Court File No.: CV-24-00713245-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF BALBOA INC., DSPLN INC., HAPPY GILMORE INC., INTERLUDE INC., MULTIVILLE INC., THE PINK FLAMINGO INC., HOMETOWN HOUSING INC., THE MULLIGAN INC., HORSES IN THE BACK INC., NEAT NESTS INC., AND JOINT CAPTAIN REAL ESTATE INC.

Applicants

FACTUM OF THE APPLICANTS
(Returnable June 24, 2024)

June 23, 2024

BENNETT JONES LLP
3400 One First Canadian Place
P.O. Box 130
Toronto, ON M5X 1A4

Sean Zweig (LSO# 57307I)
Tel: (416) 777-6254
Email: zweigs@bennettjones.com

Joseph Blinick (LSO# 64325B)
Tel: (416) 777-4828
Email: blinickj@bennettjones.com

Joshua Foster (LSO# 79447K)
Tel: (416) 777-7906
Email: fosterj@bennettjones.com

Thomas Gray (LSO# 82473H)
Tel: (416) 777-7924
Email: grayt@bennettjones.com

Lawyers for the Applicants

TO: THE SERVICE LIST

TABLE OF CONTENTS

PART I: OVERVIEW

1. The Applicants submit this Factum in support of a motion for an 11-day extension of the Stay of Proceedings, and in response to the Secured Lenders' motion to expand the Monitor's already enhanced powers and compel the Applicants' principal service providers to provide broad and unparticularized services beyond the scope of their existing arrangements.

2. The Secured Lenders' motion is yet another step in these unduly contentious and protracted CCAA proceedings to frustrate the Applicants' good faith restructuring efforts. It is predicated on a nearly 100-page Investigative Report that the Applicants were deprived of an opportunity to review in advance, that is incomplete and at times, inaccurate or misleading and that, as a result of the compressed timeline insisted upon by the Secured Lenders and their denial of the Applicants' rights to procedural fairness, the Applicants have had only a very limited opportunity to respond to.

3. The Investigative Report suggests that Lender funds were misappropriated and cycled. It however, neglects to note that, among other things: (i) all or substantially all of the proceeds of the Applicants' First Mortgage Loans (in the approximate total principal amount of $81.5 million) were used to acquire the Applicants' properties, were sent directly to lawyer trust accounts, and were never available to the Applicants for any other use by the Applicants; (ii) approximately $16.8 million of the proceeds of the Promissory Notes were similarly used for closing costs or any other payments and were not available for any other use by the Applicants; and (iii) approximately $13.6 million (inclusive of renovations to the properties conveyed by certain of the Applicants in the Core Sale (as defined in the Investigate Report)) has been expended in the Applicants' renovations to date.

4. The Investigative Report finds that transfers of funds (comprised of borrowed funds *and* rental income – a distinction not drawn in the Investigative Report) form "a pattern of unjustifiable defalcation of funds", contrary to the Monitor's findings that payments to the Principals were justifiable in relation to *bona fide* business purchases for the Applicants. That the Applicants' practice of reimbursing the Principals for expenses incurred on their behalf has continued under the oversight of the Monitor, without any objection by the Monitor, does not appear within the Investigative Report.

5. The Investigative Report also suggests, based on information conveyed by only a few Unsecured Lenders, that all such Lenders "expected" their funds to be used in respect of a specific property. In so doing, the Investigative Report omits that there were no constraints or limitations on the use of funds, including no covenants, representations and/or warranties restricting the use of funds, in all or substantially all of the Promissory Notes as well as the Applicants' Second Mortgage Loans.

6. The Investigative Report misattributes impugned conduct to the Applicants, including in respect of several alleged misrepresentations. It omits that the Applicants generally did not deal with Lenders directly, did not provide marketing materials to any Lenders, were not provided nor reviewed the marketing materials prepared by Windrose or Lion's Share, and until recently, were unaware that Lion's Share had obtained the funds it lent to the Applicants from other individuals under approximately 602 of the 802 Promissory Notes to which the Applicants are parties.

7. The Investigative Report neglects to contextualize the payment of authorized dividends to certain of the Applicants' shareholders at times when the Applicants' financial circumstances and prospects supported the issuance of such dividends, including at and following completion of the 8-figure Core Sale in which 223 stabilized properties were sold to Core Acquisition Co Inc. ("**Core**").

8. The Investigative Report selectively highlights issues pertaining to an incredibly small subset of the Applicants' 407 owned properties, the majority of which are tenanted, and First Mortgage Loans. It largely ignores that the very premise of the Applicants' Business (as defined below) is acquiring distressed residential real estate in a state of disrepair in undervalued tertiary markets.

9. The issues resulting from the Investigative Report have been exacerbated by the highly compressed timeline insisted upon by the Secured Lenders for the hearing of their motion, and their conduct in advancing the motion. To stymy the Applicants' response, the Secured Lenders have refused to: (i) respond to the Applicants' request to inspect; (ii) submit their affiants to any cross-examination on their affidavits filed in support of their motion; and (iii) produce a single document or answer any substantive questions on Rule 39.03 examinations.

10. Seizing on misleading and inaccurate assertions in the Investigative Report, and without so much as a mention of the Applicants' response, the Secured Lenders accuse the Applicants of operating a "sham enterprise". This bald accusation is belied by the Applicants' 407 owned properties, comprised of 631 rental units (the majority are tenanted), and comparative market analysis illustrating that such properties have an aggregate value of at least $136.9 million.

11. The Secured Lenders' conduct, as compared to the Applicants' good faith efforts to maximize stakeholder value and address their stakeholders' concerns, including in proposing a with prejudice framework for the orderly and value-preserving transition of the Applicants' management and business and the resolution of these motions, is remarkable.[1]

12. The Secured Lenders' conduct should not be countenanced and their misguided motion for *extraordinary relief* should be dismissed or, at least, adjourned. The Applicants' request for a brief 11-day extension of the Stay of Proceedings, which will afford the Applicants an opportunity to responsibly resolve stakeholder concerns in the orderly and value-maximizing manner proposed in the Applicants' transition framework, should be granted.[2]

PART II: FACTS

13. The facts underlying this motion are more fully set out in the affidavit of Robert Clark sworn June 20, 2024 (the "**Clark Affidavit**").[3] All capitalized terms used but not defined herein have the meanings ascribed to them in the Clark Affidavit.

A. Background to These CCAA Proceedings

14. The Applicants are private Canadian corporations that, together with affiliate corporations that are not Applicants in these CCAA proceedings and SID Developments, SID Renos and SID Management, are part of a group of companies specializing in the acquisition, renovation and leasing

[1] Letter (With Prejudice) from Bennett Jones LLP dated June 22, 2024 [June 22 Letter], Applicants' Brief of Transcripts and Relevant Correspondence at Tab 1 [Applicants' Brief].
[2] June 22 Letter, *ibid*, Applicants' Brief at Tab 1.
[3] Affidavit of Robert Clark sworn on June 20, 2024 [Clark Affidavit], Applicant's Motion Record dated June 20, 2024 at Tab 2 [Motion Record].

of distressed residential real estate in undervalued markets throughout Ontario (the "**Business**").[4] The Applicants currently own 407 properties across secondary and tertiary markets in Ontario, containing 631 rental units, the majority of which are tenanted.[5]

15. Following careful review and consideration of their financial circumstances and alternatives, and the devasting effects of a bankruptcy or uncoordinated enforcement efforts, the Applicants determined that commencing these CCAA proceedings was in the best interests of the Applicants and their stakeholders, including their over 300 Lenders and approximately 1,000 tenants. Accordingly, the Applicants sought and obtained an initial order under the CCAA (as amended, and amended and restated, the "**Second ARIO**").[6]

16. The Second ARIO, which was granted with the Applicants' consent, provided the Monitor with certain enhanced powers and oversight including (among other things):

(a) requiring the prior written consent of the Monitor for all payments to be made, and liabilities to be incurred, by the Applicants (the "**Consent Requirement**"); and

(b) directing and empowering the Monitor to (A) investigate the use of funds borrowed by the Applicants, pre-filing transactions conducted by the Applicants and/or their principals and affiliates, and such other matters as may be requested by the Lender Representatives (as defined in the ARIO) and agreed to by the Monitor, in each case, to the extent such investigation relates to the Applicants' property, the Business or such other matters as may be relevant to these CCAA proceedings as determined by the Monitor (the "**Investigation**"), and (B) report to the Lender Representatives and the Court on the findings of the Investigation as the Monitor deems necessary and appropriate.[7]

---

[4] Clark Affidavit, *ibid* at para 5, Motion Record at Tab 2.
[5] Clark Affidavit, *ibid* at para 6, Motion Record at Tab 2.
[6] Clark Affidavit, *ibid* at paras 8-9, 16-19, Motion Record at Tab 2.
[7] Clark Affidavit, *ibid* at para 14, Motion Record at Tab 2.

17. Since the commencement of these CCAA proceedings, the Applicants and the Additional Stay Parties have cooperated with the Monitor and acted in good faith and with due diligence to continue the Business' ordinary course operations and complete 103 value accretive renovations (with a further 27 sites currently being active), subject to the significant constraints imposed on them under the Second ARIO, implement the SISP (which remains ongoing), and develop a restructuring term sheet to underpin a value-maximizing two-year realization process.[8]

B. The Applicants' and Principals' Cooperation with the Investigation

18. The Monitor commenced the Investigation in March. Notwithstanding their limited resources, which have been and continue to be severely strained, the Applicants, Robert Clark and the Additional Stay Parties (together with Mr. Clark, the "**Principals**") have cooperated with the Investigation, addressed the Monitor's extensive requests, and produced many written responses and thousands of documents in connection with same.[9]

19. In March and April 2024, the Monitor provided the Applicants and the Principals with voluminous written informal and documentary requests in connection with the Investigation, to which the Applicants and the Principals responded.[10]

20. In April 2024, the Principals voluntarily participated in four, full-day interviews under oath conducted by the Monitor's counsel notwithstanding that the Monitor declined to provide advance notice of: (i) any allegations of wrongdoing by the Applicants or the Principals; or (ii) topics that would be addressed during the interviews, both of which hindered the ability of the Principals to prepare for, and respond effectively during, the interviews.[11]

21. In May and June 2024, while continuing to manage the Business and advance these CCAA proceedings, the Applicants and Principals responded to a significant number of the almost 200 follow-up requests by the Monitor. In each response, the Applicants and the Principals advised the

[8] Clark Affidavit, *ibid* at para 21, Motion Record at Tab 2.
[9] Clark Affidavit, *ibid* at paras 47-55, Motion Record at Tab 2.
[10] Clark Affidavit, *ibid* at para 47-49, Motion Record at Tab 2.
[11] Clark Affidavit, *ibid* at paras 50-51, Motion Record at Tab 2.

Monitor that (i) they continued to "assemble documents and information in connection with other Requests made, as appropriate" and (ii) they intended to provide further responses in due course.[12]

C. The Investigative Report and the Secured Lenders' Motion

22. In May 2024, counsel for the Applicants requested that the Applicants and the Principals be provided with an advance draft of the Investigative Report to review and address any concerns or informational gaps the Monitor identified.[13] The Monitor refused.[14]

23. On June 11, 2024, one day after the Applicants and Principals had most recently provided responses to the Investigation (wherein they advised that they continued to assemble documents and information in connection with the Monitor's requests), the Monitor delivered the nearly 100-page Investigative Report, and the Brief referred to therein (comprising approximately 2,000 pages).[15]

24. In the Investigative Report, the Monitor purports to have "serious concerns" with the business practices of the Applicants, the Principals and non-Applicant affiliate companies. Its concerns include alleged "questionable transfers from the Applicants to the Principals, affiliated entities and third parties without any apparent benefit to the Business" and "[q]uestionable dividend payments or repayment of amounts identified as 'shareholder loans'".[16]

25. In the Investigative Report, the Monitor also acknowledged that the Investigative Report may need to be "subject to revision and/or correction" following the Applicants' delivery of documents and information in respect of the findings and conclusion in the Investigative Report.[17]

26. As explained below, the Investigative Report is replete with significant issues and, as a result, the findings are incomplete and, at times, inaccurate or misleading. Accordingly, counsel for the

---

[12] Clark Affidavit, *ibid* at para 55, Motion Record at Tab 2; Letter from Bennett Jones to Cassels dated May 13, 2024, Monitor's Brief of Documents [Monitor's Brief], Volume 5 of 5, Tab 35S, p. 2138; Letter from Bennett Jones to Cassels dated May 28, 2024, Monitor's Brief, Volume 5 of 5, Tab 35Y, p. 2151; Letter from Bennett Jones to Cassels dated June 10, 2024, Monitor's Brief, Volume 5 of 5, Tab 35AA, p. 2176.

[13] Clark Affidavit, *ibid* at paras 55-56, Motion Record at Tab 2; Letter from Bennett Jones to Cassels dated May 16, 2024, Monitor's Brief, Volume 5 of 5, Tab 35U, p. 2144.

[14] Clark Affidavit, *ibid* at para 56, Motion Record at Tab 2; Letter from Cassels to Bennett Jones dated May 17, 2024, Monitor's Brief, Volume 5 of 5, Tab 35V, pp. 2145-2146; Letter from Bennett Jones to Cassels dated May 21, 2024, Brief, Volume 5 of 5, Tab 35W, pp. 2147-2148; Letter from Cassels to Bennett Jones dated May 17, 2024, Monitor's Brief, Volume 5 of 5, Tab 35X, pp. 2149.

[15] Clark Affidavit, *ibid* at para 57, Motion Record at Tab 2; Clark Affidavit, Exhibit "I", Motion Record at Tab 2I.

[16] Fourth Report of the Monitor dated June 11, 2024, s 2.0, para 1 [Investigative Report].

[17] Investigative Report, *ibid*, s. 5.0, para 4.

Applicants immediately advised the Monitor that the "Applicants vigorously dispute the Monitor's findings in the Report, and have very serious concerns regarding both the contents of the Report, and the information omitted from the Report without explanation". Further, the Applicants advised that they were "preparing a comprehensive response to the Report, including to direct the Monitor's attention to information and documents that have already been provided to the Monitor."[18]

27. Instead of allowing the Applicants and Principals to substantively respond to the Investigative Report, which includes documents not previously seen or provided to the Applicants, the Monitor moved to, among other things, publicly file the Investigative Report.[19]

28. The Secured Lenders, in the face of the Applicants' concerns, and relying on the Investigative Report, moved for extraordinary relief in the form of an order (the "**Expansion of Powers Order**"), which would, among other things: (i) expand the Monitor's already heighted powers to effectively remove and replace the directors of each of the Applicants; (ii) compel SID Management, SID Developments and SID Renos to perform critical management and unparticularized transition services to the Applicants, while simultaneously exposing their management to potentially hundreds of claims; and (iii) impose a hurried, disorderly and value-destructive transition of the Applicants' Business.

D. The Issues with the Investigative Report

29. On June 19, 2024, counsel for the Applicants delivered a letter to counsel for the Monitor (the "**June 19 Letter**"), which:

(a) identified and described in detail more than 30 non-exhaustive issues, both general and specific, with the Investigative Report;

[18] Clark Affidavit, *supra* note 3 at paras 63-64, Motion Record at Tab 2; Letter from Bennett Jones to Cassels dated June 12, 2024, Clark Affidavit, Exhibit "J", Motion Record at Tab 2K.
[19] Clark Affidavit, *ibid* at paras 67-69, Motion Record at Tab 2.

(b) referred to supporting evidence where applicable, which in many cases included documents previously provided to the Monitor and answers given during the interviews conducted by the Monitor;

(c) provided additional documents to the Monitor; and

(d) requested that the Monitor revise or supplement the Investigative Report to address the issues raised in the June 19 Letter.[20]

30. Below is a non-exhaustive summary of certain of the material issues with the Investigative Report:

(a) The Monitor's various statements regarding a pattern of unjustifiable "defalcation" of funds lent to the Applicants by Investors is improper given that, among other reasons:

(i) As the Monitor is aware, (i) all or substantially all of the proceeds of the First Mortgage Loans (in the approximate total principal amount of $81.5 million) were used to acquire the Applicants' owned real property, were sent directly to lawyer trust accounts and were never even directly accessible to the Applicants or available for any other use by the Applicants, (ii) approximately $16.8 million of the proceeds of the Promissory Notes were similarly used for closing costs and other payments and not available for any other use by the Applicants, and (iii) approximately $13.6 million (inclusive of renovations to the properties conveyed by certain of the Applicants in the Core Sale) has been expended in connection with the Applicants' renovations to date.[21]

[20] Clark Affidavit, *ibid* at paras 70-71, Motion Record at Tab 2; Letter dated June 19, 2024 from Bennett Jones to Cassels [June 19 Letter], Clark Affidavit, Exhibit "O", Motion Record at Tab 2O.
[21] June 19 Letter, *ibid*, p. 1, response #1, Cark Affidavit, Exhibit "O", Motion Record at Tab 2O.

(ii) There were no constraints, including covenants, representations and/or warranties, in (i) all or substantially all of the Promissory Notes, and (ii) the syndicated second mortgage documents, on the use of funds.[22]

(iii) The Monitor did not make any distinction between the Applicants' use of borrowed funds and substantial rental income.[23]

(iv) In the Principals' interviews under oath and in the Applicants' written responses to the Monitor, they advised that all or substantially all of the Applicants' borrowed funds were used to acquire the properties and/or for renovations and operating expenses in the ordinary course of business.[24]

(v) The Monitor's conclusions are inconsistent with the Monitor's own findings that payments to Principals were justifiable in relation to *bona fide* business purchases for the Applicants. As the Monitor notes in the Investigative Report, "[s]ome of the payments made on these credit cards appear appropriate and directly related to the Applicants' business (notwithstanding that such payments were made on personal credit cards rather than a corporate card)". Notably, the business practice of payments being made to the Principals in connection with *bona fide* business purchases for the Applicants has continued under the oversight of the Monitor, without any objection by the Monitor, notwithstanding that such transfers are now being characterized as an "unjustifiable defalcation of funds." The business expense reimbursements account for approximately $4.4 million of the approximately $6 million in net disbursements

[22] June 19 Letter, *ibid*, p. 1, response #1, Clark Affidavit, Exhibit "O", Motion Record at Tab 2O.
[23] June 19 Letter, *ibid*, p. 1, response #1, Clark Affidavit, Exhibit "O", Motion Record at Tab 2O.
[24] June 19 Letter, *ibid*, p. 1, response #1, Clark Affidavit, Exhibit "O", Motion Record at Tab 2O; Transcript of the Interview of Aruba Butt dated April 26, 2024, Monitor's Brief, Volume 2 of 5, at Tab 2, pp. 304-3019, qq. 83-91, and pp. 428-430, qq. 325-332; Investigative Report, *supra* note 16, s. 4.4, para 1.

to "Related parties – Individuals" and in respect of approximately $2.9 million of the net disbursements to "Related Parties – Companies".[25]

(b) The Monitor incorrectly concludes that after the Core Sale, $22,682,895.92 was "disbursed to the Applicants, Principals and non- Applicant related companies" and that $11,082,375.97 of the proceeds were paid to "non-Applicant related companies" directly from Core, "whereas a number of the Applicants took promissory notes in lieu of payments". The trust ledger previously provided to the Monitor makes clear that the $22,682,895.92 referred to in the Report is "Disbursements Before Promissory Notes". As the Monitor has been advised by the Applicants, and as confirmed in the interview of the Applicants' mortgage broker, Claire Drage, the promissory notes referenced were with third party lenders in connection with the properties sold as part of the Core Sale. As the trust ledger reflects, following the repayment of such promissory notes, $11,600,519.96 in proceeds was to be disbursed to the Applicants, including several non-Applicant vendors and certain individual vendors each of which owned property conveyed in the Core Sale. Of this amount, $2,709,979.55 was due to the Applicant vendors. In addition, the Investigative Report omits that the sole payment contemplated by the trust ledger to a Principal of the Applicants was in respect of real property owned by such Principal personally that was conveyed in the Core Sale. In respect of the purported promissory notes in favour of the Applicants in lieu of payments, the Monitor was specifically advised that its assumption was factually incorrect prior to its issuance of the Investigative Report.[26]

(c) The Monitor's various assertions regarding (i) information provided to Lenders, (ii) information the Monitor opines ought to have been provided to Lenders, and (iii) the Lenders' purported understandings and expectations misattributes conduct to the Applicants when the conduct at issue was that of Windrose/Lion's Share. The Monitor fails to mention, or

[25] June 19 Letter, *supra* note 20, p. 2, response #1, Clark Affidavit, Exhibit "O", Motion Record at Tab 2O.
[26] June 19 Letter, *ibid*, p. 22, response #12, Clark Affidavit, Exhibit "O", Motion Record at Tab 2O; Transcript of the Interview of Claire Drage [Drage Transcript], Monitor's Brief, Volume 5 of 5 at Tab 5, p. 74-78, qq. 170-174; Investigative Report, *supra* note 16, s. 4.5, paras 4-5.

apparently even consider, critical information provided to the Monitor, including that the Applicants generally did not deal directly with Lenders, did not provide marketing materials to Lenders, were not provided nor reviewed the marketing materials prepared by Windrose/Lion's Share, and until recently, were unaware that Lion's Share (as a lender to the Applicants) had obtained the funds it lent to the Applicants from other individuals.[27]

(d) The Monitor's finding that the Applicants have failed to provide responses to its requests in a timely manner ignores the fact that: (i) the Applicants have complied, and continue to comply, with the Monitor's extensive requests in a timely manner; (ii) the Applicants and Principals have limited resources, and as detailed above, have balanced these requests with their efforts to deal with pressing issues in these CCAA proceedings; and (iii) as recently as June 10 and 19, 2024, respectively, the Applicants advised that the "Applicants and [Principals] continue to assemble documents and information in connection with other requests made, as appropriate" and "any non-response to outstanding Requests in this letter is not, and should not be construed as […] the Applicants' or [Principals'] refusal to respond to such Requests…".[28]

31. The Investigative Report, including the conclusions reached therein, remain in dispute.

32. Notwithstanding (i) the significant issues raised by the June 19 Letter and the relevance of these issues to conclusions reached in the Investigative Report, (ii) the Applicants' and Principals' cooperation with the Investigation and (iii) the fact that the Investigative Report forms the basis for the Secured Lenders' motion for the proposed Expansion of Powers Order, the Monitor has failed to substantively or meaningfully engage with the matters raised in the June 19 Letter.[29]

---

[27] June 19 Letter, *ibid*, p. 14, response #8, Clark Affidavit, Exhibit "O", Motion Record, Tab 2O; Drage Transcript, *ibid*, Monitor's Brief, Volume 5 of 5 at Tab 5, pp. 56-58, qq. 126-131; Investigative Report, *ibid*, s. 2.4, para 2; ss 4.1, para 3, p. 11; s 4.4, paras 15-16 and 18-19, pp. 20-21; s 5.1, paras 6, 9, 10, and 11, p. 30; s 5.3.1, para 3, p. 38; s 5.6, pp. 49-50; s 5.8, paras 2-3, p. 52; s 6.0, para 12, p. 57; s 7.0, para 10, p. 59.

[28] June 19 Letter, *ibid*, p. 18, response #9, Motion Record, Tab 2O; Drage Transcript, *ibid*, Monitor's Brief, Volume 5 of 5 at Tab 5; Investigative Report, *ibid*, s. 3.0, paras 6-7; s 4.6, para 3, p. 29; s 5.2, paras 7, 11 and 14, pp. 32, and 34-35; s 5.3.2, paras 5, and 9-10, pp. 39-40.

[29] See generally, Supplement to the Fifth Report of the Monitor dated June 23, 2023.

33. The Secured Lenders not only rely on the disputed, incomplete and at times, inaccurate or misleading, findings in the Investigative Report, but they also tellingly fail to address, or even acknowledge, any of the issues raised by the June 19 Letter in their Factum.

E. The Secured Lenders' Obstructive Conduct in Connection with the Motions

34. Since scheduling the motions, the Secured Lenders have stonewalled the Applicants' ability to elicit any evidence relevant to the motions and wasted the Applicants' already limited time and resources to the detriment of the Applicants' stakeholders through the following conduct:

(a) the Secured Lenders failed to respond, without justification, to the Applicants' request to inspect certain documents referenced in the affidavits that the Secured Lenders rely upon in support of their motion;

(b) on the eve of the proposed examinations of the Secured Lenders' affiants (which included a Secured Lender Representative, and two other Lenders), the Secured Lender Representative Counsel advised that the Secured Lenders would not produce any of their affiants for cross-examination – unilaterally asserting that the examinations were an abuse of process – notwithstanding that they rely on these yet-untested affidavits in support of the relief they seek and notices of examination were validly served; and

(c) at their Rule 39.03 examinations, Matthew Tatomir (a Secured Lender Representative, who may not be a Secured Lender at all) and Cameron Topp (a Secured Lender and former Secured Lender Representative), each advised, for the first time, before even being asked a substantive question about any of the matters at issue on the motions, that they would refuse to answer all questions asked and that they equally refuse to produce any documents sought under their respective summonses – as they too unilaterally asserted the examinations were an abuse of

process – even though they had been validly served with the summonses and provided with attendance money.[30]

35. As a result, the Applicants have been improperly denied the right to conduct any examinations and to test the evidence of the Secured Lenders and elicit evidence from them that support the Applicants' position.

F. The Stay of Proceedings

36. The Stay of Proceedings expires on June 24, 2024. Pursuant to the proposed Stay Extension Order, the Applicants are seeking a short 11-day extension of the Stay of Proceedings, including in respect of the Additional Stay Parties and the Additional Stay Parties' Property to and including July 8, 2024 (the "**Stay Period**") to advance these CCAA proceedings and address their stakeholders' concerns.[31] The Applicants will have sufficient cash to support the Business' ordinary course operations and the costs of these CCAA proceedings until July 31, 2024.[32]

37. The Secured Lenders, supported by the Monitor, the Unsecured Lenders and the Lion's Share Receiver oppose the proposed extension of the Stay of Proceedings in respect of the Applicants absent the granting of the Expansion of Powers Order, and in respect of the Additional Stay Parties, under any circumstances. Principally, such opposition is rooted in:

(a) the Lenders' concerns regarding the Applicants' conduct prior and subsequent to these CCAA proceedings – such conduct being as described and characterized in the disputed Investigative Report and pertaining to the state of as yet unfinished properties, the renovation and completion of which have been constrained and delayed by the same Secured Lenders who are now critiquing their state; and

---

[30] Transcript of Rule 39.03 Examination of Matthew Tatomir conducted on June 21, 2024, Applicants' Brief, *supra* note 1 at Tab 2, pp. 9-13, qq. 18-20.
[31] Clark Affidavit, *supra* note 3 at para 112, Motion Record at Tab 2.
[32] Fifth Report of the Monitor dated June 17, 2024 at section 7.0 [Fifth Report], Motion Record of the Monitor dated June 17, 2024 at Tab 2 [Monitor's Motion Record].

(b) an alleged failure to act in good faith and with due diligence, as purportedly evidenced by (i) the issues identified in the disputed Investigative Report, substantially all of which pertain to pre-filing conduct except for issues in respect of a single one of the Applicants' 407 properties, and (ii) a failure to respond to a subset of the extensive requests made during four, full-day voluntary interviews of the Principals.[33]

PART III: ISSUES

38. The issues to be considered on this motion are whether:

(a) the Secured Lenders have deprived the Applicants of their fundamental rights resulting in procedural unfairness;

(b) the enhancement of the Monitor's powers is inappropriate and unnecessary in the circumstances;

(c) SID Developments, SID Management and SID Renos can be compelled to provide broad, unparticularized services that go well-beyond their existing arrangements with the Applicants, and without proper compensation; and

(d) the Stay of Proceedings should be extended to July 8, 2024.

PART IV: LAW AND ARGUMENT

A. The Secured Lenders Have Deprived the Applicants of Their Fundamental Rights Resulting in Procedural Unfairness

39. The Applicants have been denied their uncontroverted right to cross-examine the Secured Lenders who have filed affidavits in support of the Secured Lenders' motion and were properly served with a notice of examination, contrary to the Rules, including 39.02, 34.02 and 34.10.[34] The Applicants have also been denied the right to examine and elicit evidence from other Secured Lenders

[33] Clark Affidavit, *supra* note 3 at paras 110-111; Fifth Report, *ibid* at s. 3.0, para 2-3, Monitor's Motion Record at Tab 2.
[34] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, rr. 34.02, 34.10 and 39.02.

on Rule 39.03 examinations, who were properly served with summons to witness, contrary to the Rules, including 39.03 and 34.10.[35]

40. Similarly, the Applicants have been deprived, without justification, of their right to inspect the documents referenced in the Secured Lenders' affidavits. Rules 30.04(1) and (2) are clear that a party who serves on another party a request to inspect documents is entitled to inspect any document in another party's possession, control or power that is referred to in an affidavit served by the other party.[36]

41. The Secured Lenders' outright refusal to be cross-examined or produce any documents as required constitutes a complete disregard for, and unilateral nullification of, the Applicants' procedural rights and has resulted in procedural unfairness and prejudice. It has denied the Applicants the opportunity to scrutinize the evidence presented by the Secured Lenders on which they rely on their motion and elicit evidence from them in the highly compressed timeline upon which they insisted.[37] This has significantly compromised the Applicants' ability to respond to the Secured Lenders' claims – in respect of which the Applicants have serious concerns.[38] The opinion of the Secured Lender Representative Counsel on the value of cross-examining the Affiants in this case, particularly where the Applicants were denied the right to ask the Secured Lender affiants a single question, is wholly irrelevant.[39]

42. The right of a party to cross-examine a witness has been described as "near absolute"[40] and "fundamental to our adversarial system".[41] The Supreme Court of Canada has described the right to cross-examine as "a vital element of the adversarial system applied and followed in our legal

---

[35] *Ibid*, rr. 34.10 and 39.03.
[36] *Ibid*, r. 30.04.
[37] *Doef v Hockey Canada et al*, 2022 ONSC 1411 at para 63 [*Doef*].
[38] *Trade Capital Finance Corp v Cook*, 2016 ONSC 3511 at para 23.
[39] *Carriere v Bell Canada*, 2006 CanLII 19490 (ON SC) at para 40.
[40] *Doef*, *supra* note 37 at para 67.
[41] *Howe v Institute of Chartered Accountants of Ontario*, 1994 CanLII 3360 (ON CA) at para 48.

system…since the earliest times"[42] and integral to "the pursuit of justice and an indispensable ally in the search for truth."[43]

43. The Secured Lenders have stonewalled the Applicants' ability to scrutinize or elicit any evidence on their motion and wasted the Applicants' already limited time and resources to the detriment of the Applicants' stakeholders. In stark contrast, the Principals have cooperated with the Monitor's Investigation by voluntarily participating in in-person interviews under oath conducted by the Monitor's counsel and producing written responses and documents as requested.

44. Given the prejudice caused to the Applicants on this motion by the Secured Lenders' conduct, and the Monitor's failure to engage in any meaningful manner with the Applicants' responses to the omissions and inaccurate and misleading assertions in the Investigative Report, the only appropriate remedy is to dismiss or adjourn the Secured Lender's motion, including to permit the Applicants to conduct their cross-examinations, rule 39.03 examinations and to inspect the documents referred to in the Secured Lenders' affidavits.[44]

B. The Enhancement of the Monitor's Powers is Inappropriate in the Circumstances

45. Relying on the (i) disputed, incomplete and at times, inaccurate or misleading, findings and conclusions within the Investigative Report, and (ii) affidavits of three Secured Lenders who refused to be examined, produce any documents, or make documents available for inspection, the Secured Lenders seek the extraordinary relief of further expanding the Monitor's already enhanced powers to the exclusion of the Principals absent the Applicants' consent. Such relief is inappropriate in the circumstances.

46. The traditional role of the Monitor in proceedings under the CCAA is that of the "eyes and ears" of the Court.[45] While this Court may use its discretion to enhance a monitor's powers beyond

---

[42] *Innisfil Township v Vespra Township*, 1981 CanLII 59 (SCC) at p. 167.
[43] *R. v Lyttle*, 2004 SCC 5 at para 1.
[44] *South Junction Triangle Grows Neighbourhood Association v City of Toronto*, 2024 ONSC 1885 at para 20.
[45] *Ernst & Young Inc v Essar Global Fund Limited*, 2017 ONCA 1014 at para 109 [*Ernst*]; *Canada v Canada North Group Inc*, 2021 SCC 30 at para 28.

its supervisory role, it can only do so in "extraordinary circumstances" where "absolutely necessary".[46] It is neither a "routine" nor "regular" occurrence.[47]

47. In this case, the Applicants previously consented, in good faith, to considerable enhancements to the Monitor's powers. These powers include the Monitor's authority to conduct the Investigation and the Consent Requirement, which necessitates that the Monitor's prior written consent be obtained for *all* of the Applicants' expenditures and the incurrence of any liabilities.[48] The Monitor is already empowered to oversee and approve all disbursements made by the Applicants in these proceedings. There is no basis to suggest that these *exceptional* powers are insufficient.

48. Despite the breadth of its existing powers, the Secured Lenders now request that the Monitor be authorized to exercise *any powers which may be properly exercised by a board of directors or any officers of the Applicants to the exclusion of all other persons*, including the Applicants' directors, officers, employees, and/or other representatives.

49. Generally, it should be absolutely necessary for the expansion of powers of a Monitor to be granted to allow the monitor to fulfill its statutory duties and to maximize recoveries.[49] Courts have declined to expand a monitor's powers where the debtor and its creditors have not been given a fair chance to arrive at a successful restructuring solution within the existing framework,[50] and have accepted that a monitor should not be granted managerial powers absent evidence that management is "failing or neglecting to exercise its fiduciary duties appropriately".[51]

50. The Secured Lenders point to cases in their Factum in which the monitor's powers are expanded significantly less than what they propose here. Specifically, they cite cases in which: (i) a monitor was consensually granted expanded powers over a "ResidualCo" that was newly-incorporated in connection with an RVO;[52] (ii) a monitor was granted powers to compel productions

---

[46] *Fiera Private Debt Fund v SaltWire Network Inc*, 2024 NSSC 89 at para 15, sub 6 [*Fiera*]; *Arrangement relatif à Bloom Lake General*, 2021 QCCS 2946 at para 80 [*Arrangement relatif*].
[47] *Fiera*, *ibid* at para 15, sub 6.
[48] Clark Affidavit, *supra* note 3 at para 18, Motion Record at Tab 2.
[49] *Fiera*, *supra* note 46 at para 15, sub 6; *Arrangement relatif*, *supra* note 46 at para 80.
[50] See generally, *Canadian Imperial Bank of Commerce v Quintette Coal Ltd*, 1991 CanLII 951 (BC SC).
[51] *Fiera*, *supra* note 46 at para 15, sub 6.
[52] *PricewaterhouseCoopers Inc v Canada Fluorspar (NL) Inc*, 2023 NLSC 88.

and conduct investigations (powers which the Monitor already has under the Second ARIO);[53] (iii) a monitor was permitted act as a complainant against certain related parties;[54] and (iv) a monitor was granted the ability to exercise the rights of certain creditors to pursue third parties.[55]

51. The relief sought by the Secured Lenders on this motion is far greater than most "super monitor" orders (including those in the cases on which the Secured Lenders rely). It is tantamount to a removal of directors, which is governed by subsection 11.5(1) of the CCAA. The removal and replacement of directors under the CCAA is an "extreme form of judicial intervention in the business and affairs of the corporation", and requires the Court to find that the actions of the directors "unreasonably impair" or are "likely to unreasonably impair" a viable restructuring.[56] As such, the moving party has a significant threshold to meet to show that it is entitled to that relief.[57] Courts have declined to grant that relief when the only evidence before the court comes from contradictory affidavits and where examinations and cross-examinations would help the record in that regard, such as the case here.[58]

52. The Secured Lenders have not met this significant threshold. Their materials fail to make clear why such extraordinary relief is necessary, and as discussed above, the compressed timeline and outright failure of the relevant Secured Lenders to attend at the scheduled examinations, answer any questions or produce any documents has severely prejudiced the ability of the Applicants (and this Court) to better understand their position and infringed the Applicants' fundamental procedural rights.[59] The thrust of their argument appears to be that the Applicants and the Principals will dissipate assets to entities not involved in these CCAA proceedings if the Monitor's powers are not further expanded, ignoring that the dissipation of assets is impossible given the terms of the Second ARIO. The Secured Lenders also argue that the Applicants have neglected certain properties (which the

---

[53] *Arrangement relatif*, *supra* note 46.
[54] *Ernst*, *supra* note 45.
[55] *Arrangement relatif à 9323-7055 Québec inc (Aquadis International Inc)*, 2020 QCCA 659.
[56] *Quest University Canada (Re)*, 2020 BCSC 318 at para 61.
[57] *Ibid* at paras 60, 69.
[58] *Bluberi Gaming Technologies Inc/Bluberi jeux et technologies inc (Arrangement relatif à)*, 2015 QCCS 5373 at para 31.
[59] See generally, Transcript of Rule 39.03 Examination of Matthew Tatomir Conducted on June 21, 2024, Applicants' Brief at Tab 2; Transcript of Rule 39.03 Examination of Cameron Topp Conducted on June 21, 2024, Applicants' Brief at Tab 3; Correspondence from Chaitons LLP dated June 20, 2024 regarding Cross-Examinations of Secured Lender Affiants, Applicants' Brief at Tab 4.

Applicants dispute) – again ignoring that the Monitor already has full and complete access to all properties, and it is the Monitor who is controlling the use of funds from the DIP Facility.

53. It cannot be said that the Principals are unreasonably impairing a restructuring. As explained above, the Principals have been cooperative with the Monitor throughout these CCAA proceedings, completed 103 value accretive renovations, cooperated with the Investigation, engaged with stakeholders, and explored various restructuring alternatives. They have at all times acted in good faith and with due diligence in these CCAA proceedings. There is no evidence before this Court that would support their removal pursuant to subsection 11.5(1) of the CCAA.

54. In short, the extraordinary circumstances necessary to grant the relief sought by the Secured Lenders do not exist in this case. There is no prejudice to any party to keeping the *status quo* in place with respect to the powers of the Monitor. As such, this Court should not grant the Secured Lenders' request to further expand the powers of the Monitor.

C. SID Developments, SID Management and SID Renos Should not be Compelled to Provide Unparticularized Services

55. Despite impugning their conduct and capability, the Secured Lenders seek to compel SID Developments, SID Management and SID Renos to continue to perform services for the Applicants and cooperate in "any transition of the services provided by the SID Companies to alternative service providers".[60] In so doing, the Secured Lenders fail to articulate the terms of such transition services or the basis under the CCAA on which their provision may be *compelled*.

56. Subsection 11.4(2) of the CCAA confers discretion on this Court to make an order requiring a person to "supply goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate."[61] This Court's discretion under subsection 11.4(2) of the CCAA may only be exercised where this Court *first* makes an order declaring such person to be "a critical supplier to the Company" pursuant to

---

[60] Draft Order dated June 24, 2024, Motion Record of the Secured Lenders dated June 14, 2024 at Tab 1A.
[61] *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, s 11.4(2) [CCAA]; *Re Soccer Express Trading Corp*, 2020 BCSC 749 at para 56 [*Soccer Express*].

subsection 11.4(1) of the CCAA.[62] If this Court grants an order pursuant to subsection 11.4(2) of the CCAA (which has not even been sought by the Secured Lenders), it must also grant a charge over the Applicants' Property in "an amount equal to the value of the goods or services supplied under the terms of the order."[63]

57. Though there appears to be little to no dispute that SID Management and SID Renos supply property management and renovation services to the Applicants that are critical to the Business, an order under subsection 11.4(1) is plainly only available on "application by a debtor company".[64] It cannot be imposed by the Secured Lenders. This alone is dispositive of their request.

58. If this Court nonetheless declares that SID Management and SID Renos are each "a critical supplier" to the Applicants, it may compel the provision of services specified by this Court on "terms and conditions that are consistent with the supply relationship" or that it "considers appropriate."[65] The terms of SID Management's and SID Renos' existing arrangements do not contemplate the provision of any transition services whatsoever,[66] and the Secured Lenders have proposed none. Rather, the Secured Lenders seek to compel SID Management and SID Renos to provide *any transition* services requested by the Monitor without remuneration or reimbursement.

59. While this Court has recognized that subsection 11.4 of the CCAA does not oust the Court's jurisdiction under section 11 of the CCAA to authorize pre-filing payments in favour of critical suppliers,[67] the Secured Lenders have not identified any instance in which such *general* jurisdiction was relied upon instead of this Court's *specific* jurisdiction under subsection 11.4(2) of the CCAA to *compel* the provision of goods or services.[68]

---

[62] CCAA, *ibid*, s 11.4(1); *Soccer Express*, *ibid* at para 57.
[63] CCAA, *ibid*, s 11.4(3); *Soccer Express*, *ibid* at para 57.
[64] CCAA, *ibid*, s 11.4(1); *Re Essar Steel Algoma Inc*, 2017 ONSC 2585 at para 24 [*Essar*]; *Arrangement relatif à Atis Group Inc*, 2021 QCCS 744 at paras 24-25. There is nothing to suggest that SID Developments is a "supplier of goods or services to the [Applicants] and that the goods or services that are supplied are critical to the [Applicants'] continued operation".
[65] CCAA, *ibid* s 11.4(2); *Soccer Express*, *supra* note 61 at para 69.
[66] See generally, Affidavit of Robert Clark sworn January 23, 2024, Exhibit "B", Application Record of the Applicants dated January 23, 2024, at Tab 2B.
[67] *Pride Group Holdings Inc et al*, 2024 ONSC 2026 at para 45; CCAA, *supra* note 61 s 11;
[68] See for example, *Essar*, *supra* note 64 at para 26 where Newbould J. expressed "serious doubts that a critical supplier charge should be made under the general discretion provided under section 11 in the face of a specific provision in section 11.4 dealing with that subject".

60. If this Court accepts that it maintains discretion to grant an order compelling the provision of services under section 11 of the CCAA, the exercise of that discretion must "further the remedial objectives of the CCAA and be guided by the baseline considerations of appropriateness, good faith, and due diligence".[69] Appropriateness in this regard "extends not only to the purpose of the order, but also to the means it employs".[70]

61. Here, the proposed Expansion of Powers Order compels SID Management and SID Renos to provide *any transition* services requested by the Monitor without compensation. It does not further the CCAA's remedial objectives nor is it appropriate in the circumstances.

62. What's more, the proposed Expansion of Powers Order neglects to afford SID Developments, SID Management, SID Renos and their respective management and employees, including certain of the Additional Stay Parties, the benefit of any stay of proceedings in respect of the disputed claims upon which the Secured Lenders' motion is premised. Such relief is appropriate where "the business operations of a group of entities are inextricably intertwined" or the applicable non-Applicant entities are "highly integrated with the Applicants and indispensable to the Applicants' business and restructuring".[71] The Principals cannot be expected to devote the time required to provide and transition property management services while also dealing with potentially hundreds of claims against them.

D. The Stay of Proceedings Should be Extended

63. The CCAA is remedial legislation, which provides a means to avoid the devastating social and economic consequences of commercial bankruptcies and is to be liberally construed.[72] The CCAA's remedial objectives are facilitated by the "power to stay proceedings".[73]

---

[69] *9354-9186 Québec inc v Callidus Capital Corp*, 2020 SCC 10 at para 70.
[70] *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60 at para 70 [*Century Services*].
[71] *Re Imperial Tobacco Canada Limited, et al.*, 2019 ONSC 1684 at paras 11-12; *Laurentian University of Sudbury*, 2021 ONSC 659 at para 40; *Re Chalice Brands Ltd*, 2023 ONSC 3174 at paras 35-37.
[72] *Re Metcalfe & Mansfield Alternative Investments II Corp*, 2008 ONCA 587 at para 44; *Century Services*, *supra* note 70 at para 59; *Re Canadian Airlines Corp*, [2000] AWLD 666 at para 12 [*Canadian Airlines*].
[73] *Canadian Airlines*, *ibid* at para 13.

64. The concerns of the Secured Lenders and the Monitor with respect to alleged *pre-filing* misconduct have no bearing on the Applicants' good faith requirement in the CCAA, and the post-filing conduct complained of is anomalous and certainly not grounds to suggest the Applicants are not acting in good faith. For the reasons discussed below, the Applicants submit that the proposed brief extension of the Stay of Proceedings is in the best interests of the Applicants and their stakeholders, is consistent with the purposes of the CCAA, and is appropriate in the circumstances.

1. The Stay of Proceedings Should be Extended for the Applicants

65. Subsection 11.02(2) of the CCAA authorizes this Court to grant an extension of the Stay of Proceedings for "any period the court considers necessary".[74] To grant such an extension, this Court must be satisfied that circumstances exist that make the order appropriate and that the Applicants have acted, and are acting, in good faith and with due diligence.[75] The consideration of good faith relates to the conduct of the Applicants within, and *not prior to*, these CCAA proceedings.[76]

66. The jurisdiction vested in Courts to stay proceedings under section 11.02 "should be construed broadly to accomplish the legislative purposes of the CCAA".[77] These purposes include, among others, enabling the continuation of the applicants' business, avoiding the social and economic costs of a liquidation and facilitating a value-maximizing restructuring.[78] Accordingly, a stay of proceedings will be appropriate where it maintains the *status quo* and provides applicants with breathing room while they seek to restore solvency and attempt to arrange an acceptable restructuring plan in order to maximize recoveries for stakeholders.[79]

67. In this case, the proposed *brief* extension of the Stay of Proceedings is appropriate in the circumstances given that:

---

[74] CCAA, *supra* note 61 s 11.02(2); *Re Nordstrom Canada Retail Inc*, 2023 ONSC 1631 at para 7 [*Nordstrom*].
[75] CCAA, *ibid* s 11.02(2); *Nordstrom*, *ibid* at para 7.
[76] *Re Muscletech Research and Development Inc*, 2006, OJ No. 462 at para 4; *Re 4519922 Canada Inc*, 2015 ONSC 124 at para 45.
[77] *Canwest Global Communications Corp*, 2011 ONSC 2215 at para 24 [*Canwest*].
[78] *Canwest*, *ibid* at para 24; *Century Services*, *supra* note 70 at para 15; *Target Canada Co. (Re)*, 2015 ONSC 303 at para 8 [*Target*]; *Timminco Limited (Re)*, 2012 ONSC 2515 at para 15 [*Timminco*].
[79] *Century Services*, *ibid* at para 14; *Target*, *ibid* at para 8; *Timminco*, *ibid* at para 15.

(a) since the granting of the Initial Order, the Applicants have acted in good faith and with due diligence to stabilize and continue the Business' ordinary course operations, service the Applicants' approximately 1,000 tenants, cooperate in the Investigation and respond to numerous requests made therein, renovate 103 units, engage extensively with the Monitor and the SISP Advisors with respect to the SISP, prepare and circulate a restructuring term sheet providing a path forward for the Applicants, reconcile their unsecured indebtedness (which appears to be significantly overstated by approximately $32 million), and advance their restructuring objectives;

(b) the Stay of Proceedings is necessary to avoid uncoordinated and distressed sales or forced liquidations of the properties to the detriment of the Applicants' stakeholders;

(c) the extension of the Stay of Proceedings will preserve the *status quo* and afford the Applicants the breathing space and stability required to continue the Business' ordinary course operations, continue to complete value accretive renovations, and allow the Monitor, with the assistance of the SISP Advisors, to continue to evaluate the appropriate next steps in the SISP;

(d) the extension of the Stay of Proceedings will afford the Applicants time to engage with the Monitor, counsel to the Lion's Share Receiver as well as the Lender Representative Counsel and the Unsecured Lender Representative Counsel regarding their respective constituents' interests and concerns;

(e) the Applicants are forecasted to have sufficient liquidity to support the Business' ordinary course operations and the costs of these CCAA proceedings throughout the Stay Period;

(f) pursuant to the Consent Requirement, the Monitor has exclusive and complete authority to control the payments to be made, and liabilities to be incurred, by the Applicants during the Stay Period; and

(g) the Monitor has, and will continue to have access to each of the Applicants' bank accounts during the Stay Period.[80]

2. The Stay of Proceedings Should be Extended for the Additional Stay Parties and the Additional Stay Parties' Property, and the Tolling Relief Should be Granted

68. The proposed Stay Extension Order also extends the Stay of Proceedings in favour of the Additional Stay Parties and the Additional Stay Parties' Property for the Stay Period. The Additional Stay Parties are indirect shareholders of the Applicants and are the Applicants' only directors.[81]

69. Pursuant to the Initial Order (as amended and restated most recently by the Second ARIO), this Court granted a limited stay of proceedings in favour of the Additional Stay Parties and the Additional Stay Parties' Property with respect to the Related Claims for the Initial Stay Period (the "**Non-Applicant Stay**"). Among other things, the purpose of seeking the Non-Applicant Stay was to allow the Additional Stay Parties to focus on achieving a restructuring solution in these CCAA proceedings and to prevent them from being dragged into the myriad of claims that have been and could (and likely will) soon be issued as a result of their purported guarantee of all or substantially all of the Applicants' funded indebtedness.

70. This Court has previously found that it has jurisdiction to grant the Non-Applicant Stay in light of subsections 11.04 and 11.03(2) of the CCAA and that such a stay is just and convenient in the circumstances.[82] In its endorsement accompanying the Initial Order, it found that the Non-Applicant Stay was consistent with the "single-proceeding model" and that uncoordinated enforcement by hundreds of Lenders against the Additional Stay Parties would not be in the best interests of the Applicants or the administration of justice.[83]

---

[80] Clark Affidavit, *supra* note 3 at paras 112-115, Motion Record at Tab 2; Fifth Report, *supra* note 32 s 6.0 at paras 3-4, Monitor's Motion Record at Tab 2.
[81] Clark Affidavit, *ibid* at para 116, Motion Record at Tab 2.
[82] *In the Matter of a Plan of Compromise or Arrangement of Balboa Inc, DSPLN Inc, Happy Gilmore Inc, Interlude Inc, Multiville Inc, The Pink Flamingo Inc, Hometown Housing Inc, The Mulligan Inc, Horses In The Back Inc, Neat Nests Inc, and Joint Captain Real Estate Inc* (January 23, 2024), Toronto, CV-24-00713254-00CL (Endorsement) (ONSC) (Commercial List), (Kimmel J) at para 35 [*Initial Order Endorsement*].
[83] *Ibid* at para 34.

71. The circumstances of this case continue to favour the extension of the Non-Applicant Stay for the Stay Period. There is no dispute that the continued involvement of the Additional Stay Parties' is critical to the Applicants' continued operations. Indeed, the Secured Lenders seek to compel SID Management, SID Developments and SID Renos, in which the Additional Stay Parties are integrally involved, to provide various services to the Applicants. Absent the stay extension, the Applicants and the Additional Stay Parties could be forced to respond to hundreds of claims, which would severely strain the Applicants' and the Additional Stay Parties' limited and already stretched resources and jeopardize the Applicants' ability to successfully effect a restructuring in these CCAA proceedings.[84]

72. Given that the Second ARIO tolls any prescription, time or limitation period relating to any proceeding against or in respect of the Additional Stay Parties of the Additional Stay Parties' Property in respect of the Related Claims, the plaintiffs and potential plaintiffs will only be minimally prejudiced by the temporary Non-Applicant Stay, which does not settle their actions or release, compromise or permanently enjoin any claims.[85]

PART V: RELIEF REQUESTED

73. The Applicants submit that the relief sought by the Applicants on the within motion is reasonable and appropriate in the circumstances and respectfully request that this Court grant the proposed form of Stay Extension Order and dismiss (or at least adjourn) the Secured Lenders' request for the Expansion of Powers Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 23RD DAY OF JUNE 2024

Bennett Jones LLP

BENNETT JONES LLP

[84] Clark Affidavit, *supra* note 3 at para 119, Motion Record at Tab 2.
[85] *Initial Order Endorsement*, *supra* note 82 at para 36; Clark Affidavit, *ibid* at para 118.

SCHEDULE A
LIST OF AUTHORITIES

Cases Cited

1. *9354-9186 Québec inc v Callidus Capital Corp*, 2020 SCC 10.
2. *Arrangement relatif à 9323-7055 Québec inc (Aquadis International Inc)*, 2020 QCCA 659.
3. *Arrangement relatif à Atis Group Inc*, 2021 QCCS 744.
4. *Arrangement relatif à Bloom Lake General*, 2021 QCCS 2946.
5. *Bluberi Gaming Technologies Inc./Bluberi jeux et technologies inc (Arrangement relatif à)*, 2015 QCCS 5373.
6. *Canada v Canada North Group Inc.*, 2021 SCC 30.
7. *Canadian Imperial Bank of Commerce v Quintette Coal Ltd*, 1991 CanLII 951 (BC SC).
8. *Canwest Global Communications Corp*, 2011 ONSC 2215.
9. *Carriere v Bell Canada*, 2006 CanLII 19490 (ON SC).
10. *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60.
11. *Doef v Hockey Canada et al*, 2022 ONSC 1411.
12. *Ernst & Young Inc v Essar Global Fund Limited*, 2017 ONCA 1014.
13. *Fair Change v His Majesty the King in Right of Ontario*, 2024 ONSC 1895.
14. *Fiera Private Debt Fund v SaltWire Network Inc*, 2024 NSSC 89.
15. *Howe v Institute of Chartered Accountants of Ontario*, 1994 CanLII 3360 (ON CA).
16. *In the Matter of a Plan of Compromise or Arrangement of Balboa Inc, DSPLN Inc, Happy Gilmore Inc, Interlude Inc, Multiville Inc, The Pink Flamingo Inc, Hometown Housing Inc, The Mulligan Inc, Horses In The Back Inc, Neat Nests Inc, and Joint Captain Real Estate Inc* (January 23, 2024), Toronto, CV-24-00713254-00CL (Endorsement) (ONSC) (Commercial List), (Kimmel J).
17. *Innisfil Township v Vespra Township*, 1981 CanLII 59 (SCC).
18. *Laurentian University of Sudbury*, 2021 ONSC 659.
19. *Nordstrom Canada Retail, Inc*, 2023 ONSC 1631.
20. *PricewaterhouseCoopers Inc v Canada Fluorspar (NL) Inc*, 2023 NLSC 88.
21. *Pride Group Holdings Inc et al*, 2024 ONSC 2026.

22. *Quest University Canada (Re)*, 2020 BCSC 318.

23. *R. v Lyttle*, 2004 SCC 5.

24. *Re 4519922 Canada Inc*, 2015 ONSC 124.

25. *Re Canadian Airlines Corp*, [2000] AWLD 666.

26. *Re Chalice Brands Ltd*, 2023 ONSC 3174.

27. *Re Essar Steel Algoma Inc*, 2017 ONSC 2585.

28. *Re Imperial Tobacco Canada Limited, et al*, 2019 ONSC 1684.

29. *Re Metcalfe & Mansfield Alternative Investments II Corp*, 2008 ONCA 587.

30. *Re Muscletech Research and Development Inc* 2006, OJ No. 462.

31. *Re Soccer Express Trading Corp*, 2020 BCSC 749.

32. *Sakab Saudi Holding Company et al v Saad Khalid S Al Jabri et al*, 2023 ONSC 2754.

33. *South Junction Triangle Grows Neighbourhood Association v City of Toronto*, 2024 ONSC 1885.

34. *Target Canada Co. (Re)*, 2015 ONSC 303.

35. *Timminco Limited (Re)*, 2012 ONSC 2515.

36. *Trade Capital Finance Corp v Cook*, 2016 ONSC 3511.

SCHEDULE B

STATUTES AND REGULATIONS RELIED ON

***Companies' Creditors Arrangement Act*, R.S.C. 1985, c C-36**

Section 11

General power of court

11 Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

R.S., 1985, c. C-36, s. 111992, c. 27, s. 901996, c. 6, s. 1671997, c. 12, s. 1242005, c. 47, s. 128

Section 11.02

Stays, etc. — initial application

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

> **(a)** staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;
>
> **(b)** restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> **(c)** prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Stays, etc. — other than initial application

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

> **(a)** staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
>
> **(b)** restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> **(c)** prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Burden of proof on application

(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.

Restriction

(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

2005, c. 47, s. 128, 2007, c. 36, s. 62(F) 2019, c. 29, s. 137.

Critical supplier

11.4 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operation.

Obligation to supply

(2) If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.

Security or charge in favour of critical supplier

(3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.

Priority

(4) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

1997, c. 12, s. 1242000, c. 30, s. 1562001, c. 34, s. 33(E)2005, c. 47, s. 1282007, c. 36, s. 65

Rules of Civil Procedure, RRO 1990, Reg 194

Affidavit of Documents

Inspection of Documents

Request to Inspect

30.04 (1) A party who serves on another party a request to inspect documents (Form 30C) is entitled to inspect any document that is not privileged and that is referred to in the other party's affidavit of documents as being in that party's possession, control or power. R.R.O. 1990, Reg. 194, r. 30.04 (1).

(2) A request to inspect documents may also be used to obtain the inspection of any document in another party's possession, control or power that is referred to in the originating process, pleadings or an affidavit served by the other party. R.R.O. 1990, Reg. 194, r. 30.04 (2).

(3) A party on whom a request to inspect documents is served shall forthwith inform the party making the request of a date within five days after the service of the request to inspect documents and of a time between 9:30 a.m. and 4:30 p.m. when the documents may be inspected at the office of the lawyer of the party served, or at some other convenient place, and shall at the time and place named make the documents available for inspection. R.R.O. 1990, Reg. 194, r. 30.04 (3); O. Reg. 575/07, s. 1.

Before Whom to be Held

34.02 (1) An oral examination to be held in Ontario shall be held at a time and place set out in the notice of examination or summons to a witness, before a person assigned by,

(a) an official examiner;

(b) a reporting service agreed on by the parties; or

(c) a reporting service named by the examining party. O. Reg. 171/98, s. 8.

(2) A person who objects to being examined at the time or place set out in the notice of examination or before a person assigned under subrule (1) may make a motion to show that the time, place or person is unsuitable for the proper conduct of the examination. O. Reg. 171/98, s. 8.

(3) If a motion under subrule (2) is dismissed, the court shall fix the responding party's costs on a substantial indemnity basis and order the moving party to pay them forthwith, unless the court is satisfied that the making of the motion, although unsuccessful, was nevertheless reasonable. O. Reg. 171/98, s. 8; O. Reg. 284/01, s. 8.

Interpretation
34.10 (1) Subrule 30.01 (1) (meaning of "document", "power") applies to subrules (2), (3) and (4). R.R.O. 1990, Reg. 194, r. 34.10 (1).

Evidence by Cross-Examination on Affidavit

On a Motion or Application
39.02 (1) A party to a motion or application who has served every affidavit on which the party intends to rely and has completed all examinations under rule 39.03 may cross-examine the deponent of any affidavit served by a party who is adverse in interest on the motion or application. R.R.O. 1990, Reg. 194, r. 39.02 (1).

(1.1) Subrule (1) does not apply to an application made under subsection 140 (3) of the *Courts of Justice Act*. O. Reg. 43/14, s. 11.

(2) A party who has cross-examined on an affidavit delivered by an adverse party shall not subsequently deliver an affidavit for use at the hearing or conduct an examination under rule 39.03 without leave or consent, and the court shall grant leave, on such terms as are just, where it is satisfied that the party ought to be permitted to respond to any matter raised on the cross-examination with evidence in the form of an affidavit or a transcript of an examination conducted under rule 39.03. R.R.O. 1990, Reg. 194, r. 39.02 (2).

To be Exercised with Reasonable Diligence
Evidence by Cross-Examination on Affidavit

On a Motion or Application
39.02 (1) A party to a motion or application who has served every affidavit on which the party intends to rely and has completed all examinations under rule 39.03 may cross-examine the deponent of any affidavit served by a party who is adverse in interest on the motion or application. R.R.O. 1990, Reg. 194, r. 39.02 (1).

(1.1) Subrule (1) does not apply to an application made under subsection 140 (3) of the *Courts of Justice Act*. O. Reg. 43/14, s. 11.

(2) A party who has cross-examined on an affidavit delivered by an adverse party shall not subsequently deliver an affidavit for use at the hearing or conduct an examination under rule 39.03 without leave or consent, and the court shall grant leave, on such terms as are just, where it is satisfied that the party ought to be permitted to respond to any matter raised on the cross-examination with evidence in the form of an affidavit or a transcript of an examination conducted under rule 39.03. R.R.O. 1990, Reg. 194, r. 39.02 (2).

To be Exercised with Reasonable Diligence
(3) The right to cross-examine shall be exercised with reasonable diligence, and the court may refuse an adjournment of a motion or application for the purpose of cross-examination where the party seeking the adjournment has failed to act with reasonable diligence. R.R.O. 1990, Reg. 194, r. 39.02 (3).

Additional Provisions Applicable to Motions
(4) On a motion other than a motion for summary judgment or a contempt order, a party who cross-examines on an affidavit,

(a) shall, where the party orders a transcript of the examination, purchase and serve a copy on every adverse party on the motion, free of charge; and

(b) is liable for the partial indemnity costs of every adverse party on the motion in respect of the cross-examination, regardless of the outcome of the proceeding, unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 39.02 (4); O. Reg. 284/01, s. 10.

Evidence by Examination of a Witness

Before the Hearing
39.03 (1) Subject to subrule 39.02 (2), a person may be examined as a witness before the hearing of a pending motion or application for the purpose of having a transcript of his or her evidence available for use at the hearing. R.R.O. 1990, Reg. 194, r. 39.03 (1).

(2) A witness examined under subrule (1) may be cross-examined by the examining party and any other party and may then be re-examined by the examining party on matters raised by other parties, and the re-examination may take the form of cross-examination. R.R.O. 1990, Reg. 194, r. 39.03 (2).

(2.1) Subrules (1) and (2) do not apply to an application made under subsection 140 (3) of the *Courts of Justice Act*. O. Reg. 43/14, s. 12.

To be Exercised with Reasonable Diligence
(3) The right to examine shall be exercised with reasonable diligence, and the court may refuse an adjournment of a motion or application for the purpose of an examination where the party seeking the adjournment has failed to act with reasonable diligence. R.R.O. 1990, Reg. 194, r. 39.03 (3).

At the Hearing
(4) With leave of the presiding judge or officer, a person may be examined at the hearing of a motion or application in the same manner as at a trial. R.R.O. 1990, Reg. 194, r. 39.03 (4).

Summons to Witness
(5) The attendance of a person to be examined under subrule (4) may be compelled in the same manner as provided in Rule 53 for a witness at a trial. R.R.O. 1990, Reg. 194, r. 39.03 (5).

The right to cross-examine shall be exercised with reasonable diligence, and the court may refuse an adjournment of a motion or application for the purpose of cross-examination where the party seeking the adjournment has failed to act with reasonable diligence. R.R.O. 1990, Reg. 194, r. 39.02 (3).

Additional Provisions Applicable to Motions
(4) On a motion other than a motion for summary judgment or a contempt order, a party who cross-examines on an affidavit,

(a) shall, where the party orders a transcript of the examination, purchase and serve a copy on every adverse party on the motion, free of charge; and

(b) is liable for the partial indemnity costs of every adverse party on the motion in respect of the cross-examination, regardless of the outcome of the proceeding, unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 39.02 (4); O. Reg. 284/01, s. 10.

Evidence by Examination of a Witness

Before the Hearing
39.03 (1) Subject to subrule 39.02 (2), a person may be examined as a witness before the hearing of a pending motion or application for the purpose of having a transcript of his or her evidence available for use at the hearing. R.R.O. 1990, Reg. 194, r. 39.03 (1).

(2) A witness examined under subrule (1) may be cross-examined by the examining party and any other party and may then be re-examined by the examining party on matters raised by other parties, and the re-examination may take the form of cross-examination. R.R.O. 1990, Reg. 194, r. 39.03 (2).

(2.1) Subrules (1) and (2) do not apply to an application made under subsection 140 (3) of the *Courts of Justice Act*. O. Reg. 43/14, s. 12.

To be Exercised with Reasonable Diligence
(3) The right to examine shall be exercised with reasonable diligence, and the court may refuse an adjournment of a motion or application for the purpose of an examination where the party seeking the adjournment has failed to act with reasonable diligence. R.R.O. 1990, Reg. 194, r. 39.03 (3).

At the Hearing
(4) With leave of the presiding judge or officer, a person may be examined at the hearing of a motion or application in the same manner as at a trial. R.R.O. 1990, Reg. 194, r. 39.03 (4).

Summons to Witness
(5) The attendance of a person to be examined under subrule (4) may be compelled in the same manner as provided in Rule 53 for a witness at a trial. R.R.O. 1990, Reg. 194, r. 39.03 (5).

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF BALBOA INC., DSPLN INC., HAPPY GILMORE INC., INTERLUDE INC., MULTIVILLE INC., THE PINK FLAMINGO INC., HOMETOWN HOUSING INC., THE MULLIGAN INC., HORSES IN THE BACK INC., NEAT NESTS INC. AND JOINT CAPTAIN REAL ESTATE INC

Court File No.: CV-24-00713245-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
Proceeding commenced at Toronto

FACTUM OF THE APPLICANTS
(Returnable June 24, 2024)

BENNETT JONES LLP
3400 One First Canadian Place
P.O. Box 130
Toronto, Ontario M5X 1A4

Sean Zweig (LSO# 57307I)
Tel: (416) 777-6254
Email: zweigs@bennettjones.com

Joseph Blinick (LSO# 64325B)
Tel: (416) 777-4828
Email: blinickj@bennettjones.com

Joshua Foster (LSO# 79447K)
Tel: (416) 777-7906
Email:fosterj@bennettjones.com

Thomas Gray (LSO# 82473H)
Tel: (416) 777-7924
Email: grayt@bennettjones.com

Lawyers for the Applicants