



**SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

COUNSEL SLIP/ ENDORSEMENT FORM

COURT FILE
NO.:

CV-24-00713245-00CL

DATE: DECEMBER 6, 2024

NO. ON LIST: 1

TITLE OF
PROCEEDING:

IN THE MATTER OF BALBOA INC. *et al.*

BEFORE:

JUSTICE OSBORNE

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party, Crown:

Name of Person Appearing	Name of Party	Contact Info
Joseph J. Bellissimo Stephanie Fernandes	Cassels Brock & Blackwell LLP, Counsel to the Monitor	jbellissimo@cassels.com sfernandes@cassels.com
David Sieradzki Noah Goldstein	KSV Restructuring Inc., the Monitor	ngoldstein@ksvadvisory.com dsieradzki@rsvadvisory.com

For Defendant, Respondent, Responding Party, Defence:

Name of Person Appearing	Name of Party	Contact Info
George Benchetrit David Im	Secured Lenders Representative Counsel	George@chaitons.com dim@chaitons.com
Jennifer Stam	The Fuller Landau Group Inc., Receiver of The Lion's Share Group Inc.	jennifer.stam@nortonrosefulbright.com
Nelson Da Silva Bruce Shepherd	Harbour Mortgage Corp. DIP Lender	ndasilva@harbourmortgage.ca bshepherd@harbourmortgage.ca
Kyle Plunkett	Aird & Berlis LLP Lawyers for Viscount Capital Inc. in its capacity as proposed DIP Lender	plunkett@airdberlis.com
Gary Abrahamson	Fuller Landau LLP Receiver of the Lion's Share Group Inc.	gabrahamson@FullerLLP.com

Mario Forte	Goldman Sloan Nash & Haber LLP The Unsecured Lender Representative Counsel	forte@gsnh.com
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ENDORSEMENT OF JUSTICE OSBORNE:

1. The Monitor moves for two orders.
2. First, the Monitor seeks an order:
 - a. approving the Credit Bid Asset Purchase Agreements (APAs) as defined in the 10th Report of the Monitor dated November 29, 2024, and authorizing and directing the Monitor to execute the Credit Bid APAs;
 - b. vesting in the applicable person or entity listed on Schedule “A” to the Credit Bid Vesting Order (the Purchasers), the applicable Applicant’s right, title and interest in and to the applicable lands and premises described in Schedule “A” to the Credit Bid Vesting Order (the “Purchased Properties”); and
 - c. assigning to the applicable Purchaser, the applicable landlord’s rights and obligations in and to the applicable tenant leases associated with the applicable Purchase Property.
3. Second, the Monitor seeks an order in the nature of the draft Approval of Replacement DIP Facility and Ancillary Matters Order:
 - a. extending the Stay Period to and including February 28, 2025;
 - b. approving the Term sheet dated November 26, 2024, attached as Appendix “Q” to the 10th Report (the Viscount DIP Term Sheet) and authorizing and directing the Monitor, *nunc pro tunc*, to enter into the Viscount DIP Term Sheet on the terms provided;
 - c. effective upon the Effective Time, authorizing and directing the Monitor to repay the Existing DIP Facility from cash on hand, the DIP Allocation Amounts held by the Monitor, and the proceeds of the Viscount DIP Term Sheet;
 - d. effective upon the Effective Time, making certain amendments to the SARIO and the Charges as defined therein, all as set out in the 10th Report;
 - e. assigning to the applicable Applicant, the applicable landlord’s rights and obligations in and to the applicable Leases;
 - f. discharging the Unsecured Lender Representative Counsel, and providing that, upon payment of any accrued fees, that Counsel no longer has the benefit or right to the Administration Charge; and
 - g. approving the Seventh Report, the Eighth Report, the Ninth Report, the 10th Report, the activities of the Monitor as described in all of those, and the fees and disbursements of the Monitor and its counsel as set out in the 10th Report and the fee affidavits of Noah Goldstein sworn November 29, 2024 and Ryan Jacobs sworn November 29, 2024, respectively.

4. At the outset of the hearing, counsel to the Monitor advised that the motion for an order discharging the Unsecured Lender Representative Counsel was adjourned to a later date given the continuing role for that counsel.
5. Defined terms in this Endorsement have the meaning given to them in the 10th Report, unless otherwise stated.
6. Service of motion materials was effected on the entire Service List, and a significant number of parties beyond that, including the Supplementary List of parties whose rights are being vested off, and notice by email to Secured Lenders and affected tenants under the Leases discussed below. In short, I am satisfied that the Monitor, assisted by Representative Counsel for both the Unsecured Lenders and the Secured Lenders has made all practical and reasonable efforts to provide notice to all affected parties on his wide a basis as reasonably possible. I note that in addition to counsel for the parties, a very significant number of secured and unsecured lenders were present in Court as observers.
7. The relief sought today was unopposed. No party filed any materials opposing the relief sought. That said, a number of observers, who has more particularly noted below were Secured Lenders or Unsecured Lenders - individuals and families - affected by these events, made submissions as to their perspective on the process and the hardship that has been inflicted upon them by the unfortunate circumstances of this case.
8. The full background for, and context of, this motion is set out in the 10th Report and earlier reports, and I have not repeated all of that here.

The SISP, the APAs and the Leases

9. This Court approved a SISP on April 12, 2024. Regrettably, the SISP generated 12 letters of intent that contemplated third-party sales or refinancing transactions, but the Monitor determined not to pursue any of them after extensive consultation with the Secured Lender Representative Counsel, the Unsecured Lender Representative Counsel and the Lions Share Representative and its counsel.
10. While the principals of the Applicants had conveyed to stakeholders an estimated Portfolio value of approximately \$140 million based on a Comparative Market Analysis obtained by the Applicants in May, 2024 from a representative of a brokerage with which Mr. Suiter is affiliated, the Monitor ultimately came to the conclusion that the Comparative Market Analysis included significant overstatements and errors in the underlying assumptions and comparable properties used for the analysis, all with the result that it was not credible.
11. Both SISP Advisors accordingly refused to include the analysis in their respective data rooms, with the result that that Monitor also concluded it was unreliable. This unfortunate series of events contributed significantly to misunderstandings on the part of numerous stakeholders and inflated expectations with respect to anticipated recoveries in these proceedings.
12. Following the conclusion of the SISP, the Monitor worked with the Secured Lender Representative Counsel, the Unsecured Lender Representative Counsel, the Lions Share Representative and its counsel to negotiate the Restructuring Term Sheet which was approved by this Court on August 30, 2024. That established deadlines for mortgagees to submit credit bids for their respective Properties, all as set out in the 10th Report.

13. Ultimately, the Monitor received 323 credit bids representing approximately 79% of the Properties. The form of purchase agreement documenting the credit bid transactions was developed by the Secured Lender Representative Counsel in consultation with the Monitor and was made available to the Secured Lenders.
14. The Monitor now seeks approval of the Credit Bid APAs and the granting of the Credit Bid Vesting Order.
15. These APAs require that each Purchaser assume any tenant leases on closing. Of the 323 properties, 253 are tenanted. The form of tenant leases does not contain any restriction on the right of the landlord to assign the lease. However, it is the view and strong recommendation of the Monitor that it is important to provide to both purchasers and tenants certainty as to the state of the leases, but that it will be impractical to obtain executed consents or acknowledgements from hundreds of tenants under the leases, and that doing so will create a risk of completing the simultaneous closing of all credit bid transactions on an expedited timeline as contemplated by the APAs.
16. The Monitor recently identified that the leases are between the applicable tenant and SID Management rather than the Applicant entity owner of each Property. SID Management has confirmed to the Monitor that the leases are in its name as agent for the applicable Applicant Property Owner and that it agrees that the leases should be assigned to the applicable Purchasers on closing of the credit bid transactions.
17. For those reasons, the Monitor seeks an assignment of the leases from the SID Companies to the applicable Purchaser as well as an assignment of the tenant leases in respect of the remaining properties to the applicable Applicant.
18. This Court has jurisdiction pursuant to section 36 of the *CCAA* to authorize an Applicant to sell or otherwise dispose of its assets outside the ordinary course of business, free and clear of charges. A sale to preserve a going concern outcome is consistent with the objectives of the *CCAA*.
19. In determining whether to approve the transaction, the Court must determine whether it is appropriate, fair and reasonable as against the primary objectives of the *CCAA*, and considering the non-exhaustive list of factors set out in section 36(3) of the *CCAA*. The *Soundair Principles* continue to be relevant to such an analysis.
20. I am satisfied for the reasons set out in the 10th Report that both the section 36(3) factors and the *Soundair Principles* have been satisfied here. I recognize, as I observed in Court and particularly for the benefit of affected stakeholders and observers, that the result here is not perfect. I am satisfied, however, that it is fair and reasonable and represents the best outcome in what is a most unfortunate set of circumstances.
21. I also pause to observe that a number of Purchasers have already assigned their rights under the APAs to one party, Big North, a vehicle created by a number of Secured Lenders to finance and hold a number of the Properties in an efficient manner. The president of Big North, Mr. Dan Uszynski, was present in Court today and confirmed that neither Big North nor any of its principals are related in any way, directly or indirectly, to Mr. Suiter.
22. The number of people (real people, individuals and families) who are secured and unsecured lenders and who are adversely affected by this entire situation is significant. The impact on them, their lives and their life savings is profound, as was clear from a number of comments made by many of those parties to the Court today. I recognize all of those concerns and hardships. In approving the transactions as I am doing today, the Court is not for a moment condoning the actions and events that led to the unfortunate situation in which all affected stakeholders find themselves today. As noted, however, I am satisfied that approving

the relief sought today represents the best and most advantageous path forward and maximizes outcomes and recoveries in challenging circumstances.

23. It remains impractical to list and attempt to sell all 323 Properties individually. The terms of the Restructuring Term Sheet already provided the right for Secured Lenders to credit bid, and they set out the mechanism to determine any Equity Properties as to fairness and reasonableness. The Monitor views all of the transactions as satisfying all relevant criteria. It is not aware of any Purchasers being related to the Applicants.
24. With respect to the assignment of the leases from the SID Companies to the applicable Purchaser as well as an assignment of tenant leases in respect of the remaining properties to the applicable Applicant, this Court has the authority to approve such transactions pursuant to section 11.3 of the *CCAA* if three statutory factors as set out in that subsection are met. In addition, the Court must be satisfied that all monetary defaults in relation to the assigned contracts (subject to certain exceptions) will be remedied.
25. The Monitor gave notice to the known tenants under the Leases for the Remaining Portfolio advising of the proposed assignments. No objections have been received. While it is important to provide both purchasers and tenants with certainty as to the state of the leases, obtaining executed consents and acknowledgements would clearly be impractical here. It would risk a failure of the simultaneous closing of all credit bid transactions on an expedited timeframe. The Monitor is not aware of any reason why the applicable Purchasers would not be able to satisfy their obligations under the Leases once assigned, nor is it aware of any potential monetary obligations in favour of tenants that would be outstanding.
26. Accordingly, and while, without question, the current circumstances, unique and ought not to serve as a general precedent, I accept the recommendation of the Monitor that the proposed assignment of Leases is warranted here given that the Credit Bid Vesting Order provides that such assignments are subject to, among other things, the payment of amounts required to be paid under section 11.3 of the *CCAA*.

The DIP Allocation, Repayment of the Existing DIP and the Viscount DIP Term Sheet

27. There is approximate \$15 million owing under the Existing DIP Facility, and the Monitor seeks allocation of that amount as between property specific costs such as renovations and property taxes negated to the applicable Property; and general costs, such as professional fees, allocated over the Portfolio in proportion to the acquisition cost of each Property. The proposed allocation is more fully set out in the 10th Report.
28. With respect to the proposed Viscount DIP Facility, the Monitor negotiated its terms, which provide for a maximum principal amount of \$4.85 million. Immediate funding is necessary to repay the Existing DIP Facility, finalize transactions under the Credit Bid APAs and support an orderly liquidation of the 84 remaining properties in the Portfolio. None of those steps can be completed without the Viscount DIP Facility. Failure to complete those steps would impair recoveries for all stakeholders with the result that the Monitor believes the terms and conditions of the Viscount DIP Facility are commercially reasonable, and further that they are in the best interests of the stakeholders.
29. As a result of all of the above, the Monitor seeks a reduction in the Administration Charge from \$1.5 million to \$500,000, of which 50% is to rank in priority to, and 50% is to rank subordinate to, the DIP Lenders Charge, to become effective upon the filing of the Monitor's Certificate under the Credit Bid Vesting Order.
30. The Monitor is also seeking a reduction in the DIP Lender's Charge from \$15 million plus interest, fees and costs to \$4.85 million plus interest, fees and costs being the amount of the Viscount DIP Facility,

provided that Viscount will be the beneficiary of the DIP Lender's Charge, effective upon the filing of the Monitor's Funding Certificate.

31. I am satisfied that this relief should be granted pursuant to section 11 of the *CCAA* and the general power to make orders that are considered by the Court to be appropriate in the circumstances.
32. The allocation of costs proposed here is reasonable in the particular circumstances of this case and as measured against the factors set out by this Court in *Royal Bank of Canada v. Atlas Block Co Limited*, 2014 ONSC 153. It is approved.
33. It is equitable in that it allocates general costs across all Properties, and property-specific costs to the applicable Property. It employs the acquisition cost as the basis for allocation of general costs which, in these circumstances is, in the view of the Monitor, more appropriate than allocating those costs based on mortgage debt as the Applicants did not incur or repay mortgage debt in any systematic manner.
34. The proposed DIP Allocation was first communicated to stakeholders in August and well in advance of the credit bid submission deadline, such that mortgagees had time to review their allocations for first and second mortgagees, respectively. The large number of credit bids received, with deposits, reflects a strong desire on the part of the mortgagees to proceed, which includes the funding of their respective DIP Allocation amounts. The Monitor is not aware of any outstanding information requests in respect of the DIP Allocation or objections thereto.
35. This Court has authority to approve interim financing, and related charges, pursuant to section 11.2 of the *CCAA*, if consideration of the non-exhaustive list of factors set out in section 11.2(4) leads to the conclusion that the relief should be granted. Having considered those here, I agree with the recommendation of the Monitor that the Viscount DIP Facility, and corresponding DIP Lender's Charge should be approved.

Approval of activities and fees of the Monitor and its Counsel

36. With respect to the approval of the Seventh through 10th Reports, inclusive, and the activities of the Monitor described in all, as well as the fees and disbursements of the Monitor and its counsel, I am satisfied that they have been required to undertake significant work to get this proceeding to where it is, including conducting operational oversight, conducting the SISF, performing the Investigation as set out in the 10th Report, taking control over the Applicants in accordance with the Expanded Powers Order, coordinating the transition of property management from the SID Companies to Richmond Advisory Services and dealing with the Credit Bid APAs.
37. All of this work was accretive to the outcome for stakeholders, consistent with the mandate given to the Monitor in the original appointment order and the Expanded Powers Order. Accordingly, I am satisfied that the activities were fair and reasonable, and should be approved. The fees and disbursements of the Monitor and its counsel as set out in the fee affidavits appended to the 10th Report correspond to those activities, are fair and reasonable and consistent with market rates. They also are approved: *Bank of Nova Scotia v. Diemer*, 2014 ONCA 851 at para. 33.

Stay Extension

38. Finally, I am satisfied that the stay of proceedings should be extended through and including February 28, 2025 to provide the time necessary for the Monitor to close the transactions contemplated under the Credit Bid Vesting Order and consult with applicable stakeholders to formulate and implement an orderly liquidation plan for the Remaining Portfolio.

39. Jurisdiction to extend the stay is found in section 11.02(2) of the *CCAA*.
40. I am satisfied that the Monitor has been acting, and continues to act, in good faith and with due diligence. The Cash Flow Forecast appended to the 10th Report projects, subject to approval of the Viscount DIP Facility, sufficient funding available to fund operations and these proceedings through the extended period. No creditor will be prejudiced by the granting of the extension.
41. The motion (except for discharge of Unsecured Lender Representative Counsel, which is adjourned) is granted.
42. Both orders to go in the form I have signed today. These orders are effective immediately and without the necessity of issuing and entering.

O'Shea, J.