Court File No. CV-23-00703161-00CL

***ONTARIO***
**SUPERIOR COURT OF JUSTICE**
**COMMERCIAL LIST**

**IN THE MATTER OF SECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C. B-3, AS AMENDED, AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O 1990 C. C.43, AS AMENDED**

B E T W E E N:

**ROMSPEN INVESTMENT CORPORATION**

Applicant

- and -

**TUNG KEE INVESTMENT CANADA LTD. and TUNG KEE INVESTMENT LIMITED PARTNERSHIP**

Respondents

**FIRST REPORT OF THE RECEIVER AND MANAGER**
**DATED OCTOBER 31, 2023**

## INTRODUCTION

1. This first report of the Receiver and Manager (the "**First Report**") is filed by Ernst & Young Inc. ("**EYI**" or the "**Receiver**") in its capacity as receiver and manager of all the assets, undertakings and properties of the Respondents acquired for, or used in relation to a business carried on by them, pursuant to the Order of Justice Osborne dated October 19, 2023 (the "**Appointment Order**"). A copy of the Appointment Order is attached hereto as **Appendix** "**A**".

2. The Report of the Proposed Receiver dated October 4, 2023 (the "**Pre-Receivership Report**") provided, among other things, background information regarding the Respondents and the property known municipally as 3143 19$^{th}$ Avenue, Markham, Ontario (the "**Real Property**"), a summary of the Sale Process that was undertaken by the Applicant prior to the Appointment Order being made, the Receiver's views on the

issuance of an Approval and Vesting Order ("**AVO**") without the Receiver launching its own marketing and sale process for the Real Property, and a request for a Sealing Order sealing terms of the Times APS (defined below), and the competing offers and appraisals for the Real Property. A copy of the Pre-Receivership report is attached hereto as **Appendix** "**B**", without the confidential appendices thereto.

3. The Receivership Application proceeded as a "pre-packaged" receivership, with two competing transactions. The first transaction (the "**Times Transaction**") was contemplated in an agreement of purchase and sale between the Applicant and first-ranking mortgagee Romspen Investment Corporation ("**Romspen**") and Times 1010 Inc. dated September 15, 2023, as amended by a waiver, assignment and amending agreement dated September 29, 2023 (the "**Times APS",** attached hereto as **Confidential Appendix "1"**) between the Applicant and Times 1010 Inc., 3143 Holdings Inc., and Times 3143 Limited Partnership (collective, the "**Times Group**"). The Times APS was conditional on the Appointment Order and the AVO being issued.

4. The second transaction (the "**281 Transaction**") was between SOW Capital Ontario Limited ("**SOW**", the fifth-ranking mortgagee) and the Appellant 2816513 Ontario Inc. ("**281 Ontario**") pursuant to an agreement of purchase and sale dated July 18, 2023 (the "**281 APS**", attached to the affidavit filed by SOW, reproduced at Appendix H, described below).

5. On October 19, 2023, Justice Osborne issued the AVO approving, among other things, the Times Transaction. A copy of the AVO and the related endorsement of Justice Osborne are attached hereto as **Appendices "C"** and **"D"**, respectively.

6. On October 19, 2023, Justice Osborne issued an Order (the "**Sealing Order**") sealing, among other things, confidential information attached to the Affidavit of Wesley Roitman sworn July 19, 2023 (copy attached hereto as **Appendix "E"**, without confidential exhibits thereto), the Affidavit of Wesley Roitman sworn September 26, 2023 (copy attached hereto as **Appendix "F"**, without confidential exhibits thereto), and to the Pre-Receivership Report.

7. The Sealing Order and the Appointment Order were not opposed by any of the mortgagees or the Respondents. In fact, the Respondents delivered a responding Affidavit of Pui Ling Lai sworn October 5, 2023 (attached hereto **as Appendix "G"**) supporting the appointment of a Receiver.

8. The Respondents, SOW and 281 Ontario opposed the AVO. SOW brought a separate motion to approve the sale of the Real Property to 281 Ontario, and in support of that motion delivered an Affidavit of Philip Wong sworn September 26, 2023, a copy of which is attached at **Appendix "H"**. In support of SOW's motion, 281 Ontario delivered an Affidavit of Hunter Lam sworn October 4, 2023, a copy of which is attached at **Appendix "I"**.

9. The Receiver's Pre-Receivership Report included a summary of the competing offers for the Real Property, including the Times APS and the 281 APS. A copy of the Receiver's summary is attached at **Confidential Appendix "2"**.

10. On October 19, 2023, among other things Justice Osborne approved the AVO authorizing the Times Transaction and the Times APS.

**PURPOSE**

11. The First Report is being filed in connection with an urgent motion regarding the Appointment Order, the AVO and the Times Transaction, which is scheduled to close on **<u>Wednesday, November 15, 2023</u>**.

12. On October 27, 2023, 281 Ontario served a Notice of Appeal seeking, among other things, an Order setting aside the Appointment Order and the AVO, and for leave to hear its Appeal on an expedited basis.

13. On October 30, 2023, the Respondents filed a Notice of Appeal, among other things, to set aside the Appointment Order and the AVO. As alterative relief, the Respondents seek, "if necessary" leave to appeal the Appointment Order and the AVO, and staying the Orders pending Appeal.

14. Neither 281 Ontario nor the Respondents have delivered a notice of motion seeking leave to appeal the AVO, nor seeking a stay of either the Appointment Order or the AVO.

15. The Receiver seeks directions before a single judge of the Court of Appeal regarding, among other things:

a) whether 281 Ontario has standing to appeal, and if so, whether 281 Ontario's appeal of the Appointment Order and the AVO is as of right, or whether it requires leave to appeal;

b) whether the Respondents have an appeal as of right of the Appointment Order and AVO, or whether they require leave to appeal;

c) if leave to appeal is required (and if 281 Ontario has standing with respect to its purported appeal), whether leave should be granted; and

d) if leave is not required (and if 281 Ontario has standing with respect to its purported appeal), whether the Appointment Order and the AVO are stayed by the Notices of Appeal, and if stayed, whether the stays should be lifted.

16. The Receiver's position is that 281 Ontario had no standing on the underlying Application and continues to have no standing on its purported appeal. Furthermore, the Receiver's position is that there is no automatic right of appeal with respect to the Appointment Order or the AVO, pursuant to subsections 193(a) through (d) of the *Bankruptcy and Insolvency Act* (the "**BIA**"), and as a result of Respondents' consent to the Appointment Order, section 133 of the *Courts of Justice Act*, R.S.O. 1990, c C.43 precludes its appeal of the Appointment Order. In the alternative, the Receiver 's position is that the Appointment Order and the AVO are not automatically stayed pursuant to section 195 of the *BIA* by the filing of the Notices of Appeal, and that a stay is required to preclude the Times Transaction from closing on November 15, 2023.

## TERMS OF REFERENCE

17. In preparing this First Report and making the comments herein, the Receiver has been provided with, and has relied upon, certain unaudited, draft and/or internal financial statements, the motion materials filed in respect of these proceeding, and discussions with management and its counsel (collectively, the "**Information**"). Future oriented financial information relied upon in the First Report is based on assumptions regarding future events. Actual results achieved may vary from this information and these variations may be material.

18. The Receiver has not audited or otherwise attempted to verify the accuracy or completeness of the Information in a manner that would wholly or partially comply with Generally Accepted Assurance Standards ("**GAAS**") pursuant to the *Chartered Professional Accountants Canada Handbook* and, accordingly, the Receiver expresses no opinion or other form of assurance contemplated under GAAS in respect of the Information.

19. The Receiver will make a copy of the First Report, and related documents with respect to this Receivership application, available on the Receiver's website at www.ey.com/ca/tungkee. The Receiver has also established a toll-free phone number that is referenced on the Receiver's website so that parties may contact the Receiver if they have questions with respect to this proceeding.

20. Unless otherwise stated, all monetary amounts contained herein are expressed in Canadian dollars.

## BACKGROUND

21. The Respondent Tung Kee Investment Canada Ltd. is an Ontario corporation and is the registered owner of the Real Property. The Respondent Tung Kee Investment Limited Partnership is an Ontario limited partnership and is the beneficial owner of the Real Property. The Real Property consists of three separate legally described parcels which collectively comprise approximately 66.29 acres of developable vacant land at the southeast corner of 19$^{th}$ Avenue and Woodbine Avenue East in Markham, and collectively bear the municipal address of 3143 19$^{th}$ Avenue, Markham, Ontario. The Respondents

planned to develop the Real Property as a mixed used development comprised of film studios, offices, a hotel and retail.

22. On or about September 1, 2022, the Respondents defaulted in payment of interest due under the loan that Romspen extended to the Respondents (the "**Romspen Mortgage Loan**"). On October 7, 2022, Romspen made formal written demand for payment of the Romspen Mortgage Loan and delivered a Notice of Intention to Enforce Security pursuant to section 244 of the BIA. The Respondents failed to repay the Romspen Mortgage Loan following the expiry of the ten-day statutory notice period under the BIA.

23. On October 25, 2022, Romspen, by its lawyers, issued a Notice of Sale under the Romspen Mortgage. In early April 2023, the Applicant engaged Royal LePage Your Community Realty and launched a process for the marketing and sale of the Real Property (the "**Sale Process**"). The Sale Process undertaken by Romspen resulted in a firm and binding agreement between Romspen and the Times Group, subject to the appointment of a receiver and the issuance of an AVO. The Times APS contemplates a closing date of November 15, 2023.

24. In July 2023, SOW, the fifth ranking mortgage on title to the Real Property, under its own power of sale in respect of the Real Property entered into an agreement of purchase of sale with 281 Ontario (the "**281 APS**"), for a purchase price that is less than the Times APS (on a net basis).

25. On October 19, 2023 Justice Osborne released his Reasons for Decision issuing the Appointment Order and issuing the AVO approving the sale transaction and the Times APS. The Sale Process undertaken prior to the Appointment Order, the Times APS, and the 281 APS are described in detail in the Pre-Receivership Report.

26. The same day (October 27, 2023) counsel for 281 Ontario delivered its client's Notice of Appeal and counsel to the Respondents advised in writing of its clients' intention to appeal, the Receiver's counsel advised counsel for 281 Ontario and the Respondents that their clients' required leave to appeal, and that the Receiver would be seeking directions in a motion before a single judge of the Court of Appeal the week of November 6, 2023, as the

Times Transaction was scheduled to close on November 15, 2023.

27. The relevant email correspondence from counsel for the Receiver on October 27, 2023 is attached at **Appendix "J"**.

## ENCUMBRANCES/SECURED CLAIMS AGAINST THE REAL PROPERTY

28. There are five mortgages (the "**Five Mortgages**") registered on title to the Real Property, summarized below:

| **Ranking Priority** | **Creditor** | **Approximate Amount Owing (per Romspen factum)** |
|---|---|---|
| First | Romspen | $33.552 million |
| Second | Amber Mortgage Investment Corporation | $9.869 million |
| Third | 2149602 Ontario Inc. | $11.394 million |
| Fourth | Frank Pa and Steven Tung | $3.54 million |
| Fifth | SOW | $11.965 million |

29. On April 14, 2023, DX Strategies Inc.("**DX**") registered a claim for a lien over the Real Property in the amount of $4,653,028 and perfected the lien by registering a certificate of action on June 16, 2023. DX seeks priority over the mortgages registered on title to the Real Property.

30. The Receiver is in the process of performing an independent security review of the Five Mortgages, and of DX's lien, to determine validity and priority.

## APPRAISED VALUE OF THE REAL PROPERTY

31. The Times Transaction reflects a purchase price higher than the value of the Real Property as reflected by the appraisals commissioned by Romspen and SOW. Romspen produced the appraisal of Altus Group Limited dated January 28, 2023 as a confidential appendix (attached hereto as **Confidential Appendix "3"**), and sought (and obtained) the Sealing Order keeping the purchase price in the Times APS and the value in the appraisal confidential. SOW, on the other hand, did not seek a sealing order, and has publicly disclosed the purchase price in the 281 APS, and the valuations set out in the two appraisals SOW had commissioned.

## RISKS ASSOCIATED WITH A STAY OF THE APPOINTMENT ORDER AND AVO

32. The prejudice associated with a stay of the Appointment Order and the AVO would include:
    a. erosion of the net recovery through per diem interest of approximately $22,871, plus continued costs of the Receivership;
    b. a likely cap or ceiling on the amount of any future offer for the Real Property at an amount below the two appraisal values publicly disclosed by SOW (both of which are below the purchase price in the Times APS);
    c. the risk of losing the Times APS in the face of not just uncertainty, but in the face of a strong likelihood that a superior offer will not be received; and,
    d. the risk that a second sale process is likely to have a chilling effect on the market for the Real Property.

All of which is respectfully submitted this 31st day of October, 2023.

**ERNST & YOUNG INC.,**
**solely in its capacity as Receiver of the assets, property and undertaking of the Tung Kee Investment Canada Ltd. and Tung Kee Investment Limited Partnership and not in its personal capacity**
Per:

Jeffrey D. Kerbel
Senior Vice-President