appeal in the way I have in order to assure business people who deal with court-appointed receivers that they can have confidence that an agreement which they make with a court-appointed receiver will be far more than a platform upon which others may bargain at the court approval stage. I think that persons who enter into agreements with court-appointed receivers, following a disposition procedure that is appropriate given the nature of the assets involved, should expect that their bargain will be confirmed by the court.[5]

12. The Receiver has carefully considered all of the factors concerning the sales process and the 231 Offers, and determined that it is appropriate and commercially reasonable to proceed with seeking approval of the Penhold Crossing and 196 PSA. This decision is owed significant deference by this Honourable Court.

13. Notably, the consideration provided by both the 231 Offers is unlikely to result in higher net realizations for the estate than pursuing the Penhold Crossing and 196 PSA. Moreover, the

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[1] *1705221 Alberta Ltd. v Three M Mortgages Inc.*, 2021 ABCA 144 at para 19, [2021] AWLD 4108. [***Three M***] https://www.canlii.org/en/ab/abca/doc/2021/2021abca144/2021abca144.html?autocompleteStr=2021%20abca%20144&autocompletePos=1

[2] ***Three M*** at para 22.

[3] ***Three M*** at para 47, citing Royal Bank v Soundair Corp**.** (1991), 4 OR (3d) 1 at para 49, 7 CBR (3d) 1 (ONCA).

[4] ***Three M*** at para 40.

[5] ***Three M*** at para 42.

proposed purchase price in both of the 231 Offers supports the position that the Penhold Crossing and 196 PSA is commercially reasonable.

14. Further, it is respectfully submitted that the fact that the offer which lead to the Penhold Crossing and 196 PSA was submitted after the bid deadline (but before any binding agreement was reached) has not introduced unfairness into the process as:

    (a) the offer was unsolicited, such the Receiver was not acting unfairly by inviting some but not all parties to put in an additional bid;

    (b) upon removal of conditions (and prior to any price increase) the offer was the highest qualified bid;

    (c) the offer was received prior to the Receiver executing any binding agreement; and

    (d) given that there were three prior failed efforts to negotiate definitive sale documentation and that the renewed sales process was the second call for bids:

        (i) there would be concern that in opening a third round of bidding, parties would lose faith in the process; and

        (ii) all parties had multiple opportunities to put in their best bid, and based on the quantum of bids submitted it was not likely that additional bids would be improved over the offer.

15. The timing of revising the offer that lead to the Penhold Crossing and 196 PSA did not introduce unfairness into the process, and the only commercially reasonable course of action was for the Receiver to consider the offer received. It did so, and determined that it was fair, commercially reasonable, and in the best interests of the Debtors and their stakeholders to proceed with the offer.

16. In contrast, there is concern that allowing a bid submitted at the eleventh hour, long after the Receiver has entered into a binding agreement of purchase and sale, would call into question the integrity of the sales process, and would colour the view of any parties participating in a further sales process. It is not commercially reasonable to consider accepting such an offer or re-opening the sales process based on such an offer, particularly where the bid submitted (and follow up bid) do not appear likely to provide better realizations than the existing bid and the fulcrum creditor continues to support the existing bid.

17. The Receiver has also considered whether there might be other structures that could be employed, such as a stalking horse bid, and found that such a structure is not achievable in the

circumstances, and would in any event not be anticipate to provide superior realizations to the present Penhold Crossing and 196 PSA.

18. Ultimately, the Receiver has considered the matter in detail, as reflected in the Supplement to the Fifth Report and 2nd Confidential Appendices, and determined that the proper course of action is to proceed with the Penhold Crossing and 196 PSA, and that doing so is most likely to maximize realizations, is fair in all the circumstances, and is commercially reasonable. This is a reasoned decision made by the Receiver, supported by all the facts and circumstances, and it is respectfully submitted that there are no extraordinary factors that would suggest the Court ought to second guess this decision.

## V. CONCLUSION

19. The Receiver's decisions are owed deference by this Honourable Court, and must be considered in light of all the circumstances at the time they are made. The Receiver has considered all of the factors and determined that seeking approval of the Penhold Crossing and 196 PSA it is fair, commercially reasonable, and likely to maximize realization of the Debtors' estates. There are no extraordinary circumstances that would cause the Court to second-guess this determination, and it is respectfully submitted the SAVO Application should be approved accordingly.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** at Calgary, Alberta this 9th day of December, 2021.

**DENTONS CANADA LLP**

Per: John Regush

John Regush

Counsel for the Applicant, Receiver Ernst & Young Inc. in its capacity as Court-appointed Receiver of 1963843 Alberta Ltd. and Penhold Crossing Plaza Ltd.