

**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 FEBRUARY 27, 2025)**

February 25, 2025

**CASSELS BROCK & BLACKWELL LLP**  
Suite 3200, Bay Adelaide Centre - North Tower  
40 Temperance Street  
Toronto, ON M5H 0B4

**Ryan Jacobs LSO#: 59510J**  
Tel: 416.860.6465  
rjacobs@cassels.com

**Shayne Kukulowicz LSO#: 30729S**  
Tel: 416.860.6463  
skukulowicz@cassels.com

**Joseph J. Bellissimo LSO#: #46555R**  
Tel: 416.860.6572  
jbellissimo@cassels.com

*Lawyers for the Monitor, KSV Restructuring Inc.*

## **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 further amended from time to time, including by Order dated December 6, 2024, the “**SARIO**”) and pursuant to the Order (Expansion of Monitor’s Powers) of the Court dated June 25, 2024 (the “**Expanded Powers Order**”), seeking two orders from the Court.

2. The first is a further credit bid vesting order which will allow for the closing of credit bid transactions on five properties that were already approved by this Court in December 2024 but which could not close for the reasons described below.

3. The second is an order which, among other things, approves a secondary credit bid process whereby mortgagees will have a further and final opportunity to submit credit bids in respect of properties and approves an orderly sale process for the properties that remain after completion of any credit bids that may be submitted, accepted by the Monitor and approved by the Court under the secondary credit bid process.

4. More specifically, the Monitor seeks the following:

- (a) an order substantially in the form attached at Tab 3 of the Motion Record (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 February 27, 2025 and dispensing with further service thereof;
- (ii) approving the credit bid transactions (collectively, the "**Transactions**" and each a "**Transaction**") contemplated by agreements of purchase and sale (collectively, the "**Sale Agreements**" and each a "**Sale Agreement**") between, in each case, an Applicant, as seller, and a Purchaser (as defined in the Credit Bid Vesting Order), as buyer, dated as of various dates and in each case substantially in the form of Sale Agreement appended to the Tenth Report of the Monitor dated November 29, 2024 (the "**Tenth Report**");
- (iii) vesting in the applicable person(s) or entity(ies) listed on Schedule "A" of the Credit Bid Vesting Order (each, a "**Purchaser**"), the applicable Applicant's right, title and interest in and to the applicable lands and premises legally described in Schedule "A" of 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 in respect of the applicable Purchased Property (collectively, the "**Assigned Leases**" and each an "**Assigned Lease**"); and

- (b) an order substantially in the form attached at Tab 4 of the Motion Record (the “**Credit Bid/Liquidation Process Order**”, and 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 February 27, 2025 and dispensing with further service thereof;
  - (ii) approving and authorizing the Secondary Credit Bid Process (as defined and described below) providing mortgagees of the Applicants’ Remaining Properties with a final option to submit credit bids in respect of such Remaining Properties;
  - (iii) approving and authorizing the Orderly Liquidation Plan (as defined and described below), including approving listing agreements to list for sale any Remaining Properties that are not subject to credit bids under the Secondary Credit Bid Process;
  - (iv) extending the Stay Period (as defined in the SARIO) to and including May 31, 2025; and
  - (v) approving (i) the Eleventh Report of the Monitor dated February 20, 2025 (the “**Eleventh Report**”) and the activities of the Monitor referred to therein and (ii) the fees and disbursements of the Monitor and its counsel, Cassels Brock & Blackwell LLP (“**Cassels**”) in each case, from November 1, 2024 to and including January 31, 2025, as set out in the Eleventh Report, the

Affidavit of Noah Goldstein sworn February 20, 2025 (the “**Goldstein Affidavit**”) and the Affidavit of Ryan Jacobs sworn February 18, 2025 (the “**Jacobs Affidavit**”).

5. Capitalized terms not defined herein have their meaning as set out in the Eleventh Report.

## **PART II - SUMMARY OF FACTS**

### **A. Background**

6. 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 and thereafter further amended ultimately resulting in the SARIO.<sup>1</sup>

7. On June 25, 2024, the Court granted the Expanded Powers Order, which, among other things:<sup>2</sup>

- (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;

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<sup>1</sup> The Eleventh Report of the Monitor dated February 20, 2025 at section 1.0(9) [Eleventh Report].

<sup>2</sup> Eleventh Report at section 1.0(9).

- (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.<sup>3</sup>

8. On August 30, 2024, the Court granted an Order, which, among other things, approved the restructuring term sheet (the “**Restructuring Term Sheet**”), and authorized and directed the Monitor to carry out its obligations under the Restructuring Term Sheet, including, without limitation, facilitating the negotiation and settlement of the transactions contemplated therein and finalizing all documentation reasonably necessary to carry out such transactions, but provided that nothing in such order approved any specific transaction or agreement contemplated by the Restructuring Term Sheet, all of which remained subject to further approval by the Court.<sup>4</sup>

9. On December 6, 2024, the Court granted an order, which, among other things (the “**Omnibus Credit Bid Vesting Order**”):

- (a) extended the Stay Period to February 28, 2025;
- (b) approved the Credit Bid APAs submitted in accordance with the Restructuring Term Sheet and authorized the Monitor to execute each of the Credit Bid APAs on behalf of each applicable Applicant in its capacity as “super” monitor of the Applicants pursuant to the Expanded Powers Order;

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<sup>3</sup> Eleventh Report at section 1.0(9).

<sup>4</sup> Eleventh Report at section 1.0(11).

- (c) approved credit bid transactions in respect of 323 of the Applicants' properties, including assigning tenant leases for the properties subject to the Omnibus Credit Bid Vesting Order to the respective purchasers, and separate from the Omnibus Credit Bid Vesting Order, assigned all tenant leases applicable to the Remaining Portfolio from the SID Companies to the applicable Applicant;
- (d) approved the DIP Allocation;
- (e) approved a replacement DIP Term Sheet with Viscount Capital Inc. ("**Viscount**") (the "**Viscount DIP Term Sheet**") and authorized the Monitor to execute the Viscount DIP Term Sheet on behalf of the Applicants in its capacity as "super" monitor of the Applicants pursuant to the Expanded Powers Order;
- (f) authorized the Monitor, on behalf of the Applicants in its capacity as "super" monitor of the Applicants pursuant to the Expanded Powers Order, to repay the Harbour 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 Allocations paid on closing of each Credit Bid APA; and (iii) the proceeds of the Viscount DIP Term Sheet;
- (g) approved the amendments to the Court-ordered charges in these proceedings, being a decrease in the Administration Charge from \$1.5 million to \$500,000, and a decrease to the DIP Lender's Charge from \$15 million (plus interest and costs) to \$4.85 million (plus interest, fees and costs); and

- (h) approved the fees and disbursements of the Monitor and its counsel through October 31, 2024.<sup>5</sup>

***SISP and Restructuring Term Sheet***

10. On April 12, 2024, the Court granted an order (the “**SISP Approval Order**”) that, among other things, approved the SISP.<sup>6</sup>

11. The SISP generated 12 letters of intent (“**LOIs**”) that contemplated third-party sales or refinancing transactions, none of which were sufficient to pay in full the Applicants’ DIP and first mortgage obligations. In accordance with the SISP, copies of the LOIs were provided to the applicable “Reviewing Parties” under the SISP. After extensive consultation with the Secured Lender Representative Counsel, the Unsecured Lender Representative Counsel and the Lion’s Share Representative and its counsel, the Monitor determined not to pursue any of the LOIs submitted in the SISP.<sup>7</sup>

12. Following the conclusion of the SISP, the Monitor worked with the Secured Lender Representative Counsel, the Unsecured Lender Representative Counsel, the Lion’s Share Representative and its counsel to negotiate the Restructuring Term Sheet. The principal purposes of the Restructuring Term Sheet were to: (a) provide for a process for mortgagees to submit credit bids; and (b) for properties not subject to credit bids, outline a framework for (i) a process to

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<sup>5</sup> Eleventh Report at section 1.0(15).

<sup>6</sup> Eleventh Report at section 1.0(8).

<sup>7</sup> Eleventh Report at section 3.0(2).



complete the sale and/or liquidation of the Portfolio; and (ii) a distribution mechanism for Secured and Unsecured Lenders in accordance with their respective priorities and entitlements.<sup>8</sup>

13. The Restructuring Term Sheet was approved by the Court on August 30, 2024, provided that such order did not constitute approval of any specific transaction or agreement contemplated by the Restructuring Term Sheet, all of which remained subject to further order of the Court.<sup>9</sup>

**B. Prior Credit Bid Transactions and Proposed Credit Bid Vesting Order**

14. The Restructuring Term Sheet established deadlines of September 20, 2024 for first mortgagees, and September 30, 2024 for second mortgagees, to submit credit bids for their respective Properties. In total, the Monitor received 323 credit bids representing approximately 79% of the Properties. Each credit bid was accompanied by the required deposit. All but two of the credit bids were made by first mortgagees and the remaining two were made by the second mortgagees on the applicable Properties.<sup>10</sup>

15. 316 credit bid transactions closed on or around December 17, 2024. On that date, the amount owing to Harbour (approximately \$15 million) then secured by the DIP Lender's Charge was repaid in full from the cash consideration of the credit bids and the replacement DIP funding advanced by Viscount under the Viscount DIP Term Sheet.<sup>11</sup>

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<sup>8</sup> Eleventh Report at section 3.0(5).

<sup>9</sup> Eleventh Report at section 3.0(6).

<sup>10</sup> Eleventh Report at section 3.1(1).

<sup>11</sup> Eleventh Report at section 3.1(4).

16. Two of the credit bid transactions did not close as the mortgagees failed to pay their respective DIP Allocation. In accordance with the Credit Bid APAs, the deposits paid by those two credit bidders were not refunded.<sup>12</sup>

17. Five Properties that were subject to the Omnibus Credit Bid Vesting Order could not be completed for reasons set out below and in the Eleventh Report. Accordingly, the Monitor is seeking the proposed additional Credit Bid Vesting Order to permit credit bid transactions for those five Properties to close.<sup>13</sup>

### **C. The Proposed Credit Bid/ Liquidation Process Order**

#### ***Proposed Secondary Credit Bid Process***

18. The Monitor is proposing for the Secondary Credit Bid Option mechanics to be substantially the same as those used in the initial credit bid process set out in the Restructuring Term Sheet and approved by this Court on August 30, 2024, subject to one substantive change, being that purchasers must pay on closing an additional 25% reserve/escrow on the DIP Allocation as required under the Viscount DIP Term Sheet. The 25% premium will be held in escrow by the Monitor until further order of the Court or upon agreement of the Monitor, the DIP Lender and the applicable purchaser.<sup>14</sup>

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<sup>12</sup> Eleventh Report at section 3.1(5).

<sup>13</sup> Eleventh Report at section 3.1(6) to (8).

<sup>14</sup> Eleventh Report at section 5.1(1) and (2).

19. In this regard, the forms of the purchase agreements documenting the credit bid transactions (the “**Secondary Credit Bid APAs**”) are otherwise substantially the same as the forms of Credit Bid APAs approved by this Court under the Omnibus Credit Bid Vesting Order.<sup>15</sup>

20. Consistent with the Credit Bid APA used in the initial process, first mortgagees must provide a \$10,000 non-refundable deposit to be paid on submission of a Secondary Credit Bid APA and second mortgagees must provide a non-refundable deposit of \$10,000 plus an additional amount equal to 10% of the applicable first mortgage debt on the applicable Remaining Property to be paid on submission of a Secondary Credit Bid APA. Second mortgagees are also required to pay in full on closing all amounts owing under the prior ranking mortgage on the Remaining Property (other than a mortgage securing the obligations under the Viscount DIP Term Sheet).<sup>16</sup>

21. Consistent with the Restructuring Term Sheet: (i) any credit bid purchaser shall not have a deficiency claim in connection with the liquidation of the Remaining Portfolio after completion of a transaction under its Credit Bid APA, without prejudice to any or all other rights and remedies it may have, including against any personal guarantors of its debt or any non-Applicant parties or other recovery procedures; and (ii) there will be no purchase price adjustments, including in respect of any deposits, rental arrears under leases and/or unpaid property taxes, utilities or other expenses that may be outstanding on the closing date.<sup>17</sup>

22. For Remaining Properties designated as Equity Properties, a credit bid purchaser shall be required to pay the imputed equity value in the Remaining Property, which shall be determined on

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<sup>15</sup> Eleventh Report at section 5.1(1).

<sup>16</sup> Eleventh Report at section 5.1(5)(e).

<sup>17</sup> Eleventh Report at section 5.1(8).

a further motion before the Court seeking approval of any secondary credit bid transactions submitted.<sup>18</sup>

***Proposed Orderly Liquidation Plan***

23. For the Remaining Properties that do not get acquired under the proposed Secondary Credit Bid Process, the Monitor has worked with CBRE Limited, in its capacity as an existing SISP Advisor in these proceedings, to formulate an orderly liquidation strategy.<sup>19</sup>

24. Subject to Court approval, the Monitor proposes to take the following steps to implement the Orderly Liquidation Plan:

- (a) enter into listing agreements with the Listing Agents recommended by CBRE, being five reputable local realtors in their respective markets;
- (b) work with CBRE and the Listing Agents to determine the sequencing of listing the Remaining Properties, which will consider, among other things, the markets, cash flow being generated by each property (if any) and their condition (i.e. many of the Remaining Properties are in a state of disrepair and/or boarded up);
- (c) list the Remaining Properties using MLS and other traditional marketing efforts to canvass the market and identify potential purchasers for each property. Based on the advice of CBRE and the Listing Agents, in order to prevent a flooding of the market, only four or five properties will be listed concurrently in each market; and

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<sup>18</sup> Eleventh Report at section 5.2.

<sup>19</sup> Eleventh Report at section 6.0(1).

- (d) the properties will initially be listed for sale at the suggested list prices provided by the Listing Agents as set out in the Remaining Portfolio Analysis (which is attached at Appendix “J” to the Eleventh Report), provided that the Monitor shall be entitled, on behalf of the applicable Applicant in accordance with the Expanded Powers Order, from time to time as it considers necessary or appropriate, to increase or reduce the list price for any property and/or to accept an offer to purchase any property at a price greater or less than the applicable list price for such property, provided that, unless the Monitor obtains the prior consent of the DIP Lender, the Monitor shall not accept an offer that would result in net proceeds (after deduction of reasonable sale commissions and property specific legal costs) that would be less than 125% of the DIP Allocation in respect of such property, which is a condition of property sales set out in Section 11(a) of the Viscount DIP Term Sheet.<sup>20</sup>

***Approval of the Monitor’s Reports, Activities, and Fees and Disbursements***

25. The Monitor is seeking approval of the Eleventh Report, and the activities of the Monitor described therein, as well as the fees and disbursements of the Monitor and its counsel, Cassels.

26. In support of this motion, the Eleventh Report attaches the Goldstein Affidavit and the Jacobs Affidavit, which provides a comprehensive listing of accounts sought to be passed, including each account (redacted for matters of privilege or confidentiality) 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.<sup>21</sup>

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<sup>20</sup> Eleventh Report at section 6.0(2).

<sup>21</sup> Eleventh Report at Appendix S and Appendix T.

27. The fees (excluding disbursements and HST) of the Monitor and Cassels from November 1, 2024 to January 31, 2025 total \$329,091 and \$162,160, respectively.<sup>22</sup>

### **PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES**

28. The issues to be determined on this Motion are whether this Court should approve the Credit Bid Vesting Order and the Credit Bid/ Liquidation Process Order.

#### **A. THE PROPOSED CREDIT BID VESTING ORDER**

29. The Credit APAs contemplated by the proposed Credit Bid Vesting Order are already subject to the Omnibus Credit Bid Vesting Order, which was granted by this Court on December 6, 2024.<sup>23</sup>

30. The transactions for four Properties included in the Omnibus Credit Bid Vesting Order (the “**Align Properties**”) were not completed as the credit-bidding mortgagees changed their designated transferees after the order was issued.<sup>24</sup>

31. In addition, with respect to a Property located at 106 Croatia Ave, Timmins, both the first mortgagee and second mortgagee submitted credit bids for the Property. The Omnibus Credit Bid Vesting Order approved the credit bid by the second mortgagee in accordance with the process set out in the Restructuring Term Sheet. However, the second mortgagee failed to complete the transaction notwithstanding multiple requests and deadlines provided by the Monitor and counsel

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<sup>22</sup> Eleventh Report at section 11.0(2).

<sup>23</sup> Eleventh Report at section 1.0(15).

<sup>24</sup> Eleventh Report at section 3.1(6).

to the first mortgagee. The Monitor is therefore now seeking, in the Credit Bid Vesting Order, approval of the first mortgagee which still wants to complete its credit bid.<sup>25</sup>

32. The Monitor requests and recommends that the Court grant the Credit Bid Vesting Order for the following reasons:

- (a) for the Align Properties, the proposed amendments (to change the legal name of the purchaser in which title to the applicable property is to vest) do not affect the business terms of the transactions and/or the Monitor's prior recommendation that they should be approved by the Court (as set out in the Tenth Report);<sup>26</sup>
- (b) for the 106 Croatia Ave, Timmins property, notwithstanding having been given every opportunity to close the transaction, the second mortgagee has not been able to do so. Accordingly, the Monitor believes it is appropriate for the first mortgagee, who submitted its credit bid on September 20, 2024 in accordance with the Restructuring Term Sheet, to complete its credit bid transaction at this time, and the Monitor believes that its prior recommendations (as set out in the Tenth Report) apply equally to this transaction;<sup>27</sup>
- (c) the prospective purchasers have all paid the required deposit; and
- (d) the required modifications will provide for the closing of an additional four credit bid transactions which were already approved by this Court on December 6, 2024, and a fifth property, being 106 Croatia, for which substantially the same transaction with the second mortgagee was also previously approved by the Court on December 6, 2024.<sup>28</sup>

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<sup>25</sup> Eleventh Report at section 3.1(7).

<sup>26</sup> [Tenth Report](#) at sections 4.1 and 4.6.

<sup>27</sup> [Tenth Report](#) at section 4.6.

<sup>28</sup> [Omnibus Approval and Vesting Order](#) dated December 6, 2024; [Endorsement of Justice Osborne](#) dated December 6, 2024.

33. In addition, the Monitor's submissions in support of its motion seeking the Omnibus Credit Bid Vesting Order as set out in the Monitor's Factum dated December 4, 2024 apply equally to the Monitor's request that the Credit Bid Vesting Order be granted.<sup>29</sup>

## **B. THE PROPOSED CREDIT BID/ LIQUIDATION PROCESS ORDER**

### The Secondary Credit Bid Process and Orderly Liquidation Plan should be Approved

34. Pursuant to the Expanded Powers Order, the Monitor has been empowered by this Court to, among other things, pursue alternative transactions in respect of the Property, including negotiating the terms and conditions of sale or other transactions as the Monitor, in its discretion, may deem appropriate.<sup>30</sup>

35. Additionally, section 11 of the CCAA empowers courts to make any order that it considers appropriate in the circumstances.<sup>31</sup> 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.<sup>32</sup>

36. As noted above, on August 30, 2024, the Court previously approved the Restructuring Term Sheet, including the right of mortgagees to submit credit bids in respect of the Properties.<sup>33</sup>

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<sup>29</sup> [Factum of the Monitor](#) dated December 4, 2024 at paras 21-32.

<sup>30</sup> See [Expanded Powers Order dated June 25, 2024](#) at para 3.

<sup>31</sup> [Companies' Creditors Arrangement Act](#), R.S.C. 1985, c. C-36, [s 11](#) [CCAA].

<sup>32</sup> [Canada v. Canada North Group Inc.](#), [2021 SCC 30](#) at [para 21](#).

<sup>33</sup> [Restructuring Term Sheet and DIP Amendment Order](#) dated August 30, 2024; [Endorsement of Justice Cavanagh](#) dated August 30, 2024.



37. The Monitor believes it is reasonable and appropriate to provide mortgagees with a final Secondary Credit Bid Option at this time for the following reasons:

- (a) some of the mortgagees have informed the Monitor that they decided to forego submitting a credit bid in September 2024 on the assumption that the Remaining Properties would potentially be more economically viable and whereby an experienced CEO could be appointed to manage and maximize value over an extended period of time outside of the CCAA proceedings. However, the approval and closing of 316 credit bid transactions to date has substantially impaired the economics of the portfolio of Remaining Properties. They are projected to generate limited positive cash flow (if any) and the Monitor believes that there is no realistic prospect of the portfolio emerging from these CCAA proceedings under the management and oversight of a CEO;
- (b) since the Court approved certain credit bid transactions on December 6, 2024, some mortgagees have expressed to the Monitor and Secured Lender Representative Counsel that they would like to credit bid even though they did not do so previously;
- (c) the Restructuring Term Sheet included the concept of preserving a secondary credit bid option for those mortgagees that did not exercise their credit bid option in September 2024, albeit outside of the CCAA proceeding and only after the applicable property was listed for sale and if offers were received for less than the mortgage debt on the property. In the Monitor's view, the material change to the economics and viability of the Remaining Properties justifies providing a

Secondary Credit Bid Option at this time rather than making those mortgagees wait until their property is listed for sale;

- (d) completing a Secondary Credit Bid Process prior to listing the Remaining Properties for sale should also provide more certainty and finality to the ultimate liquidation process. In the Monitor's view, marketing the properties without the need to advise the market that mortgagees have a credit bid option eliminates one potential complication to the listing and marketing process;
- (e) the Remaining Portfolio Analysis supports this alternative given that, among other things, the suggested list price for all but 16 of the 86 properties is below the mortgage and other secured debt on the applicable properties. Accordingly, other than Viscount (in its capacity as DIP Lender, the "DIP Lender"), the mortgagees for which the credit bid option is being made available are likely the only economic stakeholders in those Remaining Properties;
- (f) the Remaining Portfolio Analysis provides the Monitor with a credible basis to capture any equity for the select Remaining Properties whose list price exceeds the mortgage and other secured debt should a credit bid be submitted for those properties; and
- (g) the Monitor discussed its recommendations on the Secondary Credit Bid Process with legal counsel to the DIP Lender, the Secured Lender Representative Counsel, the Unsecured Lender Representative Counsel and the Lion's Share Representative

and its counsel. The Monitor is not aware of any opposition to its proposed Secondary Credit Bid Process.<sup>34</sup>

### The Orderly Liquidation Plan Should be Approved

38. The Monitor further recommends that any Remaining Properties that are not acquired through the Secondary Credit Bid Process (if approved by the Court) be listed for sale in accordance with the Orderly Liquidation Plan as described above and in the Eleventh Report.<sup>35</sup>

39. It is well established that a CCAA court has the jurisdiction to approve a sale process in relation to a CCAA debtor's business and assets, prior to the development (or even in the absence) of a plan of compromise and arrangement. The Court in *Nortel* identified a number of factors that should be considered in determining whether to authorize a sale process, including:<sup>36</sup>

- (a) Is a sale transaction warranted at this time?
- (b) Will the sale benefit the whole economic community?
- (c) Do any of the debtors' creditors have a *bona fide* reason to object to a sale of the business?
- (d) Is there a better viable alternative?

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<sup>34</sup> Eleventh Report at section 5.0(4).

<sup>35</sup> Eleventh Report at section 6.0(1).

<sup>36</sup> *Nortel Networks Corp. (Re)* (2009), [2009 CanLII 39492 \(ON SC\)](#) at [para 48](#).

40. Although the *Nortel* criteria were articulated prior to the 2009 amendments to the CCAA, the Court in *Brainhunter* confirmed that the same criteria apply under the post-2009 CCAA in determining whether a sale process should be approved.<sup>37</sup>

41. While not technically applicable at the sale process stage, the factors set out in subsection 36(3) of the CCAA have also been considered when deciding whether to approve a sale process:

- (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 its 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.<sup>38</sup>

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<sup>37</sup> *Brainhunter Inc. (Re)*, [2009 CanLII 72333 \(ON SC\)](#) at [paras 15-17](#).

<sup>38</sup> See for example *U.S. Steel Canada Inc. (Re)*, 2015 ONSC 2523 at para 8 (Schedule “C” herein).

42. In consideration of the above criteria and factors, the Orderly Liquidation Plan should be approved because:

- (a) it is necessary to deal with the Remaining Properties that are not acquired through the Secondary Credit Bid Process (if approved by the Court) for the benefit of the Applicants' stakeholders and to bring these CCAA proceedings to a conclusion;
- (b) the Orderly Liquidation Plan is a fair, open and transparent process that contemplates a flexible and broad public marketing process using a methodology that is commonly used in the marketing of residential real estate properties;
- (c) the Orderly Liquidation Plan will be overseen and conducted by the Monitor, with the assistance and involvement of CBRE and the Listing Agents and it was developed, including the selection of the Listing Agents, with CBRE's assistance.
- (d) the Listing Agents are reputable, experienced realtors in their respective markets and the Monitor has been provided with each of the Listing Agents' credentials and qualifications, including experience in the local markets;
- (e) the forms of Listing Agreements, including the commissions payable on each sale, are in the standard OREA form and generally consistent with agreements and commission rates typically approved by this Court in the context of insolvency proceedings involving residential real estate;
- (f) the Orderly Liquidation Plan provides the Monitor and the Listing Agents with sufficient flexibility to market the Remaining Properties in a manner to maximize the chances of securing the best possible prices for the Remaining Properties, and

the staged and tailored approach to listing the Remaining Properties is based on the advice and expertise of CBRE and the Listing Agents and is consistent with the Monitor's overall objective of maximizing value in the circumstances;

- (g) in carrying out the Orderly Liquidation Plan, the Monitor intends to consult on any material matters with the DIP Lender and the Secured Lender Representative Counsel; and
- (h) the Applicants' creditors have no *bone fide* reason to object to the Orderly Liquidation Plan and there is no better viable alternative available.<sup>39</sup>

#### The Stay Period should be Extended

43. 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.<sup>40</sup>

44. 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.<sup>41</sup>

45. Extending the Stay Period is necessary and appropriate in the circumstances, and the following factors support the extension of the Stay Period to May 31, 2025:

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<sup>39</sup> Eleventh Report at section 6(6).

<sup>40</sup> CCAA, ss. [11.02\(2\)-\(3\)](#).

<sup>41</sup> *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.

- (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;<sup>42</sup>
- (b) it will provide additional time to, if approved by the Court: (i) conduct the Secondary Credit Bid Process; (ii) return to Court for approval of Secondary Credit Bids, if any; and (iii) commence the process contemplated by the Orderly Liquidation Plan to list the Remaining Properties for sale;<sup>43</sup>
- (c) the Monitor believes that no creditor will be materially prejudiced as a result of the extension of the Stay Period;<sup>44</sup> 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.<sup>45</sup>

The Eleventh Report, the Monitor's Activities, and Fees and Disbursements of the Monitor and Cassels should be Approved

46. 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:<sup>46</sup>

- (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;

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<sup>42</sup> Eleventh Report at section 8.0(2)(a).

<sup>43</sup> Eleventh Report at section 8.0(2)(d).

<sup>44</sup> Eleventh Report at section 8.0(2)(b).

<sup>45</sup> Eleventh Report at section 8.0(2)(c).

<sup>46</sup> *Target Canada Co. (Re)*, [2015 ONSC 7574](#) at [para 23](#).

- (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;
- (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.

47. This Court has approved prior Monitor's reports in these CCAA proceedings.<sup>47</sup> 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.

48. The Credit Bid/ Liquidation Process Order also seeks to approve the fees and disbursements of the Monitor and its counsel, Cassels, incurred between November 1, 2024 to January 31, 2025.

49. 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-

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<sup>47</sup> See [SISP Approval Order dated April 12, 2024](#), the [Order dated June 24, 2024](#), the [Ancillary Order dated June 25, 2024](#), [Order Dated July 31, 2024](#), the [Restructuring Term Sheet and DIP Amendment Order dated August 30, 2024](#), and the [Approval of Replacement DIP Facility and Ancillary Matters](#) dated December 6, 2024.



line assessment of the accounts.<sup>48</sup> The following factors assist a court in assessing the reasonableness of the Monitor's fees:<sup>49</sup>

- (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;
- (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.

50. 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.”<sup>50</sup>

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<sup>48</sup> *Nortel Networks Inc.*, [2022 ONSC 6680](#) at [para 10](#) [*Nortel 2022*].

<sup>49</sup> *Bank of Nova Scotia v. Diemer*, [2014 ONCA 851](#) at [para 33](#); *Nortel 2022* at [para 11](#).

<sup>50</sup> *Re Nortel Networks Corporation et al.*, [2017 ONSC 673](#) at [para 13](#).

51. The fee affidavits attached as Appendices “S” and “T” to the Eleventh Report, provide detailed information on the fees and disbursements of the Monitor and of Cassels, in each case from November 1, 2024 to January 31, 2025.<sup>51</sup>

52. 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 SARIO, 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 316 transactions.<sup>52</sup>

#### **PART IV - ORDER REQUESTED**

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

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 25<sup>th</sup> day of February, 2025.

*Cassels Brock & Blackwell LLP*

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

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<sup>51</sup> Eleventh Report at Appendix S and Appendix T.

<sup>52</sup> Eleventh Report at section 11.0(4).

## SCHEDULE “A”

### LIST OF AUTHORITIES

1. *Bank of Nova Scotia v. Diemer*, [2014 ONCA 851](#)
2. *Brainhunter Inc. (Re)*, [2009 CanLII 72333 \(ON SC\)](#)
3. *Canada v. Canada North Group Inc.*, [2021 SCC 30](#)
4. *Forme Development Group Inc. (Re)*, Court File No.: CV-18-608313-00CL ([Endorsement of Mr. Justice Hainey](#)) February 20, 2020
5. *In the Matter of a Compromise or Arrangement of Balboa Inc. et. al*, Court File No.: CV-24-00713245-00CL ([SISP Approval Order](#)) dated April 12, 2024
6. *In the Matter of a Compromise or Arrangement of Balboa Inc. et. al*, Court File No.: CV-24-00713245-00CL ([Order](#)) dated June 24, 2024
7. *In the Matter of a Compromise or Arrangement of Balboa Inc. et. al*, Court File No.: CV-24-00713245-00CL ([Ancillary Order](#)) dated June 25, 2024
8. *In the Matter of a Compromise or Arrangement of Balboa Inc. et. al*, Court File No.: CV-24-00713245-00CL ([Expanded Powers Order](#)) dated June 25, 2024
9. *In the Matter of a Compromise or Arrangement of Balboa Inc. et. al*, Court File No.: CV-24-00713245-00CL ([Order](#)) dated July 31, 2024
10. *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

11. *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 Order](#)) dated August 30, 2024
12. *In the Matter of a Compromise or Arrangement of Balboa Inc. et. al*, Court File No.: CV-24-00713245-00CL ([Endorsement of Justice Cavanagh](#)) dated August 30, 2024
13. *In the Matter of a Compromise or Arrangement of Balboa Inc. et. al*, Court File No.: CV-24-00713245-00CL ([Omnibus Approval and Vesting Order](#)) dated December 6, 2024
14. *In the Matter of a Compromise or Arrangement of Balboa Inc. et. al*, Court File No.: CV-24-00713245-00CL ([Endorsement of Justice Osborne](#)) dated December 6, 2024
15. *In the Matter of a Compromise or Arrangement of Balboa Inc. et. al*, Court File No.: CV-24-00713245-00CL ([Approval of Replacement DIP Facility and Ancillary Matters](#)) dated December 6, 2024
16. *Nortel Networks Corp. (Re)* (2009), [2009 CanLII 39492 \(ON SC\)](#)
17. *Nortel Networks Inc.*, [2022 ONSC 6680](#)
18. *Re Nortel Networks Corporation et al*, [2017 ONSC 673](#)
19. *Target Canada Co. (Re)*, [2015 ONSC 7574](#)
20. *U.S. Steel Canada Inc, (Re)*, 2015 ONSC 2523

## 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.

**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.

**SCHEDULE “C”**

***U.S. Steel Canada Inc, (Re), 2015 ONSC 2523***

**CITATION:** U.S. Steel Canada Inc. (Re), 2015 ONSC 2523  
**COURT FILE NO.:** CV-14-10695-00CL  
**DATE:** 20150417

**SUPERIOR COURT OF JUSTICE - ONTARIO**

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT  
WITH RESPECT TO U.S. STEEL CANADA INC.

**BEFORE:** Mr. Justice H. Wilton-Siegel

**COUNSEL:** *K. Peters and R. Paul Steep*, for the Applicant

*R. Sahmi*, for the Monitor

*R. Thornton and J. Galway*, for United States Steel Corporation

*L. Harmer*, for the United Steelworkers International Union, the United Steelworkers Union, Local 8782 and as agent for the United Steelworkers Union, Local 1005

*A. Hatnay and B. Walancik*, for the non-unionized retirees and active employees

*L. Willis*, for Her Majesty the Queen in Right of Ontario and the Superintendent of Financial Services (Ontario)

**HEARD:** April 2, 2015

**ENDORSEMENT**

[1] The applicant sought an order authorizing a sale and restructuring process (the "SARP") and approving the eighth report of the Monitor and the activities described therein, which relate principally to the SARP. The order was granted with written reasons to follow, which are set out in this Endorsement.

[2] The proposed form of the SARP was initially the subject of objections from Her Majesty the Queen in Right of Ontario and the Superintendent of Financial Services (Ontario), the United Steelworkers, the United Steelworkers Local 8782, the United Steelworkers Local 1005, and the non-unionized retirees and active employees of the applicant (collectively, the "Major Stakeholders"). After negotiations among the parties, the revised form of the SARP was consented to by the Major Stakeholders and the United States Steel Corporation.

[3] The proposed process satisfies the criteria enumerated by Morawetz R.S.J. in *Nortel Networks Corp., Re*, 2009 CanLII39492 (ONSC) at para. 49 for the following four reasons which address the four factors articulated in that decision.



[4] First, commencement of the SARP is warranted at this time to permit the applicant sufficient time to run an effective sales and investment process if a consensual restructuring is not possible among the stakeholders.

[5] Second, a sale or restructuring process will benefit the whole "economic community" having a stake in the applicant. In particular, an active sales or investment process is necessary to maintain the confidence of the applicant's suppliers and customers and thereby ensure the continued operation of the applicant's business in the ordinary course. Absent a consensual restructuring, a sale of, or investment in, the applicant is the only form of restructuring that would have the potential for maintaining the applicant's business as a going concern and thereby maintaining the economic and social benefits of its continued operation, including preservation of employment at the applicant's two facilities.

[6] Third, as mentioned, the Major Stakeholders consented to the Order. The Monitor also advised the Court that it supported the SARP. No other creditors objected to the SARP process as contemplated in the proposed order.

[7] Lastly, there is no better viable alternative. In particular, in the absence of a consensual restructuring, a sale or investment transaction produced by the SARP would likely preserve considerably more value than a sale in a receivership or in a bankruptcy liquidation proceeding.

[8] In addition, while not technically applicable, the relevant factors in s. 36(3) of the *Companies' Creditors Arrangement Act* are also satisfied in respect of the Order. In particular, as mentioned, the Monitor supported the proposed SARP, which was also consented to by the Major Stakeholders. Further, the process contemplated is reasonable, both in terms of the substance and the timelines contemplated for the stages of such process, and is consistent with sales and investment process orders for businesses of comparable complexity in the current market.



Wilton-Siegel J.

**Date:** April 17, 2015

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 MONITOR**  
**(RETURNABLE ON FEBRUARY 27, 2025)**

**CASSELS BROCK & BLACKWELL LLP**  
Suite 3200, Bay Adelaide Centre - North Tower  
40 Temperance Street  
Toronto, ON M5H 0B4

**Ryan Jacobs LSO#: 59510J**  
Tel: 416.860.6465  
rjacobs@cassels.com

**Shayne Kukulowicz LSO#: 30729S**  
Tel: 416.860.6463  
skukulowicz@cassels.com

**Joseph J. Bellissimo LSO#: 46555R**  
Tel: 416.860.6572  
jbellissimo@cassels.com

*Lawyers for the Monitor, KSV Restructuring Inc.*