

**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. (collectively the "Applicants", and each an "Applicant")**

**FACTUM OF THE MONITOR
(MOTION RETURNABLE DECEMBER 6, 2024)**

December 4, 2024

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PART I - NATURE OF THIS MOTION

1. This factum is filed in support of a motion by KSV Restructuring Inc., in its capacity as court-appointed monitor (in such capacity, the “**Monitor**”) of the Applicants, pursuant to the Initial Order of the Ontario Superior Court of Justice (Commercial List) (the “**Court**”) dated January 23, 2024, as subsequently amended and restated by Orders dated February 15, 2024 and March 28, 2024 (as amended and restated, the “**SARIO**”) and pursuant to the Order (Expansion of Monitor’s Powers) of the Court dated June 25, 2024 (the “**Expanded Powers Order**”), for:

- (a) an order (the “**Credit Bid Vesting Order**”), among other things:
 - i. abridging the manner and time for, and validating service of, this Notice of Motion and supporting materials such that the motion is properly returnable on December 6, 2024 and dispensing with further service thereof;
 - ii. approving the Credit Bid APAs and authorizing and directing the Monitor, on behalf of the Applicants in accordance with the Expanded Powers Order, to execute the Credit Bid APAs;
 - iii. vesting in the applicable person(s) or entity(ies) listed on Schedule “A” to the Credit Bid Vesting Order (each, a “**Purchaser**”), 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 (collectively, the “**Purchased Properties**” and each a “**Purchased Property**”); and

- iv. assigning to the applicable Purchaser, the applicable landlord's rights and obligations in and to the applicable tenant leases associated with the applicable Purchased Property;
- (b) an order (the “**Approval of Replacement DIP Facility and Ancillary Matters Order**”, together with the “**Credit Bid Vesting Order**”, the “**Proposed Orders**”), among other things:
- i. abridging the manner and time for, and validating service of, this Notice of Motion and supporting materials such that the motion is properly returnable on December 6, 2024 and dispensing with further service thereof;
 - ii. extending the Stay Period (as defined in the SARIO) to and including February 28, 2025;
 - iii. approving the DIP Allocation;
 - iv. approving the Term Sheet dated November 26, 2024 (the “**Viscount DIP Term Sheet**”) and authorizing and directing the Monitor, on behalf of the Applicants in accordance with the Expanded Powers Order, *nunc pro tunc*, to enter into the Viscount DIP Term Sheet with such minor amendments as may be acceptable to the Monitor and to perform the Applicants' obligations under the Viscount DIP Term Sheet with no personal or corporate liability of the Monitor in doing so;
 - v. effective upon the Effective Time (as defined in the proposed Approval of Replacement DIP Facility and Ancillary Matters Order), authorizing and

directing the Monitor, on behalf of the Applicants in accordance with the Expanded Powers Order, to repay the Existing DIP Facility from: (i) cash on hand in the Applicants' bank accounts and/or the Monitor's trust account in respect of the Applicants; (ii) the DIP Allocation Amounts held by the Monitor; and (iii) the proceeds of the Viscount DIP Term Sheet;

- vi. effective upon the Effective Time, making certain amendments to the SARIO and the Charges (as defined in the SARIO) as set out in the Tenth Report;
- vii. assigning to the applicable Applicant, the applicable landlord's rights and obligations in and to the applicable Leases, but excluding "Assigned Leases" assigned, conveyed and transferred to a Purchaser pursuant to the Credit Bid Vesting Order;
- viii. discharging Goldman Sloan Nash & Haber LLP ("GSNH") as the Unsecured Lender Representative Counsel (as defined in the SARIO) and directing that, upon payment of any accrued fees of GSNH incurred in its capacity as the Unsecured Lender Representative Counsel up to and including the date of the Order, the Unsecured Lender Representative Counsel (as defined in the SARIO) shall no longer have the benefit of, or right to, the Administration Charge (as defined in the SARIO) pursuant to paragraph 48 of the SARIO or any other Orders made in these proceedings;
- ix. approving (i) the Seventh Report of the Monitor dated August 23, 2024 (the "**Seventh Report**") and the activities of the Monitor referred to therein, (ii)

the Eighth Report of the Monitor dated October 23, 2024 (the “**Eighth Report**”) and the activities of the Monitor referred to therein, (iii) the Ninth Report of the Monitor dated November 21, 2024 (the “**Ninth Report**”) and the activities of the Monitor referred to therein, (iv) the Tenth Report of the Monitor dated November 29, 2024 (the “**Tenth Report**”, together with the Eighth Report and the Ninth Report, the “**Reports**”) and the activities of the Monitor referred to therein, and (v) the fees and disbursements of the Monitor and its counsel, Cassels Brock & Blackwell LLP (“**Cassels**”) as set out in the Tenth Report, the Affidavit of Noah Goldstein sworn November 29, 2024 and the Affidavit of Ryan Jacobs sworn November 29, 2024.

2. Capitalized terms not defined herein have their meaning as set out in the Tenth Report.

PART II - SUMMARY OF FACTS

A. Background

3. On January 23, 2024, the Applicants obtained an initial order (the “**Initial Order**”) under the CCAA, which among other things, appointed KSV Restructuring Inc. as the Monitor in these CCAA proceedings. The Initial Order was subsequently amended and restated ultimately resulting in the SARIO.

4. On June 25, 2024, the Court granted the Expanded Powers Order, which, among other things:¹

¹ The Tenth Report of the Monitor dated December 6, 2024 at [section 1.0\(9\)](#) [[Tenth Report](#)].

- (a) authorized and empowered the Monitor to exercise any powers which may be properly exercised by a board of directors or any officers of the Applicants to cause the Applicants to take various actions or steps as set out in paragraph 3 of the Expanded Powers Order;
 - (b) provided for a process for the Monitor to transition the Applicants' property and other management service providers from the SID Companies (as defined in the Expanded Powers Order) as determined necessary by the Monitor; and
 - (c) granted various additional and ancillary relief to facilitate the foregoing.
5. On November 26, 2024, the Court granted an order extending the Stay Period to December 31, 2024.²

B. The Proposed Credit Bid Vesting Order

Credit Bid APAs

6. The form of purchase agreement documenting the credit bid transactions (the “**Credit Bid APA**”) was developed by the Secured Lender Representative Counsel, in consultation with the Monitor and its counsel, and was made available to the Secured Lenders by the Monitor in the days following Court approval of the Restructuring Term Sheet on August 30, 2024.³
7. Credit Bid APAs (with the required deposits thereunder) were submitted by 323 mortgages, including two second mortgagees.⁴

² Tenth Report at [section 1.0\(14\)](#).

³ Tenth Report at [section 4.1\(1\)](#).

⁴ Tenth Report at [section 4.0\(1\)](#).

Assignment and Assumption of Leases

8. The Credit Bid APAs require that each Purchaser assume any tenant leases on closing. Based on the information available to the Monitor from the Applicants' records, of the 323 properties subject to the Credit Bid Vesting Order, 253 are tenanted.⁵

C. The Proposed Approval of Replacement DIP Facility and Ancillary Matters Order

Extension of the Stay Period

9. The Monitor is requesting that the Stay Period be extended to February 28, 2025 to provide the time necessary for the Monitor to close the transactions contemplated under the Credit Bid Vesting Order (subject to Court approval) and proceed to consult with the applicable stakeholders to formulate and implement an orderly liquidation plan for the Remaining Portfolio.⁶

The DIP Allocation

10. Pursuant to the Restructuring Term Sheet, the approximately \$15 million owing under the Existing DIP Facility has been allocated by the Monitor on the following basis:⁷

- (c) property specific costs, such as renovations and property taxes, to the applicable Property; and
- (d) general costs, such as professional fees associated with these CCAA proceedings, over the Portfolio in proportion to the acquisition cost of each Property.

⁵ Tenth Report at [section 4.2\(1\)](#).

⁶ Tenth Report at [section 12.0\(2\)\(d\)](#).

⁷ Tenth Report at [section 5.0\(1\)](#)

Proposed Viscount DIP Facility

11. The Monitor negotiated the Viscount DIP Facility with Viscount, which provides for a maximum principal amount of \$4.85 million, the terms of which are set out in section 8.0 of the Tenth Report.⁸

12. Immediate funding is necessary to repay the Existing DIP Facility, finalize transactions under the Credit Bid APAs and support an orderly liquidation of the Remaining Portfolio. Without access to the Viscount DIP Facility, none of those critical steps can be achieved, which has the potential of resulting in an enforcement and/or forced liquidation process of the entire Portfolio, which would impair recoveries for all stakeholders.⁹

Discharge of the Unsecured Lender Representative Counsel

13. The Monitor does not believe that there is any reasonable prospect of material recovery, if any, for the Unsecured Lenders.¹⁰

14. Accordingly, particularly given the limited cash flow and funding available and the critical need to reduce the costs of these proceedings, the Monitor believes it is no longer appropriate for the Applicants to fund the fees incurred by the Unsecured Lender Representative Counsel.¹¹

15. The Monitor is therefore requesting an order discharging GSNH as the Unsecured Lender Representative Counsel.¹²

⁸ Tenth Report at [sections 8.0](#) and [8.0\(1\)\(d\)](#).

⁹ Tenth Report at [section 8.0\(1\)\(b\)](#).

¹⁰ Tenth Report at [section 9.0\(1\)](#).

¹¹ Tenth Report at [section 9.0\(2\)](#).

¹² Tenth Report at [section 9.0\(3\)](#).

Amendment to Court-Ordered Charges

16. Subject to Court approval, the Monitor is seeking to have the:¹³
- (a) Administration Charge reduced from \$1.5 million to \$500,000, of which \$250,000 is to rank in priority to and \$250,000 of which is to rank subordinate to the DIP Lender's Charge (as defined in the SARIO), respectively, to become effective upon the filing of the Monitor's Funding Certificate under the Approval of Replacement DIP Facility and Ancillary Matters Order;
 - (b) DIP Lender's Charge reduced 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, and providing that Viscount shall be the beneficiary of the DIP Lender's Charge, all to become effective upon the filing of the Monitor's Funding Certificate; and
 - (c) Unsecured Lender Representative Counsel removed from the professionals covered under the Administration Charge, subject to paying any fees owing to the Unsecured Lender Representative Counsel through the date of the proposed Order.

Approval of the Monitor's Reports, Activities, and Fees and Disbursements

17. The Monitor is seeking approval of the Reports, and the activities of the Monitor described therein, as well as the fees and disbursements of the Monitor and its counsel, Cassels.
18. In support of this motion, the Tenth Report attaches affidavits from representatives of the Monitor and Cassels and provides a comprehensive listing of accounts sought to be passed, including each account (redacted for matters of privilege) and summary tables identifying the individual professionals who have worked on this matter, their hourly billing rates and total number of hours worked, among other information.¹⁴

¹³ Tenth Report at [section 10.0\(1\)](#).

¹⁴ Tenth Report at [section 14.0\(5\)](#).

19. The fees (excluding disbursements and HST) of the Monitor and Cassels from August 1, 2024 to October 31, 2024 total \$416,453 and \$205,345, respectively.¹⁵

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

20. The issues to be determined on this Motion are whether the Credit APAs should be approved and whether the Credit Bid Vesting Order and the Approval of Replacement DIP Facility and Ancillary Matters Order should be granted to effect the related relief.

B. THE PROPOSED CREDIT BID VESTING ORDER

The Transactions contemplated by the Credit APAs should be Approved

21. Under s. 36 of the CCAA, this Court may authorize the Applicant to sell or otherwise dispose of its assets outside of the ordinary course of business free and clear of any security, charge or other restriction. A sale to preserve the business as a going-concern is consistent with the objectives of the CCAA.¹⁶

22. In deciding whether to exercise its discretion to approve a transaction, this Court must review a transaction as a whole and decide whether it is appropriate, fair, and reasonable. This determination is made in the context of the primary objectives of the CCAA, which include avoiding the devastating social and economic costs of liquidation of a debtor company's assets.¹⁷

Section 36(3) of the CCAA provides a non-exhaustive list of factors to be considered:¹⁸

¹⁵ Tenth Report at [section 14.0\(2\)](#).

¹⁶ *Consumers Packaging Inc., Re* (2001), 27 C.B.R. (4th) 197, [2001 CanLII 6708](#) at paras [5, 9](#) (CA); *Nortel Networks Corporation (Re)*, [2009 CanLII 39492](#) at para [35 – 40, 48](#) (ON SC); *PCAS Patient Care Automation Services Inc. (Re)*, [2012 ONSC 3367](#) at [para 35](#) [PCAS].

¹⁷ PCAS at [para 54](#); *Veris Gold Corp. (Re)*, [2015 BCSC 1204](#) at [para 23](#) [Veris Gold], citing *White Birch Paper Holding Co., Re*, [2010 QCCS 4915](#) at [para 49](#) [White Birch]; *Mountain Equipment Co-Operative (Re)*, [2020 BCSC 1586](#) at paras [156, 157](#).

¹⁸ *Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36*, ss. [36\(3\)](#) [CCAA]; and see *White Birch* at [para 48](#).

- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances.¹⁹ The SISP was developed by the Monitor in consultation with the Applicants, the Secured Lender Representative Counsel, the Unsecured Lender Representative Counsel and the Lion's Share Representative, each of whom supported or did not oppose its approval by the Court.²⁰ The rights of the Secured Lenders to credit bid were specifically preserved under the SISP, and 452 Secured Lenders submitted credit bid LOIs in the SISP.²¹ All of the acquisition or refinancing LOIs submitted under the SISP for all or a portion of the Portfolio would have resulted in a substantial shortfall to the Applicants' first ranking Secured Lenders, and each of Secured Lender Representative Counsel, the Unsecured Lender Representative Counsel and the Lion's Share Representative agreed that the Monitor should not pursue any such offers.²²
- (b) whether the Monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy.²³ The Tenth Report states that the Monitor believes that the proposed sales are more beneficial to creditors than a sale or disposition under a bankruptcy.²⁴

¹⁹ CCAA, s. [36\(3\)\(a\)](#).

²⁰ Tenth Report at [section 4.6\(1\)\(a\)](#).

²¹ Tenth Report at [section 4.6\(1\)\(b\)](#).

²² Tenth Report at [section 4.6\(1\)\(c\)](#).

²³ CCAA, s. [36\(3\)\(c\)](#).

²⁴ Tenth Report at [section 4.6\(1\)\(l\)](#).

- (c) the extent to which the creditors were consulted.²⁵ The terms and conditions of the Restructuring Term Sheet, including the Secured Lender credit bid rights, were the result of substantial negotiations involving the Secured Lender Representative Counsel, the Unsecured Lender Representative Counsel and the Lion's Share Representative, with the assistance and support of the Monitor and its counsel, and each of them supported its approval by the Court. In addition, the Lion's Share Representative confirmed its support of the Restructuring Term Sheet at a townhall meeting on August 28, 2024 arranged for the Monitor to present the Restructuring Term Sheet to Unsecured Lenders.²⁶
- (d) the effects of the proposed sale or disposition on the creditors and other interested parties.²⁷ The Secured Lenders have not been paid interest on their mortgage debt for 12 to 18 months (or longer) and have incurred further costs and taken steps (including funding their Deposits) to prepare to complete the transactions contemplated by the Credit Bid APAs, presumably including securing the necessary funds to pay the Priority Payables in connection with their transactions, should the Court approve them.²⁸

²⁵ CCAA, s. [36\(3\)\(d\)](#).

²⁶ Tenth Report at [section 4.6\(1\)\(d\)](#).

²⁷ CCAA, s. [36\(3\)\(e\)](#).

²⁸ Tenth Report at [section 4.6\(1\)\(h\)](#).

- (e) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.²⁹ The Monitor believes that the consideration to be received under the Credit Bid APAs is fair and reasonable in the circumstances.³⁰

23. The s. 36(3) factors are not intended to be exhaustive and the principles established in *Royal Bank v. Soundair Corp.* for approval of a sale in an insolvency proceeding remain relevant.³¹

Applying these principles, courts examine: (i) whether the party conducting the sale made sufficient efforts to obtain the best price and did not act improvidently; (ii) the interests of all parties; (iii) the efficacy and integrity of the process by which offers were obtained; and (iv) whether there has been unfairness in the working out of the process.³²

24. The Monitor served a short-form notice to each secured creditor or other party whose interest in the Properties is proposed to be discharged by the Credit Bid Vesting Order advising of the relief being sought and directing the party to the Case Website to review a copy of the Motion Record, which the Monitor intends to deliver by email and, where email address is not available, by courier to any known address of such lender.³³

25. Although it was, and remains, impractical to list all 323 Properties for sale individually, the Monitor believes the terms of the Restructuring Term Sheet providing the right for Secured Lenders to credit bid and the mechanism to determine any Equity Properties are fair and reasonable. Accordingly, the Monitor respectfully submits, the transactions contemplated by the

²⁹ CCAA, s. [36\(3\)\(f\)](#).

³⁰ Tenth Report at [section 4.6\(1\)\(l\)](#).

³¹ *Veris Gold* at [paras 22 – 25](#); *Arrangement relative à Black Rock Metals Inc.*, [2022 QCCS 2828](#) at [para 95](#), citing *Harte Gold (Re)*, [2022 ONSC 653](#); see also *CCAA Plan of Arrangement – Clearbeach and Forbes (Re)*, [2021 ONSC 5564](#) at para [24, 25](#).

³² *Royal Bank of Canada v. Soundair Corp.*, [1991 CanLII 2727](#) (ON CA) at [para 16](#).

³³ Affidavit of Service of Nathalie El-Zakhem sworn December 3, 2024; Affidavits of Service of Stephanie Fernandes sworn November 29, 2024 and December 2, 2024.

Credit Bid APAs viewed as a whole, are appropriate, fair, and reasonable in the circumstances and should be approved by this Court.

26. The Monitor is also not aware of any of the Purchasers being “related” to the Applicants.³⁴

Assignment of Leases and Tenant Leases should be Approved

27. The Monitor is seeking 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.³⁵

28. Section 11.3 of the CCAA provides that this Court may grant an order assigning the rights and obligations of the Applicant to “any person who is specified by the court and agrees to the assignment”, with certain limited exceptions.³⁶ In deciding whether to exercise its discretion under s. 11.3, this Court must consider, among other things, three statutory factors:³⁷

- (a) whether the Monitor approved the proposed assignment;
- (b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations. Where the assignee is a sophisticated financial entity, courts have found comfort in the viability and likely success of the proposed assignment; and
- (c) whether it would be appropriate to assign the rights and obligations to that person.³⁸ Appropriateness under the CCAA is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA, which are “avoiding the social and economic losses resulting from liquidation of an insolvent company”. Thus, where an assignment is necessary for the business to continue as a going-concern, Courts have found the assignment to be appropriate.

³⁴ Tenth Report at [section 4.6\(1\)\(m\)](#).

³⁵ Tenth Report at [section 4.2\(4\)](#).

³⁶ CCAA, s. [11.3](#).

³⁷ CCAA, s. [11.3](#)

³⁸ CCAA, s. [11.3\(3\)](#).

29. Finally, this Court may not make an order under s. 11.3 of the CCAA unless it is satisfied that all monetary defaults in relation to the assigned contracts, with certain exceptions, will be remedied on or before the day fixed by this Court.³⁹

30. The Monitor served a short-form notice to the known tenants under Leases for the Remaining Portfolio advising of the proposed assignment pursuant to the Credit Bid Vesting Order, or proposed to be assigned to the applicable Applicant.⁴⁰ As of the date of this Factum, no objections to the proposed assignments have been received.

31. While the Monitor believes it is important to provide both purchasers and tenants with certainty as to the state of the leases, it would be impractical to obtain executed consents or acknowledgments from hundreds of tenants under the leases and that doing so will create a risk to completing the simultaneous closing of all credit bid transactions on an expedited timeframe as contemplated by the Credit Bid APAs.⁴¹

32. The Monitor believes it is appropriate, and in the best interests of the affected tenants, for the Leases to be assigned to the applicable Purchaser, and 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 and assumed. Given the nature of the Leases, the Monitor is also not aware of any potential monetary obligations in favour of the tenants that would be outstanding.⁴² Although this is a unique situation, the Monitor believes that the proposed assignment of the Leases is warranted

³⁹ CCAA, s. [11.3\(4\)](#).

⁴⁰ Affidavit of Service of Nathalie El-Zakhem sworn December 3, 2024.

⁴¹ Tenth Report at [section 4.2\(2\)](#).

⁴² Tenth Report at [section 4.2\(5\)](#).

under and the Credit Bid Vesting Order expressly provides that such assignment is subject to, among other things, the payment of any amounts required to be paid under s. 11.3 of the CCAA.⁴³

C. THE PROPOSED APPROVAL OF REPLACEMENT DIP FACILITY AND ANCILLARY MATTERS ORDER

The Stay Period should be Extended

33. Section 11.02(2) of the CCAA empowers courts to grant a stay extension, for any period that the court considers necessary, where a court is satisfied that (a) circumstances exist which make such an order appropriate; and (b) the applicants have acted and are continuing to act in good faith and with due diligence.⁴⁴

34. As endorsed by the Court in this proceeding and other CCAA proceedings, in the context of a “super monitor”, the monitor is held to the good faith standard.⁴⁵

35. Extending the Stay Period is necessary and appropriate in the circumstances, and the following factors support the extension of the Stay Period to February 28, 2025:⁴⁶

- (a) the Monitor is discharging its duties and obligations under the CCAA, the Expanded Powers Order and other orders made in these CCAA proceedings in good faith and with due diligence;
- (b) it will provide additional time necessary for the Monitor to close the transactions contemplated under the Credit Bid Vesting Order (subject to Court approval) and proceed to consult with the applicable stakeholders to formulate and implement an orderly liquidation plan for the Remaining Portfolio;

⁴³ Tenth Report at [section 4.2\(7\)](#).

⁴⁴ CCAA, s. [11.02\(2\)-\(3\)](#).

⁴⁵ *Forme Development Group Inc. (Re)*, Court File No.: CV-18-608313-00CL ([Endorsement of Mr. Justice Hainey](#)) February 20, 2020; *In the Matter of a Compromise or Arrangement of Balboa Inc. et. al*, Court File No.: CV-24-00713245-00CL ([Endorsement of Madame Justice Steele](#)) July 31, 2024.

⁴⁶ Tenth Report at [section 12.0\(2\)](#).

- (c) the Monitor believes that no creditor will be prejudiced as a result of the extension of the Stay Period; and
- (d) the Cash Flow Forecast projects that there will be sufficient funding available to fund operations and the costs of these proceedings during the extension period.

The DIP Allocation and Repayment of the Existing DIP should be Approved

36. Section 11 of the CCAA empowers courts to make any order that it considers appropriate in the circumstances.⁴⁷ As the Supreme Court of Canada has recognized, the power granted to courts by section 11 of the CCAA is “vast” and, considering the importance of judicial discretion in the CCAA, a supervising judge must be satisfied that the order is appropriate, advances the remedial objectives of the CCAA, and that the applicant has acted in good faith and with due diligence.⁴⁸

37. In *Royal Bank of Canada v Atlas Block Co. Limited*⁴⁹, this Court established the following principles to be considered in allocating costs (in that case in a receivership proceeding):⁵⁰

- (a) the allocation of costs must be done on a case-by-case basis and involves an exercise of discretion by a receiver or trustee;
- (b) costs should be allocated in a fair and equitable manner, one which does not readjust the priorities between creditors, and one which does not ignore the benefit or detriment to any creditor;
- (c) a strict accounting to allocate such costs is neither necessary nor desirable in all cases. To require a receiver to calculate and determine an absolutely fair value for its services for one group of assets vis-à-vis another likely would not be cost-effective and would drive up the overall cost of the receivership;

⁴⁷ CCAA, s. [11](#).

⁴⁸ *Canada v. Canada North Group Inc.*, [2021 SCC 30](#) at [para 21](#).

⁴⁹ *Royal Bank of Canada v. Atlas Block Co. Limited*, [2014 ONSC 153](#) [*Atlas Block*].

⁵⁰ *Atlas Block* at [para 43](#).

- (d) a creditor need not benefit “directly” before the costs of an insolvency proceeding can be allocated against that creditor’s recovery;
- (e) an allocation does not require a strict cost/benefit analysis or that the costs be borne equally or on a *pro rata* basis; and
- (f) where an allocation appears *prima facie* as fair, the onus falls on an opposing creditor to satisfy the court that the proposed allocation is unfair or prejudicial.

38. The Monitor recommends the Court approve the proposed DIP Allocation for the following reasons:⁵¹

- (a) the proposed allocation methodology follows a customary and equitable manner in which DIP funding is typically allocated in similar circumstances by allocating general costs across all properties and property specific costs to the applicable property;
- (b) using acquisition cost as the basis to allocate general costs across the entire Portfolio is reasonable in the circumstances and, in the Monitor’s view, is more appropriate than allocating those costs based on mortgage debt as the Applicants did not incur or repay mortgage debt in any systematic manner;
- (c) the DIP Allocation was first communicated to stakeholders in August, allowing mortgagees sufficient time to review their allocations before the credit bid submission deadlines of September 20 and 30, 2024 for first and second mortgagees, respectively. The number of credit bids submitted (with Deposits) demonstrates the mortgagees’ choice to proceed, including funding their respective DIP Allocation amounts; and
- (d) the Monitor is not aware of any outstanding information requests in respect of the DIP Allocation or any objections thereto.

39. For the foregoing reasons, the proposed DIP Allocation meets the principles set forth in *Royal Bank of Canada v Atlas Block Co. Limited*.

⁵¹ Tenth Report at [section 5.0\(5\)](#).

The Viscount DIP Term Sheet should be Approved.

40. This Court's authority to approve interim financing and a related charge in an amount it considers appropriate is derived from section 11.2 of the CCAA.⁵² To determine whether to approve interim financing and an interim financing charge, the following non-exhaustive factors under section 11.2(4) should be considered:⁵³

- (a) the period during which the company is expected to be subject to proceedings under the CCAA;
- (b) how the company's business and financial affairs are to be managed during the proceedings;
- (c) whether the company's management has the confidence of its major creditors;
- (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
- (e) the nature and value of the company's property;
- (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
- (g) the monitor's report referred to in paragraph 23(1)(b), if any.

41. In light of these factors, the Monitor submits that the Court should approve the Viscount DIP Facility and the corresponding DIP Lender's Charge, for the reasons set out below:⁵⁴

- (a) the the Monitor believes the terms and conditions of the Viscount DIP Facility are commercially reasonable, particularly after considering the risk profile given the reduced size of the collateral pool relative to the Portfolio (i.e. 407 vs 84 Properties);

⁵² CCAA, s. [11.2](#).

⁵³ CCAA, s. [11.2\(4\)](#).

⁵⁴ Tenth Report at [section 8.1\(1\)](#).

- (b) immediate funding is necessary to repay the Existing DIP Facility, finalize transactions under the Credit Bid APAs and support an orderly liquidation of the Remaining Portfolio, and without access to the Viscount DIP Facility, none of those critical steps can be achieved, which has the potential of resulting in an enforcement and/or forced liquidation process of the entire Portfolio, which would impair recoveries for all stakeholders;
- (c) the Monitor believes that approval of the Viscount DIP Facility is in the best interests of the Applicants' stakeholders;
- (d) the cost of the proposed Viscount DIP Facility is consistent with market for similar facilities of this size approved by the Court and other Canadian courts in CCAA and other restructuring proceedings;
- (e) as further described in the Tenth Report, the Monitor obtained two other proposals to provide DIP financing, including from the Existing DIP Lender, both of which contained financial and non-financial terms that were inferior to the Viscount DIP Term Sheet; and
- (f) the Monitor approached other possible DIP lenders who advised that they were not interested in financing the Remaining Portfolio.

The Reports and Activities, and Fees and Disbursements of the Monitor and Cassels should be Approved

42. As has been noted by this Court, requests to approve a monitor's report are not unusual, and there are good policy and practical reasons for the court to do so, including:⁵⁵

- (a) allowing the Monitor to move forward with the next steps in these CCAA proceedings;
- (b) allowing the Monitor to bring its activities before the court;
- (c) allows an opportunity for the concerns of the stakeholders to be addressed, and any problems to be rectified;
- (d) enabling the court to satisfy itself that a monitor's activities have been conducted in prudent and diligent manners;

⁵⁵ *Target Canada Co. (Re)*, [2015 ONSC 7574](#) at [para 23](#).

- (e) providing protection for a monitor not otherwise provided by the CCAA; and
- (f) protecting creditors from delay that may be caused by re-litigation of steps and potential indemnity claims by the Monitor.

43. This Court has approved prior Monitor's reports in these CCAA proceedings.⁵⁶ The Reports and the actions, conduct and activities of the Monitor described therein should be approved, as the Monitor has acted reasonably and in good faith throughout these CCAA proceedings.⁵⁷

44. The Approval of Replacement DIP Facility and Ancillary Matters Order also seeks to approve the fees and disbursements incurred between August 1, 2024 to October 31, 2024 of the Monitor and its counsel, Cassels.

45. In considering whether to approve fees and disbursements, the court has regard to the "overriding principle of reasonableness," and does not engage in a docket-by-docket or line-by-line assessment of the accounts.⁵⁸ The following factors assist a court in assessing the reasonableness of the Monitor's fees:⁵⁹

- (a) the nature, extent and value of the assets being handled;
- (b) the complications and difficulties encountered;
- (c) the degree of assistance provided by the company, its officers or its employees;
- (d) the time spent;
- (e) the Monitor's knowledge, experience and skill;

⁵⁶ See [SISP Approval Order dated April 12, 2024](#), the [Order dated June 24, 2024](#), [Ancillary Order dated June 25, 2024](#), [Order Dated July 31, 2024](#) and the [Restructuring Term Sheet and DIP Amendment Order dated August 30, 2024](#).

⁵⁷ Tenth Report at section 12.0(2)(a).

⁵⁸ *Nortel Networks Inc.*, [2022 ONSC 668](#) at [para 10](#) [*Nortel 2022*].

⁵⁹ *Bank of Nova Scotia v. Diemer*, [2014 ONCA 851](#) at [para 33](#); *Nortel 2022* at [para 11](#).

- (f) the diligence and thoroughness displayed;
- (g) the responsibilities assumed;
- (h) the results achieved; and
- (i) the cost of comparable services when performed in a prudent and economical manner.

46. Additionally, courts will often consider whether fees and disbursements are “fair and reasonable in all circumstances. The concerns are ensuring that the monitor is fairly compensated while safeguarding the efficiency and integrity of the CCAA process.”⁶⁰

47. The fee affidavits attached as Appendices “U” and “V” to the Tenth Report, provide detailed information on the fees and disbursements of the Monitor and of Cassels, from August 1, 2024 to October 31, 2024.⁶¹

48. The Monitor and Cassels have been required to undertake an extensive amount of work in this CCAA proceeding to-date, which has included enhanced cash flow and operational oversight mandated by the Second ARIO, taking control over the Applicants in accordance with the Expanded Powers Order, coordinating the transition of the property management function from the SID Companies to Richmond and dealing with all aspects of the Credit Bid APAs in order to prepare for the closing of those transactions, subject to Court approval. For these reasons, the Monitor submits that the fees of the Monitor and its counsel are reasonable and appropriate in the circumstances and should be approved.⁶²

⁶⁰ *Re Nortel Networks Corporation et al.*, [2017 ONSC 673](#) at [para 13](#).

⁶¹ [Appendix “U”](#) and [Appendix “V”](#) of the Tenth Report.

⁶² Tenth Report at [section 14.0\(7\)](#).

PART IV - ORDER REQUESTED

49. For the reasons set out above, the Monitor respectfully requests that this Court grant the Proposed Orders.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of December, 2024.

Cassels Brock & Blackwell LLP

Cassels Brock & Blackwell LLP
Lawyers for the Monitor, KSV
Restructuring Inc.

SCHEDULE “A”

LIST OF AUTHORITIES

1. [Ancillary Order dated June 25, 2024](#)
2. *Arrangement relative à Black Rock Metals Inc.*, [2022 QCCS 2828](#)
3. *Bank of Nova Scotia v. Diemer*, [2014 ONCA 851](#)
4. *Canada v. Canada North Group Inc.*, [2021 SCC 30](#)
5. *CCAA Plan of Arrangement – Clearbeach and Forbes (Re)*, [2021 ONSC 5564](#)
6. *Consumers Packaging Inc., Re* (2001), 27 C.B.R. (4th) 197, [2001 CanLII 6708](#)
7. *Forme Development Group Inc. (Re)*, Court File No.: CV-18-608313-00CL ([Endorsement of Mr. Justice Hainey](#)) February 20, 2020
8. *Harte Gold (Re)*, [2022 ONSC 653](#)
9. *In the Matter of a Compromise or Arrangement of Balboa Inc. et. al*, Court File No.: CV-24-00713245-00CL ([SISP Approval Order](#)) April 12, 2024
10. *In the Matter of a Compromise or Arrangement of Balboa Inc. et. al*, Court File No.: CV-24-00713245-00CL ([Ancillary Order](#)) June 25, 2024
11. *In the Matter of a Compromise or Arrangement of Balboa Inc. et. al*, Court File No.: CV-24-00713245-00CL ([Endorsement of Madame Justice Steele](#)) July 31, 2024
12. *In the Matter of a Compromise or Arrangement of Balboa Inc. et. al*, Court File No.: CV-24-00713245-00CL ([Restructuring Term Sheet and DIP Amendment](#)) August 30, 2024

13. *In the Matter of a Compromise or Arrangement of Balboa Inc. et. al*, Court File No.: CV-24-00713245-00CL ([Order](#)) July 31, 2024
14. *In the Matter of a Compromise or Arrangement of Balboa Inc. et. al*, Court File No.: CV-24-00713245-00CL ([Order](#)) June 24, 2024
15. *Mountain Equipment Co-Operative (Re)*, [2020 BCSC 1586](#)
16. *Nortel Networks Corporation (Re)*, [2009 CanLII 39492](#) (ON SC)
17. *Nortel Networks Inc.*, [2022 ONSC 668](#)
18. *PCAS Patient Care Automation Services Inc. (Re)*, [2012 ONSC 3367](#)
19. *Re Nortel Networks Corporation et al*, [2017 ONSC 673](#)
20. [Restructuring Term Sheet and DIP Amendment Order dated August 30, 2024](#)
21. *Royal Bank of Canada v. Atlas Block Co. Limited*, [2014 ONSC 153](#)
22. *Royal Bank of Canada v. Soundair Corp.*, [1991 CanLII 2727](#) (ON CA)
23. [SISP Approval Order dated April 12, 2024](#)
24. *Target Canada Co. (Re)*, [2015 ONSC 7574](#)
25. *Veris Gold Corp. (Re)*, [2015 BCSC 1204](#)
26. *White Birch Paper Holding Co., Re*, [2010 QCCS 4915](#)

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY - LAWS

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

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.

...

Stays, etc. — other than initial application

11.02 (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.

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.

Interim financing

11.2 (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, a court may make an order declaring that all or

part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

Priority — secured creditors

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

Priority — other orders

(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

Factors to be considered

- (4) In deciding whether to make an order, the court is to consider, among other things,
- (a) the period during which the company is expected to be subject to proceedings under this Act;
 - (b) how the company's business and financial affairs are to be managed during the proceedings;
 - (c) whether the company's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the monitor's report referred to in paragraph 23(1)(b), if any.

Additional factor — initial application

(5) When an application is made under subsection (1) at the same time as an initial application referred to in subsection 11.02(1) or during the period referred to in an order made under that subsection, no order shall be made under subsection (1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

Assignment of agreements

11.3 (1) On application by a debtor company and on notice to every party to an agreement and the monitor, the court may make an order assigning the rights and obligations of the company under the agreement to any person who is specified by the court and agrees to the assignment.

Exceptions

(2) Subsection (1) does not apply in respect of rights and obligations that are not assignable by reason of their nature or that arise under

- (a) an agreement entered into on or after the day on which proceedings commence under this Act;
- (b) an eligible financial contract; or
- (c) a collective agreement.

Factors to be considered

(3) In deciding whether to make the order, the court is to consider, among other things,

- (a) whether the monitor approved the proposed assignment;
- (b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and
- (c) whether it would be appropriate to assign the rights and obligations to that person.

Restriction

(4) The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement — other than those arising by reason only of the company's insolvency, the commencement of proceedings under this Act or the company's failure to perform a non-monetary obligation — will be remedied on or before the day fixed by the court.

Copy of order

(5) The applicant is to send a copy of the order to every party to the agreement.

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.

Factors to be considered

36 (3) In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

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

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

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.

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
PROCEEDING COMMENCED AT
TORONTO

FACTUM OF THE MONITOR
(RETURNABLE ON DECEMBER 6, 2024)

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