

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,  
R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF ASHCROFT URBAN DEVELOPMENTS INC., 2067166  
ONTARIO INC., 2139770 ONTARIO INC., 2265132 ONTARIO INC., ASHCROFT  
HOMES – LA PROMENADE INC., 2195186 ONTARIO INC., ASHCROFT HOMES  
– CAPITAL HALL INC. AND 1019883 ONTARIO INC.

Applicants

**FACTUM OF ACM ADVISORS LTD.  
(MOTION TO APPOINT AN INTERIM RECEIVER)**

December 11, 2024

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**TO: THE SERVICE LIST**

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## PART I - OVERVIEW

1. ACM<sup>1</sup> is a secured lender to three distinct, single-purpose real estate corporations involved in this *Companies' Creditors Arrangement Act* ("CCAA") proceeding. Two of those corporations own retirement homes, while the other owns a student apartment building. According to the Applicants' own evidence, each property is independently operated.<sup>2</sup> ACM holds, respectively, \$19,237,983, \$40,693,224 and \$10,939,370 of debt, for a total of \$70,870,578.

2. ACM opposes the continuation of this CCAA proceeding and requests instead an interim receivership in connection with the three properties.<sup>3</sup> ACM is supported in this position by CLMS Financial Ltd., Equitable Bank, and Institutional Mortgage Capital Canada Inc. Together with ACM, these creditors hold approximately \$194 million in secured debt representing 68% of the total. Additionally, these mortgagees' opposition to the CCAA proceeding is supported by Central 1 Credit Union (collectively, the "Mortgagees"), which holds another approximately \$38 million in secured debt, representing 82% of the total.<sup>4</sup>

3. The Mortgagees propose the appointment of KSV Restructuring Inc. ("KSV"). KSV has served as receiver of similar operating entities and in real estate restructurings and has formulated an initial plan for ensuring the safe and stable operation of the properties on its initial appointment, while the path to a value maximizing transaction is identified, as set out in more detail in their pre-filing report.

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<sup>1</sup> ACM Advisors Ltd. is a Canadian alternative asset manager that specializes in the creation, structuring, and management of pooled Canadian commercial mortgage funds. ACM Commercial Mortgage Fund (the "Lender", together with ACM Advisors, "ACM") is a pooled commercial mortgage fund managed for institutional and private accredited investors.

<sup>2</sup> Affidavit of David Oswald Choo sworn December 3, 2024 ("First Choo Affidavit") at [para 9](#), Application Record of the Applicants dated December 4, 2024 ("AAR") Tab 2.

<sup>3</sup> KSV Restructuring Inc. ("KSV") has consented to act as receiver for each of these three properties. ACM understands that creditors of the applicant entities seek similar relief and that KSV has consented to act as receiver of those properties as well.

<sup>4</sup> Central 1 Credit Union separately seeks the appointment of its own receiver, as it is entitled, having already commenced that application; See First Choo Affidavit at [para 143](#).

4. Real property-centric entities such as the ones here are often less suitable for CCAA proceedings due to the nature of their security structures and operations.<sup>5</sup> Rather, those entities and their stakeholders commonly benefit more from simpler receivership proceedings. Notwithstanding these common structural challenges, the Applicants embarked on their CCAA application and obtained a stay without notice to ACM or other major lenders – a fundamental departure from usual restructuring practices and their obligations under the CCAA to act in good faith and with diligence. Compounding these missteps, the Applicants failed to even serve their Comeback Hearing materials until less than 24 hours before this hearing.

5. There was no obvious urgency that could justify such a serious lack of prior discussion and notice. The obvious inference is that this step was taken to avoid a contested initial order and thereby achieve status quo momentum. The CCAA does not, however, permit such stratagems. In the absence of notice, this hearing is required to be conducted on a *de novo* basis.

6. Against that *de novo* standard, ACM has four primary concerns that necessitate a receivership order and the termination of this misguided CCAA proceeding:

- i. the CCAA proceeding will serve no practical purpose. The Applicants have tried for months to resolve their liquidity issues in private with no success. They give no indication of having any real restructuring plan or transaction, let alone the “germ of a plan”<sup>6</sup> that could, at some point attract their lenders;<sup>7</sup>
- ii. the Applicants will divert revenues generated from the ACM secured properties to fund the activities of non-party entities bearing the Ashcroft Homes Group

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<sup>5</sup> Jeremy Opolsky et al, “Receivership versus CCAA in Real Property Development: Constructing a Framework for Analysis” (2021), Annual Review of Insolvency Law, [2020 CanLII Docs 3602](#), s 1 (Opolsky, *Receivership versus CCAA*).

<sup>6</sup> See Justice Osborne’s endorsement in *In the Matter of a Plan of Compromise or Arrangement of Antibe Therapeutics Inc* at para 70, dated April 22, 2024, CV-24-00717410-00CL ([unreported](#)) (“*Antibe*”).

<sup>7</sup> Affidavit of Ishbel Buchan sworn December 10, 2024 (“Buchan Affidavit”) at [para 59](#), Responding Motion Record of ACM dated December 11, 2024 Tab 2.

(“Ashcroft”) banner. Meanwhile, ACM’s mortgages will go unpaid while it indirectly pays for CCAA-related costs;<sup>8</sup>

- iii. the Applicants and the other 55 Ashcroft entities are distinct in form and function, each with its own lending bases. ACM should not have to involuntarily support other entities which ACM did not consider when evaluating the terms of its loans;<sup>9</sup>
- iv. the value of the Applicants’ properties is entirely uncertain in the current real estate market, relies on outdated appraisals, and may in some instances be worth less than the debts owed against each property;<sup>10</sup>
- v. ACM has lost confidence in the Applicants, whose mismanagement is not only recorded in regulatory compliance orders and the media, but is also reflected in the reckless and ill-informed planning of this proceeding.<sup>11</sup>

7. Ultimately, the only question for the Court is whether to impose receivership processes or to extend the CCAA proceeding. There are no other options at this juncture. Extending the stay of proceedings in a debtor-led insolvency process will engender significant risk and prejudice to the Mortgagees without enhancing value for any other stakeholders (except perhaps David Choo).

8. On the other hand, a receivership will ensure the stable operation of the individual entities while the value maximizing path is determined, is cost-effective, and will not cross-pollinate and jeopardize individual Mortgagee securities and revenues. ACM therefore requests that this Court appoint KSV.

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<sup>8</sup> Buchan Affidavit at [para 10](#) and [67\(c\)](#).

<sup>9</sup> Buchan Affidavit at [para 65](#).

<sup>10</sup> Buchan Affidavit at [para 54\(a\)](#).

<sup>11</sup> Buchan Affidavit at [para 54\(c\)](#).

## PART II - FACTS

### A. Background

9. ACM is a pooled commercial mortgage fund managed for institutional and private accredited investors.<sup>12</sup> ACM is a mortgagee in respect of three properties owned by three of the Applicants (the “ACM Debtors”).<sup>13</sup> Each of ACM’s loans was based on the value of the property charged as security. ACM made each loan on the understanding that each property was owned by a single-purpose entity.<sup>14</sup>

10. The ACM Debtors are members of Ashcroft, which purchases, develops, operates, leases, and sells residential properties in the Ottawa area for seniors, students, and general residential markets. Ashcroft consists of over 55 entities, of which only eight are parties to this proceeding.<sup>15</sup>

11. Seven of the Applicants own and operate separate residential projects, each with its own segregated operations, bank accounts, books and records, and assets. The Applicants engage in intercompany transactions within Ashcroft, resulting in intercompany receivables and payables.<sup>16</sup> Certain administrative services are provided on a centralized basis, but each entity pays its respective share for those services.<sup>17</sup> The eighth Applicant is Ashcroft’s head office.<sup>18</sup>

12. Four of the single-purpose Applicants are owned by David Oswald Choo, while three are owned by Mr. Choo and Envie Enterprises Inc. (“Envie Enterprises”). Envie Enterprises is owned by Mr. Choo and the David and Shanti Choo Family Trust 2016.<sup>19</sup>

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<sup>12</sup> Buchan Affidavit at [para 11](#).

<sup>13</sup> Buchan Affidavit at [para 3](#).

<sup>14</sup> Buchan Affidavit at [para 65](#).

<sup>15</sup> First Choo Affidavit at [para 19](#).

<sup>16</sup> First Choo Affidavit at [para 9](#).

<sup>17</sup> First Choo Affidavit at [para 10](#).

<sup>18</sup> First Choo Affidavit at [para 10](#).

<sup>19</sup> First Choo Affidavit at [paras 18-22](#).

**B. The ACM Mortgages and Defaults**

13. ACM<sup>20</sup> advanced an aggregate of \$74,400,000 in mortgage loans in respect of three properties respectively owned by three of the Applicants:

- i. \$19,900,000 to 2067166 Ontario Inc. (“206”) on December 21, 2022 in respect of a 99-suite seniors-oriented apartment building (“Park Place”);
- ii. \$42,200,000 to 2265132 Ontario Inc. (“226”) and 1384274 Ontario Inc. (“138”) on December 21, 2022 in respect of a 125-unit retirement residence and its related parking facility (“Ravines Senior”); and
- iii. \$11,200,000 to 2195186 Ontario Inc. (“219”) on November 24, 2017 in respect of a 185-unit, 592-bed student apartment (“Envie I”).<sup>21</sup>

14. ACM is the first mortgagee in respect of Park Place and Ravines Senior, and the second mortgagee in respect of Envie I. ACM is a perfected secured creditor of 206, 226, 138, and 219, which own the three properties, respectively.<sup>22</sup> Each of the security agreements contractually provide for and entitle the ACM Debtors to the appointment of a receiver upon default.

15. The ACM mortgages are in default. 219 has failed to pay the monthly mortgage payments under the Envie I mortgage since July 2024. Mr. Choo has failed to satisfy those unpaid amounts under his guarantee of the 219 indebtedness, which is a continuing default under the Park Place mortgage and Ravines Senior mortgage. There are also overdue outstanding municipal property

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<sup>20</sup> ACM Advisors advanced funds on behalf of ACM Commercial Mortgage Fund.

<sup>21</sup> Buchan Affidavit at [para 13](#).

<sup>22</sup> Buchan Affidavit at [para 4](#).

taxes on each of the ACM properties, and the ACM Debtors have failed to comply with reporting requirements under their mortgages.<sup>23</sup>

### **C. ACM Delivered Demands Under BIA Section 244**

16. In accordance with the statutory requirements for the appointment of a receiver, the following demands were delivered to the ACM Debtors on ACM's behalf:

- i. On July 19, 2024, a demand letter and notice of intention to enforce security under *Bankruptcy and Insolvency Act* ("BIA") section 244 was sent to 206 and related guarantors in respect of the Park Place mortgage;<sup>24</sup>
- ii. On July 19, 2024, a demand letter and notice of intention to enforce security under BIA section 244 was sent to 226, 138, and their related guarantors in respect of the Ravines Senior mortgage;<sup>25</sup> and
- iii. On September 27, 2024, a demand letter and notice of intention to enforce security under BIA section 244 was sent to 219 and related guarantors in respect of the Envie I mortgage.<sup>26</sup>

### **D. Failed Forbearances and Poor Pre-Filing Conduct of the ACM Debtors**

17. Leading up to the commencement of these proceedings, ACM took proactive steps to negotiate forbearances and engage in dialogue with Ashcroft in good faith to permit the ACM Debtors time to remedy their defaults.<sup>27</sup> During that period, ACM Debtors themselves were

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<sup>23</sup> Buchan Affidavit at [para 6](#).

<sup>24</sup> Buchan Affidavit at [para 7](#).

<sup>25</sup> Buchan Affidavit at [para 8](#).

<sup>26</sup> Buchan Affidavit at [para 9](#).

<sup>27</sup> Buchan Affidavit at [para 59](#).



reactive, and failed to provide ACM with requested information regarding the cash flows of the ACM properties and certain other required reporting under ACM's various commitment letters.

18. The ACM Debtors also requested multiple deadline extensions to satisfy the conditions to effectiveness proposed in the negotiated forbearances, whose conditions were then never met. In many instances, the delays were blamed on other lenders' not being available to discuss the provision of consents.<sup>28</sup> In brief, the ACM Debtors had gone cold.

19. At no time did the ACM Debtors advise ACM that they had considered filing for CCAA protection. The Applicants have never jointly tried to engage all their creditors.<sup>29</sup>

20. In July 2024, Ashcroft retained Hawco Peters and Associates Inc. ("Hawco") as its financial advisor. Hawco has made minimal progress. The Applicants' evidence is that, since Hawco was retained in July 2024:

- i. two unnamed Ashcroft entities have "sourced" replacement funding;
- ii. a facility has been made available for another unnamed entity's exit from a receivership process;
- iii. a fourth unnamed Ashcroft entity started to negotiate a financing for an unidentified project not associated with any of the Applicants; and
- iv. Hawco has "arranged refinancing to the Ashcroft Homes Group" – apparently a reference to obtaining uncompleted term sheets.<sup>30</sup>

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<sup>28</sup> Buchan Affidavit at [para 59](#).

<sup>29</sup> Buchan Affidavit at [para 60](#).

<sup>30</sup> First Choo Affidavit at [paras 149-152](#).

21. The Applicants have not provided ACM (or the Court) with particulars of the Hawco activities listed above. None of Hawco's efforts appear to have contributed to meeting the Applicants' obligations to the Mortgagees.

**E. The ACM Debtors Apply to This Court Without Notice to ACM**

22. On December 5, 2024, the Applicants obtained an initial order (the "Initial Order") without notice to ACM.<sup>31</sup> ACM learned about the CCAA proceedings from another mortgagee approximately 24 hours after the initial hearing. It did not receive any substantive communications from the Applicants until their lawyer contacted counsel for ACM on the afternoon of December 8, 2024, three days after the initial hearing.<sup>32</sup> ACM took this aggressive conduct as an attempt to intentionally undermine the interests of the creditors.<sup>33</sup>

**F. ACM Will Not Agree to the "Plan" Proposed by the ACM Debtors**

23. The Applicants have ostensibly proposed a process for moving forward but there is no content to that scheme and no reasonably predictable path to a value maximizing transaction for all stakeholders, let alone the Mortgagees.<sup>34</sup>

**G. The Valuations Relied on by the Applicants Misrepresent Critical Data**

24. The fundamental – and only – premise of the CCAA application is that there is significant equity value in the properties which will protect creditors in the short term and preserve Ashcroft itself as a going concern. This premise relies on faulty data, in addition to ignoring the availability of other transactional paths that would preserve individual operations outside of the Ashcroft

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<sup>31</sup> Draft Initial Order dated December 5, 2024 at [para 8](#) ("Initial Order"), AAR Tab 3.

<sup>32</sup> Buchan Affidavit at [para 61](#).

<sup>33</sup> Buchan Affidavit at [para 63](#).

<sup>34</sup> Buchan Affidavit at [para 67](#).

group. Put differently, the ACM Debtors do not need this CCAA proceeding or Ashcroft to achieve a positive result for all of their stakeholders (except David Choo).

25. Importantly, ACM's internal valuation estimates of Park Place, Ravines Senior, and Envie I are significantly lower than the valuations suggested in Mr. Choo's affidavit sworn December 3, 2024 ("Choo Affidavit").<sup>35</sup>

26. For example, in the case of Park Place, Mr. Choo represents that there is \$24.6 million of net equity after the secured debt,<sup>36</sup> whereas ACM's internal valuation estimates reflect that there may not be any equity in that property.<sup>37</sup>

27. Furthermore, the appraisals relied upon by the Applicants are badly aged. For example, the appraisal referred to in respect of Envie I is from 2017. The appraisals are no longer relevant given the level of distress in the commercial real estate market. ACM believes that current market conditions could lead to realizable values that are easily 10% to 20% less than its current valuation estimates.<sup>38</sup>

28. Similarly, the underlying net operating income upon which the appraisals are based may be significantly higher than the actual net operating income of the projects, leading to overstatements in the resulting appraisals. Park Place and Envie I are running at significant operating losses (with Ravines Senior being effectively cash flow neutral) such that the cash flow from the properties is not able to service the regular mortgage payments.<sup>39</sup> Occupancy is either highly variable or Ashcroft has provided ACM inaccurate reporting. Ashcroft reported to ACM that,

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<sup>35</sup> Buchan Affidavit at [para 52](#).

<sup>36</sup> First Choo Affidavit at [para 143 \(see table\)](#).

<sup>37</sup> Buchan Affidavit at [para 52](#).

<sup>38</sup> Buchan Affidavit at [para 54\(a\)](#).

<sup>39</sup> Buchan Affidavit at [para 54\(b\)\(i\)](#).

as of September 18, 2024, Envie I was 80% leased, but its property manager recently advised that the building was only 70% to 73% leased.<sup>40</sup>

#### **H. ACM Has Lost Confidence in the Applicants' Management of the Properties**

29. On June 21, 2024, the *Ottawa Citizen* published a highly critical article describing, among other things, how Ashcroft at the Ravines retirement residences "is using a loophole to take advantage of vulnerable seniors who can't afford to pay hundreds, or thousands, of dollars more each month for accommodation."<sup>41</sup>

30. On July 3, 2024, the Retirement Homes Regulatory Authority issued a compliance order against Alavida Lifestyles Inc. (which manages the Ashcroft seniors and retirement residences including Park Place and Ravines Senior) citing violations of the *Retirement Homes Act* with respect to an Ashcroft retirement residence for, among other things:

- i. failing to ensure that there is a written plan of care for each resident of the Home that sets out the care services being provided;
- ii. failing to ensure that the resident and/or the resident's substitute decision-maker is involved in the development and implementation of the resident's plan of care;
- iii. failing to ensure that the resident's plan of care is based on an assessment of the resident and the needs and preferences of the resident; and
- iv. failing to protect residents of the home from abuse by anyone.<sup>42</sup>

Mr. Choo's initial affidavit failed to disclose any of this information to the Court.

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<sup>40</sup> Buchan Affidavit at [para 54\(b\)\(ii\)](#).

<sup>41</sup> Buchan Affidavit at [para 54\(c\)\(i\)](#).

<sup>42</sup> Buchan Affidavit at [para 54\(c\)\(ii\)](#).

31. Furthermore, occupancy at all three properties has been challenged for the past 12 months or longer. Ashcroft has been unable to afford major improvements during that time.<sup>43</sup> ACM believes the foregoing explains, at least in part, why the Applicants have had such limited success in its refinancing efforts and why a receiver must be appointed.<sup>44</sup>

### **I. The Mismanagement is Compounded by Poor Market Conditions**

32. In ACM's assessment, there is significant distress in the commercial real estate business in Ontario. Transaction sales volumes were very low in 2024 in response to interest rate hikes. In many cases, high borrowing cost and inflationary pressures have negatively impacted occupancy rates, so rental property owners have not been able to rely on occupancy rate improvements to support their cash flow forecasts. Those dynamics suggest that rental unit portfolios may continue to face financial difficulties, particularly in regions like Ottawa, where demand growth has not materialized as expected and there are significant competing offerings for rental residences.<sup>45</sup>

33. In this regard, ACM and other lenders known to ACM are dealing with multiple distressed assets. Those lenders have, in many instances, elected to make efforts to negotiate out-of-court arrangements with their commercial mortgage borrowers. Media accounts, including from *The Globe & Mail* and *Lexpert*, have indicated elevated numbers of formal commercial real estate insolvencies in Canada in 2024.<sup>46</sup> KSV has further advised ACM that real property valuations are currently impaired, and transactions are limited except at distressed pricing, including for industrial, development, residential, multi-family, and hospitality properties.<sup>47</sup>

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<sup>43</sup> Buchan Affidavit at [para 54\(b\)\(iii\)](#).

<sup>44</sup> Buchan Affidavit at [para 57](#).

<sup>45</sup> Buchan Affidavit at [para 48](#).

<sup>46</sup> Buchan Affidavit at [para 49](#).

<sup>47</sup> Buchan Affidavit at [para 50](#).

34. ACM is concerned that its secured indebtedness will similarly be affected by the current state of the commercial real estate market in terms of property values and related sales velocity, such that the properties may sell for significantly below estimated values or take longer to sell.<sup>48</sup> This represents a grave concern because the ACM mortgages could well consume most if not all the value in certain of the ACM properties.<sup>49</sup>

### **PART III - ISSUES, LAW, & ARGUMENT**

35. This Court must determine whether to impose receivership processes or to extend the CCAA proceeding.

#### **A. This Comeback Hearing is a *De Novo* Hearing**

36. On December 5, 2024, the Applicants obtained the Initial Order without notice to ACM.<sup>50</sup> They advised ACM on Saturday December 8, 2024, for the first time, that this Court ordered a stay capturing the assets mortgaged by ACM.<sup>51</sup> A fresh evaluation of the Initial Order is necessary.

37. Where an initial CCAA order is granted without notice (or on insufficient notice) to persons who may be affected and without any proper debate, courts may vary or set aside the order if appropriate.<sup>52</sup> Accordingly, this hearing must be completely neutral to enable any creditor that had no notice of the application to raise issues of concern.<sup>53</sup> ACM is no exception.

38. In the circumstances, the onus rests “solely and squarely” with the Applicants to prove that the Initial Order is appropriate.<sup>54</sup> The onus does not rest with ACM to prove that the Initial

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<sup>48</sup> Buchan Affidavit at [para 51](#).

<sup>49</sup> Buchan Affidavit at [para 56](#).

<sup>50</sup> AAR Tab 3, [p 418](#).

<sup>51</sup> Buchan Affidavit at [para 61](#).

<sup>52</sup> *Ravelston Corp (Bankruptcy)*, Re, [2005 CanLII 13813](#) at para [6\(j\)](#) (ONSC); *Stelco Inc, Re*, [2004 CanLII 24849](#) at para [1](#) (ONSC).

<sup>53</sup> *Victorian Order of Nurses for Canada (Re)*, [2015 ONSC 7371](#) at para [13](#).

<sup>54</sup> *General Chemical Canada Ltd (Re)*, [2005 CanLII 1079](#) at para [2](#) (ONSC).

Order should be set aside.<sup>55</sup> Further, the Initial Order ought to be set aside for material non-disclosure and because there was no justifiable reason for filing and proceeding without notice.<sup>56</sup>

39. In addition to the burden described above, to comply with the requirements of the CCAA for a stay extension, the Applicants must demonstrate that, since the date on which the Initial Order was granted, they have acted and continue to act diligently and in good faith.<sup>57</sup>

40. The stay should not be extended in the circumstances. The Applicants obtained the stay against ACM, one of its major secured lenders, without notice. They then advised ACM three days following the initial hearing.<sup>58</sup> At that time, ACM discovered that, among other things, the ACM Debtors had no serious idea as to how to identify a value maximizing transaction. ACM also learned that the ACM Debtors were funding other, cash flow negative entities, that may prejudice ACM's recoveries.<sup>59</sup> As a result of these facts, the Applicants cannot fairly claim that they acted with the good faith and diligence required by the CCAA for an Applicant to receive the benefit of a stay of proceedings.

#### **B. This Court Should Not Exercise its Discretion to Order Relief Under the CCAA**

41. Even if the Applicants meet the CCAA's minimum threshold statutory requirements of diligence and good faith, this Court should not exercise its discretion to continue the stay. Contrary to the Applicants' submissions, a CCAA process would, among other things, not prevent an inevitable liquidation (of Ashcroft) from taking place. A stay would simply buy the Applicants time at the expense of ACM, which would suffer by having to indirectly fund the process while watching equity values in the mortgaged properties steadily decrease.

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<sup>55</sup> *Target Canada Co (Re)*, [2015 ONSC 303](#) at para [82](#).

<sup>56</sup> *Encore Developments Ltd (Re)*, [2009 BCSC 13](#) at paras [22-29](#).

<sup>57</sup> *Companies' Creditors Arrangement Act*, [RSC 1985, c C-36](#), s [11.02\(3\)](#) ("CCAA").

<sup>58</sup> Buchan Affidavit at [para 61](#).

<sup>59</sup> Buchan Affidavit at [para 62](#).

**i. CCAA Proceedings Will Serve No Practical Purpose**

42. The relief sought by the Applicants would not serve the CCAA's primary purpose of facilitating a compromise or arrangement between an insolvent debtor and its creditors to enable the company to stay in business.<sup>60</sup> The Mortgagees are not prepared to: (i) forego the straightforward contractual remedies available to them (e.g., bring foreclosure proceedings or appoint a receiver); (ii) assent to a process that lacks the flexibility needed to maximize property values and recoveries; and (iii) allow the Applicants to withhold payments of principal and possibly interest for the foreseeable future. Given the lack of incentive on the lenders' part, the parties are not at all likely to agree to a compromise or arrangement.

43. Courts have declined to grant relief under the CCAA in similar circumstances. In *Dondeb Inc (Re)*, this Court ruled in favour of secured creditors (representing 75% of the secured debt) to which a proposed compromise or arrangement would have been unacceptable because:

- i. in many instances, the properties over which security was held was sufficiently discrete with specific remedies (including a sale), which were more appropriate than the "enterprise" approach posed by the debtors;
- ii. individual receivership orders for many of the properties was a more appropriate remedy where the creditors would have control of the process;
- iii. the creditors had lost confidence in the owners of the debtor companies; and
- iv. the debtors were unable to propose a realistic plan capable of being accepted by the creditors given a difference in position regarding the values of various properties.<sup>61</sup>

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<sup>60</sup> *Octagon Properties Group Ltd (Re)*, [2009 ABKB 500](#) at para 9 ("*Octagon*").

<sup>61</sup> *Dondeb Inc (Re)*, [2012 ONSC 6087](#) at paras 5-6 ("*Dondeb*"); see also *Octagon* at paras 17-18.



44. Likewise, the Mortgagees have a blocking position to any CCAA plan.<sup>62</sup> They have no intention of compromising their debt in a CCAA proceeding because their priorities are straightforward.<sup>63</sup> Much like in other real estate-based insolvencies, the nature of the security makes CCAA procedures unattractive here.<sup>64</sup>

45. Similar circumstances presented in *Cliffs Over Maple Bay Investments Ltd v Fisgard Capital Corp*, in which the Court of Appeal for British Columbia set aside the debtor's initial order:

Although the CCAA can apply to companies whose sole business is a single land development [...] such companies would have difficulty proposing an arrangement or compromise that was more advantageous than the remedies available to its creditors. The priorities of the security against the land development are often straightforward, and there may be little incentive for the creditors having senior priority to agree to an arrangement or compromise that involves money being paid to more junior creditors before the senior creditors are paid in full. If the developer is insolvent and not able to complete the development without further funding, the secured creditors may feel that they will be in a better position by exercising their remedies rather than by letting the developer remain in control of the failed development while attempting to rescue it by means of obtaining refinancing, capital injection by a new partner or DIP financing.<sup>65</sup>

46. In the instant case, the Applicants have proposed no germ of an arrangement or compromise.<sup>66</sup> Instead, they have an idea about value maximization based on a cash flow forecast grounded in speculation. The Applicants' so-called "plan" consists largely of: (i) loose statements about how they will be able to imminently stabilize occupancies because of recent marketing spend; and (ii) a claim that interest rates will continue to decrease.<sup>67</sup>

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<sup>62</sup> "The real thrust of the analysis [in CCAA-BIA contests] turns on the nature of the security and the attitudes of the secured creditors": *BCIMC Construction Fund Corporation et al v The Clover on Yonge Inc*, [2020 ONSC 1953](#) at para [99](#) ("*BCIMC*").

<sup>63</sup> Buchan Affidavit at [paras 66](#) and [76](#).

<sup>64</sup> Real estate-centric businesses are "...not the classic ongoing business[es] to which CCAA protection is often afforded": *Re Redekop Properties Inc*, [2001 BCSC 1892](#) at paras [63-64](#); see also *BCIMC* at paras [97-103](#); *Marine Drive Properties Ltd (Re)*, [2009 BCSC 145](#) at paras [37-41](#) ("*Marine Drive*"); *Encore Developments Ltd (Re)*, [2009 BCSC 13](#) at paras [22-25](#); *Octagon* at paras [1, 11, 13-14, 17-18](#); see Opolsky, *Receivership versus CCAA* ([generally](#)).

<sup>65</sup> *Cliffs Over Maple Bay Investments Ltd v Fisgard Capital Corp*, [2008 BCCA 327](#) at para [36](#) ("*Cliffs*"), cited recently in *BCIMC* at para [98](#).

<sup>66</sup> *Antibe* at para [70](#).

<sup>67</sup> Buchan Affidavit at [para 67\(d\)](#).

47. This is unsurprising because, in the months leading up to the filing, the ACM Debtors failed to reach forbearance agreements with ACM, they never communicated any intention of bargaining on a consolidated basis, or even hinted at the prospect of filing under the CCAA.<sup>68</sup> Clearly, all the Applicants really want is to buy time, which is an inappropriate exploitation of the CCAA process.<sup>69</sup>

48. The claim that residents and employees (i.e., “social stakeholders”) will suffer in the absence of the Applicants’ obtaining CCAA protection should be taken with a pound of salt.<sup>70</sup> The entity that manages the Ashcroft seniors and retirement residences, including Park Place and Ravines Senior, was cited as “failing to protect residents of the home from abuse,” among other shocking violations.<sup>71</sup> Employees can only benefit from a change of course, as the Applicants (and Ashcroft, generally) have failed time and time again to secure financing and are now leading the businesses down an economically risk-ridden path.<sup>72</sup>

49. The Applicants’ operations are not nearly as important a factor as the nature of the security interests in this case.<sup>73</sup> To the extent that their operations are relevant, caselaw has supported receiverships over CCAA proceedings despite: (i) in one case, a debtor’s operation of a going concern medical health clinic business with active patients;<sup>74</sup> and (ii) in another case, a debtor’s operation of a school and retirement homes.<sup>75</sup>

## ii. CCAA Proceedings Will Allow Non-Transparent Cash Flow Waste

50. If this CCAA proceeding is not terminated, ACM and the other secured lenders will be forced to fund a lengthy, unduly expensive process over which they have no control.<sup>76</sup> In *BCIMC*

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<sup>68</sup> Buchan Affidavit at [para 60](#).

<sup>69</sup> *BCIMC* at para [102](#), citing from *Octagon* at para [17](#); see also *Antibe* at paras [60-65](#).

<sup>70</sup> Applicants’ First Factum at [paras 16, 36](#).

<sup>71</sup> Buchan Affidavit at [para 54\(c\)](#).

<sup>72</sup> Buchan Affidavit at [para 57](#).

<sup>73</sup> *BCIMC* at para [103](#).

<sup>74</sup> *Vancouver Coastal Health Authority v Seymour Health Centre Inc*, [2023 BCSC 1158](#) at paras [68-75, 135-136](#).

<sup>75</sup> *Dondeb* at paras [7, 5, 8](#).

<sup>76</sup> Buchan Affidavit at [para 69](#).

*Construction Fund Corporation et al v The Clover on Yonge Inc*, this Court found for the creditors in an analogous dispute:

...the Receivership Applicants should not necessarily be compelled to remain in the project [...] while they wait for a project specific company to obtain new financing without the Receivership Applicants having any control of the process. Forcing the Receivership Applicants to remain without control of the process is even more unfair when the contracts to which the Debtors agreed give the Receivership Applicants a right to control the process through a receivership.<sup>77</sup>

51. In the current case, the Initial Order provides for an administration charge of up to \$200,000 (the “Administration Charge”), which the Applicants now request be increased to \$700,000.<sup>78</sup> The “Monitor estimates non-operating disbursements in the CCAA proceedings to reach \$455,000 by the end of February 2025.<sup>79</sup> In addition to advances under the proposed \$1.5 million debtor-in-possession credit facility (the “DIP Facility”), the Monitor projects total receipts of \$11 million and disbursements of \$10.9 million.<sup>80</sup>

52. Notwithstanding that the Administration Charge and DIP charge are proposed to be subordinated to the mortgagees’ debt, as contemplated by the Monitor and the Initial Order, the Applicants’ ability to pay its expenses also results from increased cash flow upon the cessation of principal mortgage payments and using revenues indiscriminately from the Mortgagees’ individually-secured projects.<sup>81</sup>

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<sup>77</sup> *BCIMC* at para 71.

<sup>78</sup> Pre-Filing Report of the Monitor and Consent at [para 25](#) (“GT Pre-Filing Report”), AAR Tab 5 as amended on December 11, 2024.

<sup>79</sup> GT Pre-Filing Report, [Appendix 2](#) as amended on December 11, 2024.

<sup>80</sup> GT Pre-Filing Report at [para 20](#) as amended on December 11, 2024.

<sup>81</sup> GT Pre-Filing Report, [Appendix 2](#) as amended on December 11, 2024; Initial Order at [para 8](#), AAR Tab 3.

53. There is no definitive timeline in which the secured lenders would be forced to endure (and indirectly to fund) the CCAA proceedings.<sup>82</sup> The Applicants' "plan" also offers no insight into how the proceedings will be funded beyond the initial 13-week period.<sup>83</sup>

54. The minimal progress made since Ashcroft retained Hawco suggests that such proceedings will be protracted.<sup>84</sup> The Applicants' evidence is that, since Hawco was retained in July 2024: (i) two Ashcroft entities have "sourced" replacement funding; (ii) a facility has been made available for another entity's exit from a receivership process; (iii) a fourth Ashcroft entity started to negotiate a financing for an unidentified project not associated with any of the Applicants; and (iv) Hawco has arranged (an unparticularized) refinancing to Ashcroft.<sup>85</sup>

55. None of Hawco's efforts have contributed to meeting the Applicants' obligations to ACM or the other secured lenders. Even most of the Ashcroft entities purportedly making great strides are not in receipt of term sheets. The Applicants seek nothing more than to have the secured lenders pay professional fees incurred for other Ashcroft entities and, generally, to buy time.

56. CCAA proceedings would inappropriately afford the Applicants that time to the detriment of ACM and the other secured lenders. In declining to allow CCAA protection in similar circumstances, the court in *Marine Drive Properties Ltd (Re)* stated that:

[t]o put it bluntly, the Petitioners have sought CCAA protection to buy time to continue their attempts to raise new funding. As counsel for the Petitioners stated in argument, they need time to "try to pull something out of the hat". They have sought DIP financing so that they can do this at the expense of their creditors. This is not an appropriate use of the extraordinary remedy offered by the CCAA.<sup>86</sup>

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<sup>82</sup> GT Pre-Filing Report at [para 20](#) as amended on December 11, 2024.

<sup>83</sup> Buchan Affidavit at [para 67\(e\)](#).

<sup>84</sup> First Choo Affidavit [paras 148-153](#).

<sup>85</sup> First Choo Affidavit [paras 149-152](#).

<sup>86</sup> *Marine Drive* at paras [38-41](#); see also *Octagon* at paras [10, 17](#), cited in *BIMC* at para [102](#).

57. No exception should be made for the Applicants. Should this Court afford CCAA protection, mortgages will go unpaid while cash flow is diverted to restructuring costs and supporting non-party Ashcroft entities by way of intercompany loans.<sup>87</sup> By the time they “pull something out of the hat,” if ever, the equity of the secured lenders will almost certainly be primed and their rights and prospects of recovery seriously prejudiced.<sup>88</sup>

### iii. An En Bloc Process Will Prejudice ACM Without Justification

58. The Applicants filed collectively as one, seemingly integrated unit. The Applicants, however, are entirely distinct from one another. Proceeding without sensitivity to the legal and practical separation between them and their isolated contractual relations will prejudice ACM.<sup>89</sup>

59. The Applicants own different buildings and operate distinct businesses, each with its own unique compliment of mortgagees and equitable interest owners. The Applicants’ evidence is that they each “...own and operate a separate residential project [...] with their own segregated operations, including bank accounts, books and records, and assets.”<sup>90</sup> The Applicants engage in intercompany transactions which, on the basis of their evidence, are effected at arm’s length.<sup>91</sup> Seven of the Applicants are “...Project companies, whose single purpose is the ownership of a Project.”<sup>92</sup> Of those seven single-purpose entities, four are owned by Mr. Choo, while three are owned and controlled by Envie Enterprise and Mr. Choo.<sup>93</sup>

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<sup>87</sup> Buchan Affidavit at [para 62](#).

<sup>88</sup> Buchan Affidavit at [para 10](#).

<sup>89</sup> Buchan Affidavit at [para 69](#).

<sup>90</sup> First Choo Affidavit [para 9](#).

<sup>91</sup> First Choo Affidavit [para 9](#); See generally First Choo Affidavit Exhibit C, pp 227-350.

<sup>92</sup> First Choo Affidavit [paras 12, 18](#).

<sup>93</sup> First Choo Affidavit [para 18](#).

60. Although there is some evidence that certain administrative services are centralized, each Applicant pays for its respective share for those services.<sup>94</sup>

61. Because the Applicants ordinarily deal amongst themselves at arm's length, they should not be permitted to shapeshift at their convenience; especially not to the detriment of third contracting parties. Merging the properties into an asset melting pot would force lenders to rescue properties with which they have no contractual relation.<sup>95</sup> ACM cannot be expected to salvage a property owned by an entity with which ACM never bargained.<sup>96</sup>

62. Each of ACM's loans was based on the value of the property charged as security. ACM made each loan on the understanding that each property was owned by a single-purpose entity.<sup>97</sup> Had ACM known that privity of contract might be so severely attacked, it might have structured its loan agreements differently.<sup>98</sup> This Court should strongly consider ACM's contractual rights and expectations in deciding whether a CCAA proceeding is appropriate in this case.

#### **iv. ACM Has Lost Confidence in the Applicants' Management**

63. In deciding whether CCAA proceedings are appropriate, courts consider creditors' confidence (or lack thereof) in the debtor's ability to manage the business or properties.<sup>99</sup> ACM has lost confidence in the Applicants' management of the ACM properties because in summary the Applicants:

- i. have shown no real path forward, resulting only in wasted time and fees;

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<sup>94</sup> First Choo Affidavit at [para 10](#).

<sup>95</sup> Buchan Affidavit at [paras 65, 67\(c\)](#).

<sup>96</sup> Buchan Affidavit at [para 67\(c\)](#).

<sup>97</sup> Buchan Affidavit at [para 65](#).

<sup>98</sup> Buchan Affidavit at [para 65](#).

<sup>99</sup> *BCIMC* at paras [4, 45, 49](#).

- ii. rely on flawed financial data from outdated property valuations that are not reflective of current market conditions; and
- iii. the Applicants are effectively reliant on cash flow from the ACM Debtors to support unrelated money losing properties.

64. The ostensible remedial steps proposed by the Applicants, including by seeking relief under the CCAA, are short-sighted and will erode the properties' values.<sup>100</sup> A receiver ought to be appointed in short order to mitigate this risk.<sup>101</sup>

65. The Applicants cite increasing interest rates and declining occupancy rates as the causes of their liquidity issues.<sup>102</sup> In response, they have frozen their lenders' contractual rights to prevent "...the sale of properties under distress circumstances while allowing the continuation of marketing and other strategies to increase occupancy levels and sale receipts."<sup>103</sup> The Applicants' fail to disclose the particulars of Mr. Choo's belief that "marketing and sales initiatives" will increase occupancy. ACM is concerned because, if occupancies continue to decline, the subsequent reduction in rental income and cash flow will impair already precarious conditions.<sup>104</sup>

66. Furthermore, the Applicants rely on Mr. Choo's belief that interest rates will continue to decline during a stay of proceedings.<sup>105</sup> While arguably likely in the abstract, the immediate impact for these properties is entirely uncertain. ACM is not prepared to gamble tens of millions of dollars based on Mr. Choo's loose economic forecast.<sup>106</sup>

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<sup>100</sup> Buchan Affidavit at [para 69](#).

<sup>101</sup> Buchan Affidavit at [para 76](#).

<sup>102</sup> First Choo Affidavit [paras 144-145](#).

<sup>103</sup> First Choo Affidavit [para 162](#).

<sup>104</sup> Buchan Affidavit at [para 54\(b\)](#).

<sup>105</sup> See for example First Choo Affidavit at [para 152](#).

<sup>106</sup> Buchan Affidavit at [para 67\(d\)](#).

67. Second, the analysis underlying the Applicants' proposed remedial steps is flawed. The Applicants seek to monetize the properties to maximize their potential equity value. This is problematic because the property values relied upon by the Applicants are based on obsolete appraisals dating as far back as 2017 in some instances.<sup>107</sup> There is likely significantly less equity in the ACM properties than the Applicants have led on to believe.<sup>108</sup> As such, the values of the properties secured by the ACM mortgages may be (or soon become) worth less than the amount of indebtedness secured by those mortgages.<sup>109</sup>

68. Third, the Applicants have now disclosed that not only did they recklessly use revenues from the ACM Debtors to prop up other properties, they are asking this Court to facilitate that improvident use. Meanwhile, the ACM Debtors are struggling financially, indebted to secured lenders, and in arrears for utilities and taxes.<sup>110</sup>

### **C. An Interim Receiver Will Preserve Value and Promote Transparency**

69. This Court has a discretion to appoint an interim receiver under section 101 of the *Courts of Justice Act* and BIA section 47.<sup>111</sup> ACM has met the threshold statutory requirements by, among other things, having delivered section 244 notices to the ACM Debtors. By commencing CCAA proceedings, the Applicants have admitted to their insolvency, which is not a contested issue.

70. Accordingly, the only question that remains is whether a receivership is preferable to a CCAA proceeding. The same reasons militating against the imposition of this CCAA proceeding, as described throughout this factum, support the need to appoint an interim receiver.<sup>112</sup> The

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<sup>107</sup> First Choo Affidavit at [paras 30, 47, 61, 76, 90, 107, 120, 133](#).

<sup>108</sup> Buchan Affidavit at [para 52](#).

<sup>109</sup> Buchan Affidavit at [para 54\(a\)](#).

<sup>110</sup> Buchan Affidavit at [para 6](#).

<sup>111</sup> *Courts of Justice Act*, [RSO 1990, c C.43](#), s [101](#); *Bankruptcy and Insolvency Act*, [RSC 1985, c B-3](#), ss [47\(1\), 47\(3\)](#).

<sup>112</sup> Courts have found receiverships to be preferable to CCAA proceedings in numerous cases including those cited in this factum; see also *Bank of Montreal v Carnival National Leasing Limited*, [2011 ONSC 1007](#) at paras [24, 27](#) cited in *Antibe* at para [58](#).



appointment of an interim receiver is just, convenient, and necessary to protect ACM's interests as a major lender to the ACM Debtors.

**PART IV - ORDER REQUESTED**

71. ACM requests that this Court terminate the CCAA proceeding and order the appointment of an interim receiver and the other relief sought by AMC in its draft order.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 11th day of December 2024.

*Cassels Brock & Blackwell LLP*

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**CASSELS BROCK & BLACKWELL LLP**

## SCHEDULE "A"

### LIST OF AUTHORITIES

1. *Bank of Montreal v Carnival National Leasing Limited*, [2011 ONSC 1007](#)
2. *BCIMC Construction Fund Corporation et al v The Clover on Yonge Inc*, [2020 ONSC 1953](#)
3. *Cliffs Over Maple Bay Investments Ltd v Fisgard Capital Corp*, [2008 BCCA 327](#)
4. *Dondeb Inc (Re)*, [2012 ONSC 6087](#)
5. *Encore Developments Ltd (Re)*, [2009 BCSC 13](#)
6. *General Chemical Canada Ltd (Re)*, [2005 CanLII 1079](#) (ONSC)
7. *In the Matter of a Plan of Compromise or Arrangement of Antibe Therapeutics Inc*, endorsement dated April 22, 2024, [CV-24-00717410-00CL](#) (unreported)
8. *Marine Drive Properties Ltd (Re)*, [2009 BCSC 145](#)
9. *Octagon Properties Group Ltd (Re)*, [2009 ABKB 500](#)
10. *Ravelston Corp (Bankruptcy), Re*, [2005 CanLII 13813](#) (ONSC)
11. *Re Redekop Properties Inc*, [2001 BCSC 1892](#)
12. *Stelco Inc, Re*, [2004 CanLII 24849](#) (ONSC)
13. *Target Canada Co (Re)*, [2015 ONSC 303](#)
14. *Vancouver Coastal Health Authority v Seymour Health Centre Inc*, [2023 BCSC 1158](#)
15. *Victorian Order of Nurses for Canada (Re)*, [2015 ONSC 7371](#)

## SCHEDULE "B"

### TEXT OF STATUTES, REGULATIONS, & BY-LAWS

#### ***Bankruptcy and Insolvency Act, [RSC 1985, c B-3](#)***

##### **Appointment of interim receiver**

[47\(1\)](#) If the court is satisfied that a notice is about to be sent or was sent under subsection 244(1), it may, subject to subsection (3), appoint a trustee as interim receiver of all or any part of the debtor's property that is subject to the security to which the notice relates until the earliest of

- (a) the taking of possession by a receiver, within the meaning of subsection 243(2), of the debtor's property over which the interim receiver was appointed,
- (b) the taking of possession by a trustee of the debtor's property over which the interim receiver was appointed, and
- (c) the expiry of 30 days after the day on which the interim receiver was appointed or of any period specified by the court.

##### **When appointment may be made**

[47\(3\)](#) An appointment of an interim receiver may be made under subsection (1) only if it is shown to the court to be necessary for the protection of

- (a) the debtor's estate; or
- (b) the interests of the creditor who sent the notice under subsection 244(1).

#### ***Companies' Creditors Arrangement Act, [RSC 1985, c C-36](#)***

##### **Burden of proof on application**

[11.02\(3\)](#) The court shall not make the order unless

- (a) the applicant satisfies the court that circumstances exist that make the order appropriate; and
- (b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

**Courts of Justice Act, [RSO 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.

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

**Terms**

[101\(2\)](#) An order under subsection (1) may include such terms as are considered just.

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36

AND IN THE MATTER OF ASHCROFT URBAN DEVELOPMENTS INC., 2067166 ONTARIO INC., 2139770 ONTARIO INC., 2265132 ONTARIO INC., ASHCROFT HOMES – LA PROMENADE INC., 2195186 ONTARIO INC., ASHCROFT HOMES – CAPITAL HALL INC. AND 1019883 ONTARIO INC.

Court File No: CV-24-00098058-0000

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

PROCEEDING COMMENCED AT  
OTTAWA

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