Court File No. CV-23-00004340-0000

*ONTARIO*
**SUPERIOR COURT OF JUSTICE**

**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:

**CANADIAN WESTERN BANK**

Applicant

and

**20 CALDARI DEVELOPMENT INC.**

Respondent

**FACTUM OF THE RECEIVER**
(*Motion returnable on March 8, 2024, at 10a.m*)

March 6, 2024

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## PART I – OVERVIEW

1. This factum is filed by Ernst & Young Inc., in its capacity as court-appointed receiver and manager (the "**Receiver**") of 20 Caldari Development Inc. (the "**Company**"), in support of the Receiver's motion for an order:

(a) approving the activities of the Receiver as described in the first report of the Receiver dated January 25, 2024 (the "**First Report**");

(b) requiring each of Akash Aurora, Nakul Aurora, Ravi Aurora and Aurora Hotel Group Inc. (collectively, the "**Aurora Group**"), to forthwith provide the Receiver with any and all documents, computers, electronic devices, including cell phones or other electronic storage or media devices and computers belonging to or used in connection with the business or affairs of the Company, including without limitation, personal computers and cellular phones belonging to the Aurora Group (collectively, the "**Company Documents and Devices**"); and

(c) directing the Aurora Group to reimburse the Receiver on an actual indemnity basis for all reasonable costs and expenses resulting from their noncompliance with their obligations under the Order of the Honorable Justice Tzimas granted on December 7, 2023 (the "**Appointment Order**").

2. The Appointment Order authorizes the Receiver to take possession and control of the Company's business, assets and undertakings, and conduct a sale to maximize realizations for the benefit of all stakeholders. The Company Documents and Devices are required by the Receiver in order to carry out its mandate pursuant to the Appointment Order. The Aurora Group has disregarded their obligations under the Appointment Order to deliver the Company Documents and Devices to the Receiver. This Court ought to impose sanctions against the Aurora Group for their disregard of the Appointment Order by requiring that they pay the Receiver's actual indemnity costs and expenses resulting from their noncompliance.

## PART II – SUMMARY OF FACTS

### Background

3. The Company is incorporated under the laws of Ontario, with its registered office located at 20 Caldari Road, Vaughan. Mr. Nakul Aurora and Mr. Jay Khanna ("Khanna"), each apparently holding a 50% share, are the equal shareholders and the directors of the Company. The Company's principal asset is the real property known municipally as 20 Caldari Road, Vaughan, Ontario (the "**Property**"). The Property consists of a 95,770 square foot site, and includes an approximately 31,500 square foot[1] steel, two story building, which features a mixture of warehouse and office spaces, segmented into multiple units. These units are currently leased to multiple tenants.

### Receiver's Activities

4. Following its appointment on December 7, 2023, the Receiver has undertaken a variety of activities in pursuing its mandate, including:

(a) attended at the Property to inspect the facility and meet with the Auroras and the other tenants;

(b) issued multiple requests to the Auroras for the immediate delivery of books, records and other information relevant for the Receiver to assess the status of the Property, given the Auroras' management role;

(c) conducted a preliminary review of the leases with each of the tenants;

(d) communicated with the tenants to advise them of the receivership proceeding and discuss issues specific to each of their premises and how these will be addressed during the receivership proceedings;

(e) arranged for the extension of certain tenant lease agreements to maintain occupancy;

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[1] This is based on the TREB sale listing from 2020; however, the Receiver was advised by the Auroras that the floor area is larger according to more recent measurements. This information has not yet been verified.

(f) corresponded with Debtor's insurance broker to obtain a copy of the insurance policy, reviewed it for adequacy, arranged for the continuation of the coverage and payment of premiums, and requested that the Receiver be added as an additional insured and loss payee;

(g) Notified the bank holding a bank account in the name of the Company of the Appointment Order, and requested that this bank account be frozen immediately, that no further payments be allowed to clear, and all funds be transferred to the Receiver;

(h) established a new bank account for the Company in the name of the Receiver;

(i) arranged for the Appointment Order to be registered against the Property's title;

(j) arranged for continued utility services to the Property and set up new accounts in the Receiver's name;

(k) engaged Epic Investment Services Inc. ("**Epic**") as the property manager and negotiated a property management agreement;

(l) posted the Appointment Order and other court documents on the Receiver's website;

(m) contacted the Canada Revenue Agency ("**CRA**") to understand the status of the Debtor's HST and corporate tax filings;

(n) contacted the City of Vaughan to obtain information on the property tax arrears; and

(o) prepared and provided to all known creditors a copy of the Receiver's reports pursuant to sections 245 and 246 of the *BIA*;

(p) arranged for funding from CWB to fund the ongoing supply of goods and services relating to the receivership and provided a Receiver's Borrowing Certificate for the same.

**Aurora Group's Failure to Cooperate**

5. Paragraphs 4, 5 and 6 of the Appointment Order outline the obligations of all persons, including the Aurora Group to cooperate with the Receiver and provide timely access to the Company's books and records. Notwithstanding the repeated requests by the Receiver for information, the Aurora Group has responded slowly and has not yet delivered many of the requested items. As a result, the Receiver was required to obtain information from alternative accessible sources such as tenants, service providers, the City of Vaughan and Canada Revenue Agency. At present, the Aurora Group has still not responded to certain of the Receiver's requests, including direct access to the Company's accounting system, and all computers, electronic devices, including personal computers and cellphones, on which the Company's records are kept.

6. The lack of cooperation by the Aurora Group in providing the requested information has adversely affected the administration of the Company's estate and forced the Receiver to incur substantial additional costs to reconstruct records and obtain the information required to fulfill its mandate under the Appointment Order.

## PART III – THE ISSUES

7. The following issues are raised by this motion:

(a) Should this Court approve the Receiver's activities as described in the First Report?

(b) Should this Court grant an order compelling the Aurora Group to cooperate with the Receiver's information requests and provide the Receiver with direct access to the Company's information stored on their computers?

(c) Should this Court order the Aurora Group to reimburse the Receiver for its actual costs incurred as a result of their lack of cooperation and compliance with the Appointment Order?

## PART IV – LAW AND ARGUMENT

### The Receiver's Activities and First Report Should Be Approved

8. In *Target Canada*,[2] the court noted that a practice has developed in proceedings under the Companies' Creditors Arrangements Act ("***CCAA***") where court-appointed monitors will routinely seek approval for their reports and the activities described in them.

9. The court in *Target* added that there are good policy and practical reasons to grant such approval including: (a) allowing the monitor to bring its activities before the court; (b) allowing an opportunity for stakeholders' concerns to be addressed; (c) enabling the court to satisfy itself that the monitor's activities have been conducted in a prudent and diligent manner; (d) providing protection for the monitor not otherwise provided under the *CCAA*; and (e) protecting creditors from potential indemnity claims by the monitor.

10. The foregoing comments and policy considerations identified by the court in *Target* apply with equal force to receivership proceedings and motions seeking approval for a receiver's report and activities.[3]

11. The activities of the Receiver, as set out in its First Report, were necessary and undertaken in good faith pursuant to the Receiver's duties and powers set out in the Appointment Order. In each case, the Receiver's activities were undertaken in the best interests of the Company's stakeholders generally. The Receiver therefore respectfully submits that the First Report and the Receiver's activities described therein should be approved.

### Deliberate Disregard of Appointment Order

12. The express terms of the Appointment Order in paragraphs 4, 5 and 6 impose an obligation upon the Aurora Group to provide the Receiver with all relevant information, books and records which relate to the Company or its business and assets. The Aurora Group has deliberately disregarded the Receiver's numerous requests that they comply with their obligations to deliver access to the Company's information and records to the Receiver. Despite the Receiver's ongoing efforts to obtain the same, the Aurora Group has failed to provide the

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[2] Re *Target Canada Co.*, 2015 ONSC 7574, at paras. 2, 22 and 23

[3] *Re Hangfen Evergreen Inc.*, 2017 ONSC 7161, at para. 15.

Receiver with direct access to the Company's accounting system, computers, and other electronic devices on which the Company's records are stored.

13. The Receiver requires the information requested from the Aurora Group in order to carry out its mandate pursuant to the Appointment Order. AS a result of noncompliance by the Aurora Group with their obligations to deliver information and records to the Receiver, the Receiver was required to seek that information elsewhere and incur additional costs and expenses.

14. It is respectfully submitted that the Aurora Group's failure to comply with the Appointment sets a dangerous precedent which has the potential to completely undermine the effective functioning of receivership proceedings. Accordingly, the Receiver recommends that the Court send a strong message by ordering the Aurora Group to pay the Receiver's costs of this motion on an actual indemnity basis.

## PART V – ORDER REQUESTED

15. The Receiver respectfully recommends that this Court grant an order approving the First Report and the activities of the Receiver set out therein, compelling the Aurora Group to provide the Receiver with access to all information relating to the Company, including direct access to the computers on which the information requested by the Receiver is stored, and directing the Aurora Group to pay the Receiver's actual costs incurred as a result of their previous noncompliance.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED,** this 6th day of March, 2024.

**Lisa S. Corne**

Dickinson Wright LLP
Lawyers for the Applicant

**SCHEDULE "A"**
**LIST OF AUTHORITIES**

1. *Re Target Canada Co.,* 2015 ONSC 7574.
2. *Re Hangfen Evergreen Inc*., 2017 ONSC 7161.

**SCHEDULE "B"**
**TEXT OF STATUTES, REGULATIONS & BY-LAWS**

***Bankruptcy and Insolvency Act*, RSC 1985, c B-3**

**Court may appoint receiver**
243 (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

(a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

(b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or

(c) take any other action that the court considers advisable.

***Courts of Justice Act*, R.S.O. 1990, c. C.43**

**Injunctions and receivers**
101 (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so. R.S.O. 1990, c. C.43, s. 101 (1); 1994, c. 12, s. 40; 1996, c. 25, s. 9 (17).

**Terms**
(2) An order under subsection (1) may include such terms as are considered just. R.S.O. 1990, c. C.43, s. 101 (2)

CANADIAN WESTERN BANK
Applicant

-and-

20 CALDARI DEVELOPMENT INC.
Respondent

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***ONTARIO***
**SUPERIOR COURT OF JUSTICE**

PROCEEDING COMMENCED AT
BRAMPTON

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