Court File No. CV-23-00696017-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF LOYALTYONE, CO.

APPLICANT

FACTUM OF BREAD FINANCIAL HOLDINGS, INC.

June 5, 2024

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TO: **THE SERVICE LIST**

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PART I - INTRODUCTION

1. There are two motions before this Honourable Court, both arising in relation to the desire of LoyaltyOne, its Monitor and its Lenders to deprive Bread of its entitlement to a potential $96 million tax refund from the CRA pursuant to a tax matters agreement (the "**TMA**").[1] The LoyaltyOne-aligned parties seek to wrest the right to the tax refund from Bread for the ultimate benefit of the Lenders, who only three years prior made their debt financing conditional on LoyaltyOne entering into the TMA. To that end, they have attempted to improperly disclaim the TMA and alleged the agreement constitutes a transfer at undervalue and/or is unconscionable.[2] In addition, they have commenced other proceedings in Canada and the U.S. for similar claims arising from the spinoff of LoyaltyOne from Bread to a new public company, LVI,[3] in November 2021 (the "**Spin Transaction**").

2. The position advanced in these motions by LoyaltyOne and the Monitor (and supported by the Lenders) is inappropriate, unfair and without foundation. The cornerstone of their motion is essentially that Bread engaged in a fraudulent misrepresentation when executing the Spin Transaction – alleging that Bread kept the imminent departure of the grocery chain Sobeys from the AIR MILES program a secret and modelled the economics of the Spin Transaction on financial performance by LoyaltyOne that could only be achieved with a continuation of revenue from Sobeys in the medium to long term. This is a very serious allegation that is at issue in multiple proceedings LoyaltyOne and LVI have commenced to-date, yet it is alleged here on the basis of a handful of documents and innuendo, and in the absence of direct, admissible evidence.

3. What has become apparent through this litigation process is that the people who were aware of and responsible for what was happening, both between LoyaltyOne and Sobeys, and

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[1] "**LoyaltyOne**" is LoyaltyOne, Co.; the "**Monitor**" is KSV Restructuring Inc. in its capacity as court-appointed monitor of LoyaltyOne; the "**Lender**s" are the secured lenders of LoyaltyOne pursuant to the Credit Agreement (as hereinafter defined); "**Bread**" is Bread Financial Holdings, Inc.; and the "**CRA**" is the Canada Revenue Agency.
[2] LoyaltyOne and the Monitor have not raised their unconscionability claim in their factum.
[3] "**LVI**" is Loyalty Ventures Inc.

with LVI's credit ratings and lending facilities, are available to (and in many cases paid consultants for) the LVI Trustee[4] and, where desired, the Monitor and LoyaltyOne. These individuals worked for Bread but left with LVI in the Spin Transaction

4. Despite this, the only affidavits proffered in this proceeding were from two (paid) witnesses who have almost no direct knowledge of the allegations being made by LoyaltyOne and the Monitor and whose evidence under cross-examination largely supports the position of Bread. Meanwhile, (i) other witnesses who were directly involved in the events in issue (including paid consultants to the LVI Trustee) proffered no evidence, and (ii) the Lenders, who are the would-be beneficiaries of the disclaimer and order sought by LoyaltyOne and the Monitor, have observed these proceedings in which it is suggested they were misled (and have even submitted a supporting factum) yet gave no evidence in respect of the alleged wrong done to them.

5. The proposed disclaimer of the TMA is a late tactic in the LoyaltyOne *CCAA*[5] proceeding that does not meet the requirements for a disclaimer to be made. The alleged transfer at undervalue is unsupported by admissible evidence; and expert evidence – when free from unwarranted and false assumptions – confirms the Spin Transaction was a fair one from a financial perspective when it was undertaken in November 2021. In these circumstances, the Court should grant Bread's requested order that the disclaimer of the TMA be rejected, dismiss the motions brought by LoyaltyOne and the Monitor.

PART II - SUMMARY OF FACTS

A. ADS executed a "pure play" strategy for the benefit of all business units

6. LoyaltyOne is an Ontario corporation that up until June 2023 was the operator of the AIR MILES reward program. AIR MILES is a Canadian loyalty rewards program that incentivizes

[4] The "**LVI Trustee**" is Pirinate Consulting Group, LLC in its capacity as trustee of the Loyalty Ventures Liquidating in the US Chapter 11 Proceedings of LVI.
[5] *Companies' Creditors Arrangement Act*, R.S.C. 1985, C. C-36, as amended.

consumers to shop with certain businesses ("**Program Sponsors**") by providing "reward miles" with purchases.[6] Reward miles can be redeemed for discounted flights or other benefits. Prior to November 2021, LoyaltyOne was an indirect subsidiary of Alliance Data Systems Corporation ("**ADS**", now Bread), a Delaware company publicly traded on the New York Stock Exchange.

7. Historically, ADS was composed of three distinct business units: (a) credit card and banking services; (b) consumer loyalty reward program services; and (c) data-driven marketing services.[7] LoyaltyOne was one of two businesses in the loyalty rewards business unit. The second business was BrandLoyalty, which provided customer loyalty campaign services to retailers in Europe, Asia and the Middle East from its offices in the Netherlands.[8]

8. In 2018, ADS' leadership began to assess whether its business units benefitted from being under common ownership. Several factors – including different geographic markets, management of diverse businesses, regulatory complications, and needed capital expenditures – indicated that common ownership was not providing the expected synergies and was in fact acting as an impediment to growth.[9] ADS executives determined the market would respond favourably to a "pure play" strategy where ADS focused its efforts on its card services business and divested its other units.

9. Between 2019 and 2022, ADS executed its new strategy.[10] In 2019, the marketing business unit was sold to a third-party purchaser. In November 2021, ADS executed the Spin Transaction and LoyaltyOne and BrandLoyalty were spun out into LVI, a Delaware corporation publicly traded on the NASDAQ stock market. In early 2022, ADS rebranded to Bread.[11]

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[6] Affidavit of Joseph L Motes III affirmed February 9, 2024 ("**Motes Affidavit #1**") at para 13, Responding Motion Record of Bread dated February 14, 2024 ("**Bread Responding MR**"), Tab 2.
[7] Motes Affidavit #1 at para 11, Bread Responding MR, Tab 2.
[8] Motes Affidavit #1 at para 14, Bread Responding MR, Tab 2.
[9] Motes Affidavit #1 at paras 18-23, Bread Responding MR, Tab 2.
[10] Motes Affidavit #1 at para 23, Bread Responding MR, Tab 2.
[11] See, Figures 1 and 2 in Schedule "A" of this factum for a visual representation of the "pure play" strategy.

B. The Spin Transaction was intended to create two successful companies

10. Divestment of the loyalty rewards businesses was spearheaded by Charles Horn. Mr. Horn had been ADS' CFO from 2009 to 2019 and after a brief period as interim CEO became Executive Vice President and Senior Advisor to oversee the loyalty rewards divestment.[12]

11. Mr. Horn considered different divestment options for both BrandLoyalty and LoyaltyOne and began a sales process for LoyaltyOne that he ultimately recommended not pursuing further.[13] Beginning in 2021, Mr. Horn and his team explored the potential for a spin transaction (January to May), recommended a spin transaction to ADS' board (May), organized the Spin Transaction (May to October), obtained final approval from ADS' board (October) and completed the Spin Transaction on November 5, 2021 (the "**Spin Date**").[14] This timeline exceeded the common spin transaction timeline of six to nine months and was not rushed.[15]

12. A team of six ADS executives that worked with Mr. Horn to complete the Spin Transaction – including Cynthia Hageman and Jeffrey Fair – voluntarily chose to leave ADS and take positions with the new company (the "**Spin Team**").[16] The Spin Team was instrumental in all aspects of the Spin Transaction including the preparation of all information that was provided to rating agencies, professional advisors, and prospective lenders.[17]

13. As part of the Spin Transaction, LVI entered into a credit agreement with Bank of America (as administrative agent for the Lenders), which provided $675 million in debt financing (the "**Credit Agreement**").[18] LoyaltyOne and BrandLoyalty both guaranteed LVI's debt under the

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[12] Motes Affidavit #1 at para 25, Bread Responding MR, Tab 2.
[13] Motes Affidavit #1 at para 27, Bread Responding MR, Tab 2.
[14] Motes Affidavit #1 at paras 29, 32-35 and 70, Bread Responding MR, Tab 2.
[15] Report of Professor Steven Solomon Report dated February 9, 2024 ("**Solomon Report**") at para 25, Bread Responding MR, Tab 3, Exhibit A.
[16] Motes Affidavit #1 at paras 32-35, Bread Responding MR, Tab 2. The Spin Team refers to Cynthia Hageman, Jeffrey Fair, Jeffrey Chesnut, Jeffrey Tusa, Jack Taffe, and Laura Santillan, in addition to Charles Horn.
[17] Affidavit of Joseph Motes affirmed March 25, 2024 ("**Motes Affidavit #2**) at para 22; Bread Reply Motion Record ("**Bread Reply MR**"), Tab 1.
[18] Motes Affidavit #1 at para 70(d), Bread Responding MR, Tab 2.

Credit Agreement. LVI used the funds from the Credit Agreement and a further US$100 million dividend in prior earnings of LoyaltyOne and BrandLoyalty to pay ADS. ADS then used these funds to pay down its long-term debt. The result, in effect, was the distribution of the former conglomerate's debt between the two, now independent, business units.[19]

14. The appropriate distribution of debt between ADS and LVI was thoroughly considered by ADS and its professional advisors. Ernst & Young ("**EY**") was retained to, among other things, recommend a serviceable debt load that ensured LVI could withstand a reasonable downside scenario.[20] EY recommended a maximum debt level of US$700 million plus a maximum cash dividend of US$125 million. ADS structured the debt and dividend within these parameters, less US$25 million from both the debt and dividend to provide further buffer.[21] EY conferred with the Bank of America and agreed with the finalized debt deal terms in September 2021.[22]

15. Spin transactions are a common form of transaction under Delaware law that can help unlock shareholder value, improve management focus and remove regulatory burdens.[23] The Spin Transaction provided these benefits and had two advantages over a traditional sale.[24] First, ADS could structure the Spin Transaction to retain an interest in the new company, which would result in the new company incurring less debt and in ADS being able to monetize this retained interest in the future. Second, the Spin Transaction could be structured to have more favorable tax consequences than a sale, if deemed a tax-free reorganization.

16. ADS designed the Spin Transaction with the aim of creating two "winners".[25] It retained a 19% interest in LVI post-spin and had a material interest in the new company succeeding.[26]

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[19] See Figure 3 in Schedule "A" of this factum.
[20] Motes Affidavit #1 at paras 43-45, Exhibit D, Bread Responding MR, Tab 2.
[21] Motes Affidavit #1, at para 44, Exhibit D, Bread Responding MR, Tab 2.
[22] Motes Affidavit #1, at para 47, Exhibit D, Bread Responding MR, Tab 2.
[23] Solomon Report at paras 15-22, Bread Responding MR, Tab 3.
[24] Motes Affidavit #1 at paras 20, 21, and 28, Bread Responding MR, Tab 2.
[25] Motes Affidavit #1 at para 37-68; Exhibit D, slide 2, Bread Responding MR, Tab 2.
[26] Motes Affidavit #1 at paras 29 and 41, Bread Responding MR, Tab 2.

Throughout 2021 and following the Spin Transaction, relevant stakeholders and architects of the Spin Transaction were optimistic about the viability of LVI and its ability to provide strong returns:

(a) **ADS Board**: The ADS board and audit committee approved the Spin Transaction at each step of the process. Roger Ballou, a board member of ADS since 2001, agreed to chair the board of directors of LVI and personally purchased around US$100,000 worth of LVI shares following the Spin Transaction.[27]

(b) **The Spin Team:** Mr. Horn was instrumental in designing the Spin Transaction. He accepted the position as CEO of LVI and personally acquired over US$400,000 in LVI shares in the month following the Spin Transaction.[28] The other members of the Spin Team were excited by the opportunity and chose to leave even after ADS' CEO asked them to reconsider their decision and stay.[29]

(c) **Rating Agencies:** Moody's and S&P worked with the Spin Team throughout 2021 and provided preliminary assessments of LVI in April and May and final assessments in September 2021.[30] The rating agencies noted credit risk factors of the company but each opined that the company had a stable outlook.[31]

(d) **Debt Market:** The Spin Transaction was dependent on securing lenders who assessed the LoyaltyOne and BrandLoyalty businesses as creditworthy.[32] Prospective lenders had access to extensive disclosure that included carved-out statements of historic financial performance, risk disclosure, copies of all material spin contracts, and the opportunity to hear from and ask questions of the Spin

[27] Motes Affidavit #1 at paras 36 and 88, Bread Responding MR, Tab 2.
[28] Motes Affidavit #1 at paras 31, 32, and 88, Bread Responding MR, Tab 2.
[29] Motes Affidavit #2 at paras 16 and 17, Bread Reply MR, Tab 1.; examination of Cynthia Hageman ("**Hageman Examination**"), Exhibit 29.
[30] Motes Affidavit #1 at paras 66-67, Bread Responding MR, Tab 2.
[31] Motes Affidavit #1, Exhibits N and O, Bread Responding MR, Tab 2.
[32] Motes Affidavit #1 at para 57, Bread Responding MR, Tab 2.

Team.[33] LVI's debt was over-subscribed in the market and financed by dozens of extremely sophisticated financial institutions and investors including JPMorgan Chase, Wells Fargo, City National Bank, Blackstone, and Goldman Sachs.[34]

C. The Spin Transaction reasonably structured the allocation of taxes

17. As part of the Spin Transaction, the parties entered into the TMA on the Spin Date. An agreement allocating taxes between parties is a standard part of a Delaware spin transaction.[35] The TMA stipulates that ADS retains responsibility for all pre-spin tax payables and tax reserves, and is correspondingly entitled to all pre-spin tax receivables when realized.[36] In other words, LVI and its subsidiaries emerged post-spin with a blank slate from a tax perspective while ADS shouldered the liabilities and received the benefits of the past. The TMA was made accessible to the Lenders prior to their subscription.[37]

18. The most significant pre-spin tax receivable of the LVI group arose from a reassessment conducted by the CRA of LoyaltyOne's 2013 corporate tax return. In December 2019, the CRA issued a Notice of Reassessment disallowing a reserve taken by LoyaltyOne.[38] LoyaltyOne appealed the reassessment with the Tax Court of Canada in July 2020 (the "**Tax Appeal**"). The trial is scheduled to commence in September 2024.

19. If LoyaltyOne is successful in the Tax Appeal then it could receive a refund of the approximately CA$96 million that the company paid following the reassessment (the "**Tax Refund**").[39] If LoyaltyOne is unsuccessful in the Tax Appeal, then further tax liabilities could be imposed, potentially in excess of CA$30 million.[40] Pursuant to the TMA, ADS is entitled to the Tax

[33] Motes Affidavit #1 at paras 59-62 and 66-68, Bread Responding MR, Tab 2.
[34] Motes Affidavit #1 at paras 64-65, Bread Responding MR, Tab 2.
[35] Solomon Report at paras 28-31, Bread Responding MR, Tab 3.
[36] Motes Affidavit #1, Exhibit T at ss. 3, 8, and 11, Bread Responding MR, Tab 2.
[37] Motes Affidavit #1 at para 59, Bread Responding MR, Tab 2.
[38] Motes Affidavit #1 at para 82, Bread Responding MR, Tab 2.
[39] Motes Affidavit #1 at para 83, Bread Responding MR, Tab 2.
[40] Motes Affidavit #1 at para 84, Bread Responding MR, Tab 2.

Refund if LoyaltyOne is successful in the Tax Appeal (less legal costs) and assumes indemnity obligations with respect of the tax liability and legal costs if LoyaltyOne is unsuccessful.[41]

D. BrandLoyalty's earnings collapsed

20. Following the Spin Transaction, LVI operated the loyalty rewards businesses as a going concern. LVI announced a minimum of US$40 million in further capital expenditure investment in early 2022 and LoyaltyOne issued dividends up to LVI quarterly, as late as September 2022 (over 3 months after Sobeys gave its formal notice of exiting the AIR MILES program), the resolutions for which stated that the payments would not negatively affect the operations of LoyaltyOne.[42]

21. Ultimately, however, LVI and LoyaltyOne filed for creditor protection in the U.S. and Canada respectively in March 2023, sixteen months after the Spin Transaction. A major source of the insolvency was the almost complete collapse of BrandLoyalty's earnings in 2022.[43] In Q4 2021, BrandLoyalty reported EBITDA[44] of $47.1 million, which was reduced to $0.2 million in Q1 2022 followed by $(0.5) million and $0.1 million in Q2 and Q3 respectively.[45]

22. In public filings, LVI attributed BrandLoyalty's earnings decline to Russia's invasion of Ukraine.[46] Russia's invasion decreased BrandLoyalty's sales in markets proximate to Ukraine; elevated supply and logistics costs for the business; and contributed to underperformance of loyalty campaigns.[47] Russia's invasion commenced in February 2022 and was not reasonably foreseeable at the time of the Spin Transaction. The collapse of BrandLoyalty resulted in LoyaltyOne being responsible for a larger share of LVI's debt payments than had been expected.

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[41] Motes Affidavit #1, Exhibit T at ss. 3, 8, and 11, Bread Responding MR, Tab 2. Mr. Fair who oversaw the tax dimensions of the Spin Transaction, confirmed on cross-examinations this was the intended structure, see Examination of Jeffrey Fair ("**Fair Examination**"), Q57-Q60.
[42] Motes Affidavit #1 at para 89, Bread Responding MR, Tab 2; Hageman Examination at Q382-Q386, Exhibit 37.
[43] Expert Report of A. Scott Davidson & Kathryn Gosnell of Kroll Canada Limited dated February 14, 2024 ("**Davidson Report #1**") at para 10.19, Bread Responding MR, Tab 4.
[44] Earnings before interest, taxes, depreciation and amortization.
[45] Davidson Report #1 at para 10.21, Bread Responding MR, Tab 4.
[46] Davidson Report #1 at para 10.23-10.24, Bread Responding MR, Tab 4.
[47] Davidson Report #1 at para 10.26, Bread Responding MR, Tab 4.

23. The insolvencies of LVI and LoyaltyOne are further explained by macroeconomic factors – including interest rate increases and foreign exchange rate fluctuations – and by the loss of Sobeys as a Program Sponsor.[48] LoyaltyOne and the Monitor now rely heavily on the circumstances and timing of the Sobeys' decision to withdraw from the AIR MILES program – the problems with which are further addressed below. The agreed facts are that LoyaltyOne did not receive formal notice of Sobeys' intention to exit the program until June 2022, LVI did not disclose that Sobeys was exiting until June 2022, and Sobeys did not fully leave the program until 2023.[49]

E. LoyaltyOne and LVI have commenced numerous overlapping proceedings

24. LoyaltyOne and LVI have commenced multiple proceedings arising from the Spin Transaction. In addition to the motions currently before this Honourable Court, LoyaltyOne commenced separate proceedings in Ontario against Bread (and Joseph Motes) seeking damages in the amount of US$775 million in relation to the Spin Transaction.[50] In the U.S., the LVI Trustee has commenced two separate actions against Bread in courts in Delaware and Texas alleging, among other things, fraudulent transfer and seeking recovery of US$750 million and the Tax Refund.[51] A U.S. securities class action, based on the allegations in the bankruptcy actions, has also been commenced against Bread. A main allegation in these U.S. actions, as in the within motions, is that Bread failed to disclose to its advisors and lenders in financial modelling and other disclosures that Sobeys had decided to terminate its relationship with the AIR MILES program.

25. The Lenders are the driving force behind the actions commenced by LoyaltyOne and LVI. The Lenders represent substantially all of LoyaltyOne's secured creditors and approximately 90% of its creditors generally.[52] Despite extensive disclosure from LVI and a full awareness of the risks

[48] Davidson Report #1 at para 10.19, Bread Responding MR, Tab 4.
[49] Hageman Examination, Exhibit 34.
[50] Motes Affidavit #1 at para 95, Exhibit AA, Bread Responding MR, Tab 2.
[51] Hageman Examination Q81-90, Exhibit 27 and J.
[52] The preliminary list of creditors available on the Monitor's website indicates that as of March 9, 2023 the Lenders represented approximately 96% of LoyaltyOne's debt (See: www.ksvadvisory.com/experience/case/loyaltyone). Bread understands the Lenders' share is now approximately 90%.

prior to extending debt financing, the Lenders now attack the transaction in multiple jurisdictions in an attempt to unwind a bargain that did not prove fruitful for them.

PART III - THE EVIDENTIARY RECORD

26. The evidence proffered by LoyaltyOne and the Monitor is deficient in numerous respects and in any event does not and cannot provide the basis for the relief they seek.

27. In support of its motion before this Court, LoyaltyOne filed affidavits from Ms. Hageman and Mr. Fair, both former LVI executives. Ms. Hageman and Mr. Fair have consulting agreements with the LVI Trustee and advised that they are being paid pursuant to those agreements to assist LoyaltyOne and the Monitor in prosecution of these motions.[53] LoyaltyOne has refused to disclose the compensation that Ms. Hageman and Mr. Fair have been paid. Moreover, LoyaltyOne and the Monitor initially provided no expert evidence on value in support of their motion.[54]

28. In response to the limited evidence delivered by LoyaltyOne and the Monitor, Bread delivered, among other things, an expert report on value from A. Scott Davidson (together with his reply report, the "**Davidson Reports**").[55] As further described below, the Davidson Reports conclude that the consideration received by LoyaltyOne as part of the Spin Transaction was not conspicuously less than the fair market value of the consideration given by LoyaltyOne in the Spin Transaction and that both LoyaltyOne and LVI were solvent on the Spin Date.

29. After receiving Bread's evidence, LoyaltyOne and the Monitor delivered a second affidavit from Ms. Hageman along with their own expert report on value.[56] Ms. Hageman's second affidavit alleged, for the first time, that Bread failed to disclose Sobeys' intention to exit the AIR MILES

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[53] Hageman Examination, Q56-Q57, Q71; Fair Examination, Q12-Q18.
[54] Hageman Examination, Q71; Fair Examination, Q18.
[55] Davidson Report #1, Bread Responding MR, Tab 4. Mr. Davidson co-authored his reports with Kathryn Gosnell also of Kroll Canada Limited, however, only Mr. Davidson was cross-examined.
[56] Fresh as Amended Affidavit of Cynthia Hageman affirmed March 8, 2024 and April 17, 2024 ("**Hageman Affidavit #2**), Reply Motion Record of LoyaltyOne ("**L1 Reply MR**"), Tab 1; Report of Andrew Harington dated March 13, 2024 ("**Harington Report #1**"), L1 Reply MR, Tab 4.

program to advisors, credit rating agencies and proposed lenders resulting in LoyaltyOne being overvalued. Ms. Hageman asserted in her second affidavit that she had not been aware of the discussions with Sobeys at the time, but admitted in cross-examination that she was, in fact, aware in January 2021 and had attended the meetings in which they were discussed.[57] Ms. Hageman confirmed she had no involvement with Sobeys or firsthand knowledge of negotiations but understood there were ongoing efforts to keep Sobeys in the program or to find alternatives for the revenue it generated.[58]

30. LoyaltyOne and the Monitor did not file any evidence from any of the individuals with firsthand knowledge of the Sobeys allegations. They have also not led any evidence on how the discussions with Sobeys were considered and addressed by those who prepared the projections used in the disclosures to the credit rating agencies, advisors and proposed lenders in the lead up to the Spin Transaction (the "**Spin Projections**"). This is not from a lack of access.

31. As described further below, Jeffrey Chesnut, Jeffrey Tusa, and Jack Taffe (all of whom were part of the Spin Team that went to LVI) prepared the Spin Projections and were involved in the presentations of same to the credit rating agencies, advisors and proposed lenders.[59] Mr. Tusa and Mr. Taffe each have consulting agreements with the LVI Trustee and attended conference calls with Ms. Hageman to assist her in preparing her evidence.[60] Yet neither tendered evidence in this proceeding. LoyaltyOne and the Monitor similarly failed to adduce any evidence from Sobeys or the very Lenders who filed a factum on these motions and suggest they did not receive material information about Sobeys when they lent to LVI.

32. Instead, LoyaltyOne and the Monitor ask the Court to believe that these experienced executives – who LoyaltyOne now emphasizes were vocally critical of aspects of the Spin

[57] Hageman Affidavit #2 at para 48. L1 Reply MR, Tab 1; Hageman Examination, Q255-256 and Q264-Q272.
[58] Hageman Examination, Q222-Q223, Q343-Q346.
[59] Motes Affidavit #2 at para 21, Bread Reply MR, Tab 1.
[60] Hageman Examination, Q186 and Q193.

Transaction – improperly padded the Spin Projections based on false assumptions for the benefit of Bread and at the direct expense of their new employer and long-term job security.

33. LoyaltyOne and the Monitor's valuation expert, Andrew Harington, purports to provide opinion evidence on the solvency of LoyaltyOne. His starting point is the Spin Projections, but he was not provided access to Mr. Tusa or Mr. Taffe who initially prepared them and could explain any assumptions that were made.[61] Furthermore, the conclusions in his reports (the "**Harington Reports**") are based on instructions from counsel to make two critical assumptions: (i) that, as of the Spin Date, the loss of Sobeys was foreseeable; and (ii) that the solvency analysis undertaken as at the Spin Date in November 2021 must be conducted at the LoyaltyOne level without regard to the larger Spin Transaction.[62]

34. In a last-ditch effort to try to provide some admissible evidence regarding Sobeys, LoyaltyOne gave short notice to Bread that it intended to examine the former CEO of LoyaltyOne, Mr. Blair Cameron, under Rule 39.03. Bread objected to the manner and timing of the examination and reserved its rights. Mr. Cameron gave evidence as to his understanding about Sobeys' intention to depart the AIR MILES program but, critically, admitted on cross-examination that (i) he did not attend the calls between Mr. Horn and Sobeys' CEO that underpin the allegations, (ii) he worked hard through 2021 and into 2022 to entice Sobeys to renew its participation as a Program Sponsor and to identify alternatives in the event Sobeys did not renew, and (iii) that he had been prepared by counsel for LoyaltyOne in advance of his examination and had been given documents and questions in advance.[63] LoyaltyOne's counsel refused to let Mr. Cameron answer whether he had provided his intended answers to LoyaltyOne prior to the examination.[64]

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[61] Examination of Andrew Harington ("**Harington Examination**"), Q52-Q62.
[62] Harington Examination Q22-Q23, Q33-Q34.
[63] Examination of Blair Cameron ("**Cameron Examination**"), Q58, Q282-Q290, Q138-Q143.
[64] Cameron Examination, Q144.

35. Mr. Horn as CEO of LVI swore the "First Day Declaration" in LVI's Chapter 11 Proceedings and was a firsthand participant in negotiations with Sobeys as early as December 2020. He personally bought US$400,000 worth of LVI shares after the Spin Transaction which undercuts the contention of LoyaltyOne and the Monitor that Sobeys' departure from the AIR MILES program was a foregone conclusion as at the Spin Date and that such departure would be catastrophic for LoyaltyOne and LVI.[65] Like the Lenders and the other members of the Spin Team with direct knowledge of the matters in issue, Mr. Horn also has provided no evidence in this proceeding.

36. LoyaltyOne and the Monitor have failed to meet their evidentiary burden. This Honourable Court should not have been asked to decide the serious allegations advanced by LoyaltyOne, the Monitor and the Lenders based on the evidentiary record presented and Bread respectfully submits that an adverse inference should be made against them as a result of their failure to adduce the firsthand evidence that was available to them.

PART IV - STATEMENT OF ISSUES, LAW & AUTHORITIES

37. The following issues are raised within these combined motions:

(a) Is LoyaltyOne bound by the TMA?

(b) Is the TMA a transfer at undervalue?

(c) Should the TMA be disclaimed?

(d) Is Bread entitled to the Tax Refund?

A. LoyaltyOne is a party to the TMA under Delaware law

38. LoyaltyOne claims it is not bound by the TMA because it is not a signatory. It is not disputed that LoyaltyOne is not a direct signatory. Rather, LVI signed the TMA "on its own behalf

[65] Motes Affidavit #1 at para 88, Bread Responding MR, Tab 2.

and on behalf of the members of Loyalty Ventures Group."[66] LoyaltyOne is a member of the Loyalty Ventures Group.[67]

39. Mr. Fair signed the agreement as authorized representative for LVI and the Loyalty Ventures Group. At the time he signed the TMA, Mr. Fair was LoyaltyOne's Vice President, Taxation.[68] On cross-examination, Mr. Fair confirmed that he understood he was signing the agreement on behalf of all of LVI's subsidiaries and that he would not have signed the agreement if he had thought it was improper or a breach of his corporate obligations.[69]

40. The TMA is governed by Delaware law.[70] Mr. Steven Solomon, an expert on Delaware corporate law, opines that under Delaware law a corporate parent has the authority to bind a subsidiary to an agreement and execute a contract on its behalf.[71] Express authorization from the subsidiary is not necessary, rather consent is implied via the parent-subsidiary relationship.[72] Delaware courts have regularly upheld agreements where the subsidiary is not a signatory.[73] Mr. Solomon's evidence was not contradicted by either of LoyaltyOne's Delaware law experts. Instead, in its factum, LoyaltyOne chooses to ignore that Delaware is the governing law and its arguments accordingly have no value to the determination.

41. Moreover, while LoyaltyOne now claims not to be bound by the agreement, it previously accepted reimbursements from Bread for pre-spin tax obligations pursuant to the TMA and has also made (and is receiving) indemnity claims for costs in relation to the Tax Appeal.[74]

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[66] Motes Affidavit #1, Exhibit T, signature page, Bread Responding MR, Tab 2.
[67] Motes Affidavit #1, Exhibit R, s. 1.01, Bread Responding MR, Tab 2.
[68] Fair Examination Q34-Q37.
[69] Fair Examination, Q49-Q50, Q53.
[70] Motes Affidavit, Exhibit T, s. 22, Bread Responding MR, Tab 2.
[71] Solomon Report #1 paras 32-40, Bread Responding MR, Tab 3.
[72] Solomon Report #1 paras 34-35, Bread Responding MR, Tab 3.
[73] Solomon Report #1 paras 35-39, Bread Responding MR, Tab 3.
[74] Motes Affidavit #1 at paras 80 and 86, Bread Responding MR, Tab 2.

B. The TMA is not a transfer at undervalue

42. The Monitor alleges that the TMA is a transfer at undervalue pursuant to s. 96(1)(b)(ii)(A) of the *BIA* (applicable in these proceedings pursuant to s. 36.1 of the *CCAA*).[75] The Monitor's claim must fail as the evidence confirms both that:

(a) the TMA was not a transfer at undervalue; and

(b) LoyaltyOne was solvent at the time the TMA was entered into.

i. The Monitor's claim of fair market value is not credible

43. Section 2 of the *BIA* defines a "transfer at undervalue" as follows:

> **transfer at undervalue** means a disposition of property or provision of services for which no consideration is received by the debtor or for which the consideration received by the debtor is conspicuously less than the fair market value of the consideration given by the debtor;

44. The position set out in the Monitor's factum is that by entering into the TMA, LoyaltyOne gave up a "potential" CA$96 million tax refund in exchange for "no value or conspicuously less value".[76] The Monitor fails to account for the fact that i) LoyaltyOne may be unsuccessful in the Tax Appeal; and ii) if unsuccessful, a further $30 million in taxes and penalties could be imposed. The valuation expert of LoyaltyOne and the Monitor, Mr. Harington, surprisingly admitted in his cross-examination that he was unaware LoyaltyOne could be burdened with additional interest and penalties if it lost the Tax Appeal and that Bread would be responsible for paying those additional penalties and interest along with litigation costs.[77]

45. Therefore, the critical piece of Mr. Harington's opinion, namely that the TMA was not fair to LoyaltyOne as it received no consideration, was based on his erroneous understanding of the agreement. The Monitor has not addressed these important facts in its factum.

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[75] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended ("**BIA**"), s. 96; *CCAA*, s. 36.1.
[76] Factum of the Monitor at para 34.
[77] Harington Examination, Q87-Q95; Motes Affidavit #1, Exhibit T at ss. 3, 8, and 11, Bread Responding MR, Tab 2.

ii. The Spin Transaction must be assessed at the group enterprise level

46. In addition to its evidentiary deficiencies, LoyaltyOne and the Monitor (and their valuation expert) make a further error by focusing only on LoyaltyOne in their consideration of the transfer. By contrast, Bread and its valuation expert follow the practice established by case law to look at the larger group enterprise.

47. The Supreme Court of Canada has held that when determining whether a transaction is conspicuously less than fair market value, the Court is to look at the circumstances that explain any difference between the consideration and the fair market value received.[78] Here there is an obvious rationale for any potential discrepancy: the transfer was one piece of a larger transaction.

48. In *Re Urbancorp Toronto Management Inc.*,[79] the Court of Appeal for Ontario considered whether a secured guarantee granted by a debtor in the Urbancorp group to a creditor for $2 was a transfer at undervalue. On a strict and narrow analysis, the transfer was clearly not done at fair market value; however, the Court of Appeal affirmed the lower court's decision and concluded otherwise after considering the full context of the transfer. The secured guarantee was granted as part of a larger debt extension transaction in which the creditor also discharged an approximately $1 million lien it had registered against another debtor in the Urbancorp group.[80]

49. A more expansive approach is consistent with holdings that transactions should be viewed in their entirety and that in the insolvency context corporate groups should be treated as single enterprises rather than separating such groups into their constituent entities.[81] The "group enterprise" concept is a recognized exception to the general principle of separate corporate personhood. As set out by Belobaba J. in *Teti v Mueller Water Products Inc.*:

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[78] *Peoples Department Stores Inc. (Trustee of) v Wise*, 2004 SCC 68 at para 86. The SCC was considering s. 96's predecessor provision, however, the factors identified remain the framework for s. 96 analysis (see e.g., *Re Ian Ross McSevney*, 2023 ONSC 5555 at para 54).
[79] 2019 ONCA 757 ("***Urbancorp***").
[80] *Urbancorp* at paras 48 and 59.
[81] *Canada v McLarty*, 2008 SCC 26 at para 73; *Re SemCanada Crude Co*., 2009 ABQB 90 at para 29.

> The best explanation of the cases that have considered the "group enterprise" or "single business entity" concept can be found in the 1994 decision of Spence J. in *MacKenzie Trust*:
>
> > These decisions [Manley and others] do not support a claim that the test in *Salomon v. Salomon* has been superseded by a new "business entity" or "single business entity" test. They merely illustrate the principle that, **in particular fact situations where the nature of the legal issue in dispute makes it appropriate to have regard to the larger business entity, the court is not precluded by *Salomon* from doing so.** In a few cases, there are statements that the court will lift the corporate veil" where injustice would otherwise result". I am not able to conclude that such statements are intended to remove the authority of the *Salomon* principle. I think they may be more in the nature of a shorthand formulation reflecting the approach of the courts in the cases discussed above.[82] [emphasis added]

50. In the present case, LoyaltyOne and LVI must be treated as part of a single enterprise for the purposes of assessing an alleged transfer at undervalue. LoyaltyOne was a 100% subsidiary of LVI whose financial affairs were inextricably tied to its parent and others in the corporate group. To focus solely on what LoyaltyOne gained and lost from a tax perspective is to focus on a minute portion of the Spin Transaction that in totality saw LVI receive the assets and revenue of two established businesses in exchange for a portion of the former conglomerate's debt.

51. The group enterprise approach is consistent with how the transaction would be viewed from a business and financial perspective, and also with the fact the TMA specifically notes that it is to be understood in conjunction with the other Spin Transaction documents.[83] Moreover, the Lenders made their loans to LVI on the basis of it having two (not one) operating businesses. It is contrary to commercial realities to focus solely on LoyaltyOne and not LVI as a whole.

52. As described below, Mr. Harington, at the instruction of LoyaltyOne and the Monitor, completely ignores that BrandLoyalty was a second functioning business under LVI that was

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[82] *Teti and ITET Corp. v Mueller Water Products*, 2015 ONSC 4434,at para 19 citing *801962 Ontario Inc. v MacKenzie Trust Co*., 1994 Carswell Ont 6168, OJ No. 2105 (Ont Gen Div) at para 8.
[83] Davidson Report #1 at paras 7.1-7.7, Bread Responding MR, Tab 4; Motes Affidavit #1, Exhibit T, s 21, Bread Responding MR, Tab 2.

forecasted to contribute to LVI's debt payments. The resulting analysis stacks the deck so that LoyaltyOne is burdened with all of LVI's debt and receives no assistance from BrandLoyalty, who also served as guarantor of LVI. The Monitor asserts that BrandLoyalty had little free cash flow to contribute to debt payments. While it is true that BrandLoyalty struggled during COVID, the Spin Team projected BrandLoyalty to be the major driver of growth for LVI and foresaw it increasingly contributing to the company's revenue and earnings.[84]

iii. The credible expert evidence does not support the transfer at undervalue claim

53. The Davidson Reports conclude, among other things, as follows:

(a) the consideration received by LoyaltyOne as part of the Spin Transaction was not conspicuously less than the fair market value of the consideration given by LoyaltyOne (which included the TMA and guaranteeing LVI's debt);[85]

(b) both LoyaltyOne and LVI were solvent as at the Spin Date;[86]

(c) intervening and (as at the Spin Date) unforeseeable events had a material adverse impact on the solvency of LVI and/or LoyaltyOne;[87]

(d) as at the Spin Date, there was not a reasonably foreseeable expectation of a liquidity shortage that would deprive LVI or LoyaltyOne of the ability to pay their debts as they generally became due in the five years following the Spin Date (the "**Cashflow Period**");[88]

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[84] Motes Affidavit #2 at para 18, Bread Reply MR, Tab 1; Examination of Joseph Motes ("**Motes Examination**"), Exhibit U, slide 4.
[85] Davidson Report #1, s. 8, Bread Responding MR, Tab 4; Expert Report of A. Scott Davidson and Kathryn Gosnell of Kroll Canada Limited dated April 15, 2024 ("**Davidson Report #2**") at paras 9.14 and 9.17 and Schedule 5.
[86] Davidson Report #1, s. 9, Bread Responding MR, Tab 4.
[87] Davidson Report #1, s. 10, Bread Responding MR, Tab 4.
[88] Davidson Report #1, s. 9, Bread Responding MR, Tab 4.

(e) LVI would remain solvent in the Cashflow Period even if all of Mr. Harington's assumptions were correct (including the foreseeability of the Sobeys' departure);[89]

(f) LoyaltyOne (on a standalone basis) would remain solvent in the Cashflow Period even if there was up to a 75% chance of Sobeys' departure as at the Spin Date.[90]

54. Mr. Harington, the expert for LoyaltyOne and the Monitor, disagrees with some of the conclusions in the Davidson Reports, but does not undertake the same scope of review. Both experts looked at the Spin Projections and made adjustments to various aspects of those projections.[91] Both then used their respective revised cash flow projections and applied discount rates to the resulting EBITDA to forecast LoyaltyOne's solvency in the Cashflow Period and multiples to calculate the enterprise fair market value. [92] The experts, however, disagreed on both what adjustments should be made to the Spin Projections and what discount rates and multiples should be applied to the revised cash flows.

55. The Monitor in its factum seeks to limit the Court's analysis to only two issues: 1) the amount of the debt attributable to LoyaltyOne; and 2) the foreseeability of the Sobeys departure, and ignores all the other disagreements between the experts (11 disputed adjustments in total). The Monitor's two issues are important but not sufficient to completely address the question of solvency.

56. One adjustment that the Monitor glosses over is the adjustment to revenues as a result of the concessions LVI gave to another Program Sponsor, the Bank of Montreal ("**BMO**"), in the fall of 2022 (i.e., a year after the Spin Transaction). Without any supporting evidence, Mr. Harington revised the Spin Projections downward to reflect 100% of revenue lost from the concessions given

[89] Davidson Report #2, s.7, Bread Reply MR, Tab 2.
[90] Davidson Report #2, s. 9, Bread Reply MR, Tab 2.
[91] Harington Report #1 at para 108 and 116, L1 Reply MR, Tab 4.
[92] Harington Report #1 at para 228-223, L1 Reply MR, Tab 4.

to BMO following Sobeys' departure.[93] For context of magnitude, the direct loss to LoyaltyOne revenues from the BMO concessions was in the range of $34 million to $38 million per year compared with only a $10-11 million per year loss from the direct revenues from Sobeys.[94] In fact, even if this Court finds that the Sobeys' loss was foreseeable, but the quantum of the BMO concessions was not (or there is insufficient evidence to establish that it was foreseeable), LoyaltyOne would be found solvent – even on a standalone basis.[95]

57. The Monitor and LoyaltyOne would like the Court to gloss over this and many other adjustments that, only if taken together, get the Monitor and its expert to a conclusion of LoyaltyOne's insolvency.

58. At paragraph 24 of its factum, the Monitor suggests that on cross-examination Mr. Davidson agreed that LoyaltyOne would likely be insolvent if: i) the entirety of the Spin Transaction debt was payable solely by LoyaltyOne; and ii) Sobeys' exit was reasonably foreseeable as at the Spin Date. This is a gross overstatement of Mr. Davidson's evidence: he agreed with the above only if ***all*** of Mr. Harington's other adjustments to the Spin Projections and "bundle of assumptions" (including the BMO concessions, capital costs, adjustment, etc.) were assumed correct.[96] As neither Bread nor Mr. Davidson agree that Mr. Harington's assumptions are correct, the alleged admission is meaningless.

iv. Mr. Harington's analysis is flawed

59. The analysis in the Harington Reports contains numerous flaws that render them of little value to this Court.

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[93] Harington Examination, Q255. Mr. Harington later admitted that "one shouldn't use hindsight in valuation" see Harington Examination, Q286.
[94] Harington Report #1, schedule 2.1, L1 Reply MR, Tab 4.
[95] Harington Report #1 at Schedule 2.1.
[96] Examination of A. Scott Davidson, Q36.

(a) Assumes that no aspect of the Spin Transaction other than the TMA and its guarantee of debt affected LoyaltyOne

60. Mr. Harington does not analyze the TMA within the context in which it was entered into – as part of the larger Spin Transaction. Instead, he selects only two aspects of the transaction to include in his analysis: the TMA and the guarantee of LVI's debt.[97] Mr. Harington confirmed on cross-examination that he did not consider the broader aspects based on instructions from counsel.[98] As a result, Mr. Harington's analysis evaluates only one side of the equation.

(b) Ignores any contribution from BrandLoyalty

61. As described above, the economics of the Spin Transaction (and the Lenders' decisions to lend) were predicated on both LoyaltyOne and BrandLoyalty generating revenue that would be used to meet LVI's obligations under the Credit Agreement. Instead of reflecting this reality, Mr. Harington's analysis saddles LoyaltyOne with the entirety of the debt from the Credit Agreement – both for establishing the value and the solvency of LoyaltyOne as at the Spin Date and analyzing LoyaltyOne's exposure under its guarantee of LVI's debt.[99] He does so despite the fact that his chosen approach to valuing contingent liabilities (like the guarantee) is in conflict with (i) various respected authorities on this issue, and (ii) the views of the management of LVI on the possible apportionment of debt from the Credit Agreement at the time shortly following the Spin Date.[100]

62. Furthermore, Mr. Harington was instructed to assume that the solvency of LVI is not relevant to these motions.[101] He did not analyze BrandLoyalty and its ability to pay dividends.[102] The Harington Reports therefore offer no assistance to this Court if the Court should find that any potential BrandLoyalty revenues should be factored into the analysis of LoyaltyOne's solvency.[103]

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[97] Harington Examination, Q34-Q36; Harington Report #1, para 11, L1 Reply MR, Tab 4.
[98] Harington Examination, Q31-Q34.
[99] Harington Examination, Q199; Harington Report #1 at paras 29, 202, 286, and Schedule 1.
[100] Harington Examination, Q215-Q217, Q234-Q239, Exhibits 48-50.
[101] Harington Report #1 at para 95(a), L1 Reply MR, Tab 4.
[102] Harington Examination, Q168.
[103] Harington Examination, Q432-Q434.

(c) Assumes Sobeys' departure in 2022 was foreseeable

63. Mr. Harington was instructed by counsel to assume the foreseeability of a Sobeys' departure from the AIR MILES program. Mr. Harington implemented this assumption by removing 100% of all direct and indirect revenues that he attributed to the Sobeys' departure.[104]

64. Mr. Davidson opines that in prospective financial analysis, when faced with uncertainty, the appropriate method is to apply probabilities to the various potential outcomes to arrive at an expected value.[105] Mr. Harington, however, assumes Sobeys' departure as 100% certain and also takes it as a certainty that LoyaltyOne would not be able to implement a replacement strategy. The outcome is drastic and Mr. Harington does not perform any analysis of the solvency of LoyaltyOne over the Cashflow Period for any scenario where any of the Sobeys' (or replacement grocer) income is included in the LoyaltyOne cashflows.[106] Under cross-examination, Mr. Harington admitted that he should have added back the revenues that could be earned from replacement grocery sponsors after Sobeys' departure from the program.[107]

65. Mr. Harington purports to undertake a review of the reasonableness of his instruction to assume that Sobeys' departure was foreseeable as at the Spin Date, but in doing so, he improperly assumes the role of fact-finder and interprets a limited set of documents provided to him by the Monitor's and LoyaltyOne's counsel.[108] Under cross-examination it became apparent that he had become an advocate for the position that was the subject of his instruction, insisting on the reasonableness of the assumption to the point that he would not entertain the possibility that discussions with LoyaltyOne management could in any way alter his beliefs on the issue.[109]

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[104] Harington Report #1 at para 10, Mandate 2, L1 Reply MR, Tab 4.
[105] Davidson Report #2 at para 2.2(b), Bread Reply MR, Tab 2.
[106] Harington Examination, Q430-Q431.
[107] Harington Examination, Q378. Using the hindsight of what actually had been replaced in the short term, he suggested in cross-examination that this would not have changed his conclusions. His admission shows a shortcoming and partisan approach of his analysis and his off-the-cuff hindsight calculation does not negate that fact.
[108] Harington Report #1, s. XII, Mandate 3, L1 Reply MR, Tab 4.
[109] Harington Examination, Q289-Q291.

66. In any event, as described in greater detail below, the better evidence on the record is that the Sobeys' exit and the resulting losses were not foreseeable (and were definitely not certain) as at the Spin Date and should not have led to the complete exclusion of all direct and indirect revenues (as defined by Mr. Harington) from the LoyaltyOne solvency and valuation analysis.

(d) Employs aggressive, unrealistic and predetermined approaches in analyzing LoyaltyOne's projected cashflows and valuation

67. Throughout the Harington Reports, Mr. Harington takes the most aggressive (and often unrealistic) approach to considering what events would occur and when to arrive at his conclusion that LoyaltyOne was insolvent. Among these, Mr. Harington:

(a) uses July 1, 2022, the earliest possible date for Sobeys' departure under its participation agreement (which provided a six-month early termination window), to remove the direct revenues from Sobeys from LoyaltyOne's cashflows;[110]

(b) assumes a 100% Sobeys exit on that date even though all relevant documents contemplated a gradual region-by-region departure by Sobeys (which is what ultimately occurred over a period of many months into 2023);[111]

(c) assumes that the impact of the collector losses that were anticipated to follow a Sobeys' departure would be felt immediately on July 1, 2022;[112]

(d) ignores and excludes from his amended LoyaltyOne cashflows any potential (or actual) revenues that LoyaltyOne generated from grocers that LoyaltyOne could and did sign up to replace Sobeys;[113]

[110] Harington Examination, Q261-Q263.
[111] Harington Examination, Q261, Q266-Q269; Hageman Examination, Q355 and Exhibit 34, p. 31.
[112] Harington Report #1, s. XI.A.4, Adjustment 3, L1 Reply MR, Tab 4.
[113] Harington Examination, Q379-Q380, Q389-Q392.

(e) assumes with no supporting evidence that the quantum of the concessions granted to BMO following Sobeys' departure was reasonably foreseeable as at the Spin Date;[114]

(f) in calculating the value of the consideration received by LoyaltyOne, Mr. Harington uses higher discount rates and lower multiples than those used by EY and Morgan Stanley (resulting in a lower valuation than both these respected financial advisors had arrived at in and around the Spin Date) and also double counts various risks in the cashflows (such as a potential Sobeys' departure) by both increasing the discount rate and removing the revenue – an approach that contradicts his own authorities;[115]

(g) assumes that LoyaltyOne would continue to pay dividends to LVI to enable LVI to make payments under the Credit Agreement instead of LoyaltyOne making the payments to the Lenders directly, which could allow it to receive preferential tax treatment in respect of those payments. He does so even in the face of evidence that: (i) LoyaltyOne did in fact make payments to the Lenders directly in early 2023 and, (ii) LVI was contemplating options to push the debt down to LoyaltyOne and BrandLoyalty in order to take advantage of more favourable tax treatment;[116] and

(h) insists that LoyaltyOne would continue to pay LVI's corporate costs (e.g., public company disclosure, group marketing strategies, etc.) – even in a scenario where LoyaltyOne was experiencing liquidity issues and would cease making payments of dividends to LVI (as it did in early 2023 and could have done earlier).[117]

68. All of these assumptions and adjustments to the LoyaltyOne cashflows render Mr. Harington's analysis of LoyaltyOne's solvency and valuation unreliable.

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[114] Harington Examination, Q261, Q268-Q269; Harington Report #1, para 161.
[115] Davidson Report #1 at para 8.20; Harington Report # 1 at paras 231, 263 and 269; Harington Report #2 at Schedule R3; Harington Examination Q305-Q306, Q314-Q316, Q321, Q326, and Exhibit 51.
[116] Hageman Examination, Q405-Q408, Exhibit 38; Harington Examination, Q183-184, Exhibit 48.
[117] Harington Examination, Q405-Q411.

v. Revenue from Sobeys was appropriately included in Spin Projections

69. Sobeys provided formal notice of its intent to leave the AIR MILES program on June 7, 2022, seven months after the Spin Transaction. LVI publicly disclosed Sobeys' intent to exit for the first time the next day. Any allegation that revenue from Sobeys was improperly included in the Spin Projections is false and unsupported by the record.

70. Sobeys was one of the key Program Sponsors of the AIR MILES program and had an active relationship with LoyaltyOne. In alleging that Sobeys' departure was a "foregone conclusion", LoyaltyOne and the Monitor rely heavily on a call that occurred between Sobeys' CEO and Mr. Horn on January 5, 2021. LoyaltyOne's witness, Mr. Cameron, confirms that Mr. Horn was the only representative of ADS or LoyaltyOne on this call.[118] Mr. Horn, despite being the architect of the Spin Transaction, the CEO of LVI, and the key witness for LoyaltyOne's position, has not tendered evidence in this proceeding. There is no firsthand evidence in the record regarding this call with Sobeys. Mr. Horn had other calls with Sobeys during this time period that Mr. Cameron was not familiar with.[119] The content of these calls is unknown.

71. Mr. Horn's own report on his dealings with Sobeys in early 2021 as reflected in contemporaneous board minutes (which were prepared by Ms. Hageman) is that during the initial sales process for LoyaltyOne, Sobeys indicated unofficially that it had a "not final" intention to exit the AIR MILES program but then "ultimately chang[ed] their story".[120] LoyaltyOne's witnesses admitted there were valid and suspected reasons that Sobeys might have signalled a desire to leave, without intending to follow-through:

(a) Ms. Hageman confirmed that threatening to leave the program was a negotiation tactic of Program Sponsors, a way to exert leverage and secure better deal terms

[118] Cameron Examination, Q58.
[119] Cameron Examination Q259-261, Exhibit C.
[120] Hageman Examination, Exhibit 31.

for their continued participation as sponsors.[121] Indeed, Sobeys was able to extract a lower annual fee from LoyaltyOne following the January 5th call.[122]

(b) Mr. Cameron confirmed that he and others suspected that Sobeys may have been coordinating with another Program Sponsor, BMO, in an attempt to acquire the AIR MILES program at a low price.[123] In reaction to an email from Sobeys inquiring about further program involvement, Mr. Cameron on January 28, 2021 wrote to another LoyaltyOne executive: "I wonder if it's BMO and they said to Sobeys, hey, exercise your option to help us put price pressure on ADS ..."[124]

72. Following discussions in January 2021, LoyaltyOne and Sobeys signed an amending agreement that reduced Sobeys' annual fees and postponed the window for its early termination rights.[125] Under this amendment, the term of the participation agreement ended in February 2023, at which point it would be subject to the usual renewal negotiations LoyaltyOne undertook at the end of any agreement with a Program Sponsor. LoyaltyOne and Sobeys entered into a further amending agreement in March 2022 that again changed its early termination window.[126] On June 7, 2022, seven months after the Spin Date, Sobeys gave notice of its intent to exit the program and LVI publicly disclosed this development the next day.[127]

73. Whereas LoyaltyOne and the Monitor try to use a few cherry-picked emails and innuendo to suggest that Sobeys' departure was inevitable as at the Spin Date, the parties' conduct at that time and following confirms the opposite (or at worst that it was an unknown). The Spin Team and LoyaltyOne believed in the lead-up to and following the Spin Transaction that Sobeys'

[121] Hageman Examination, Q304-Q305.
[122] Hageman Affidavit #2 at para 45, L1 Reply MR, Tab 1.
[123] Cameron Examination, Q222-Q228, Exhibit 13, Exhibit B.
[124] Cameron Examination, Exhibit 13.
[125] Hageman Affidavit #2 at para 42 and 45, L1 Reply MR, Tab 1.
[126] Hageman Affidavit #2 at para 42 and 45, L1 Reply MR, Tab 1.
[127] Hageman Examination, Q353.

participation in the program could be renewed.[128] LoyaltyOne worked diligently in 2021 and the first half of 2022 (as part of LVI) to prepare for a contract renewal:

(a) LoyaltyOne added Voilà (Sobeys' online grocery delivery platform) into the AIR MILES program in April 2021;[129]

(b) LoyaltyOne began relaunching the AIR MILES brand with a younger feel, to which Sobeys responded positively;[130]

(c) LoyaltyOne began planning a move to a system where Program Sponsors like Sobeys were better able to access and use data collected by LoyaltyOne for their stores – a limitation Sobeys had previously expressed concern over;[131]

(d) LoyaltyOne prepared a presentation for Sobeys in January 2022 that laid out the value proposition of the AIR MILES program for Sobeys;[132] and

(e) LVI retained McKinsey & Company in around January 2022 to consult on the company's grocery chain strategy.[133]

74. Mr. Cameron confirmed on cross-examination that LoyaltyOne had further contingency plans to keep Sobeys including eliminating Metro from the program in Ontario (which at the time had a co-exclusivity right with Sobeys) or providing Sobeys an equity stake in LoyaltyOne.[134]

75. It is undisputed that there was a risk that Sobeys would leave the program, just as there was a risk that BMO (or any other sponsor) would leave the program. As Ms. Hageman confirmed on cross-examination, this had *always* been a known and discussed risk within ADS.[135] Indeed,

[128] Hageman Examination Q340; Cameron Examination, Exhibit 16.
[129] Cameron Examination, Q258.
[130] Cameron Examination, Q282-286.
[131] Cameron Examination, Q305-Q311.
[132] Cameron Examination, Q365, Exhibit 20.
[133] Hageman Examination, Q332-Q334.
[134] Cameron Examination Q322-Q324, Q344.
[135] Hageman Examination Q130-Q131.

the risk of losing a key Program Sponsor had been regularly disclosed in ADS' public filings and was likewise disclosed in LVI's public filings in the lead-up to (and following) the Spin Transaction.[136] The risk of loss of a key Program Sponsor was emphasized by both rating agencies in their published assessments on LVI's debt and the evidence indicates that stakeholders were told Sobeys was in the final years of its agreement with AIR MILES.[137] It defies reasonable belief that the sophisticated Lenders who subscribed for LVI's debt were not aware of the risks present within the AIR MILES program's business model yet still viewed the company as solvent and suitable for debt financing. Of course, the Lenders provided no evidence on these motions.

76. Revenue from Sobeys' participation was included in the Spin Projections that were provided to financial advisors like EY as well as to the rating agencies. The development of the Spin Projections was completed and overseen by those on the finance and business side of the Spin Team, particularly Charles Horn, Jeffrey Chesnut, Jeffrey Tusa, and Jack Taffe.[138] It is this group of individuals who are able to explain how the projections were developed, what assumptions were made, and how any potential exit of Sobeys was considered and addressed. For instance, EY's analysis ensured LVI could withstand a reasonable downside scenario but it is unknown whether this downside scenario was intended to ensure that the company would remain solvent if Sobeys chose to exit the program.[139] Mr. Davidson's analysis concludes that LVI was projected to remain solvent as at the Spin Date even with the loss of Sobeys.[140]

77. LVI has consulting agreements in place with Mr. Tusa and Mr. Taffe.[141] Ms. Hageman, in fact, relies on Mr. Taffe for information in her affidavits and admitted to attending conference calls

[136] Motes Affidavit #1, Exhibit J, p. 25.
[137] Motes Affidavit #1, Exhibits N and O, Bread Responding MR, Tab 2; Blair Examination, Exhibit 17.
[138] Motes Affidavit #2 at para 21, Bread Reply MR, Tab 1.
[139] Motes Affidavit #1, Exhibit D, slide 10, Bread Responding MR, Tab 2.
[140] Davidson Report #2, s. 9, Bread Reply MR, Tab 2.
[141] Hageman Examination, Q186.

with both Mr. Tusa and Mr. Taffe in the course of preparing her affidavits.[142] Yet neither Mr. Tusa nor Mr. Taffe tendered evidence, nor did they provide any insights or explanations to Mr. Harington in the course of his preparation of the Harington Reports.[143] The record is silent on how the Spin Projections came together at the time of the Spin Transaction and why revenue from Sobeys was included in the model by experienced executives who had a deep understanding of LoyaltyOne, current discussions with Sobeys, and financial modelling for such a business.[144]

78. The Spin Projections that were provided to advisors like EY were prepared by Mr. Chesnut, Mr. Tusa, and Mr. Taffe with no influence or input from those who were staying at ADS.[145] LoyaltyOne's witness confirmed that Mr. Tusa knew of the ongoing discussions with Sobeys and as Mr. Tusa reported to Mr. Chesnut and worked closely with Mr. Taffe, it strains belief that they were not also aware.[146] LoyaltyOne emphasizes that these same members of the Spin Team ADS in the lead-up to the spin.[147] Yet LoyaltyOne and the Monitor cannot point to any evidence or document that suggests these same individuals believed revenue from Sobeys was being improperly included in the revenue projections.

79. The obvious inference is that these experienced executives properly prepared the Spin Projections based on the information available to them at the time. The alternative, that they padded the Spin Projections for the benefit of ADS and detriment of LVI, flies in the face of common sense and is completely inconsistent with their history of objections to transaction elements that were perceived to be unfair to their new employer.

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[142] Hageman Affidavit #2 at paras 54 and 55, L1 Reply MR, Tab 1; Hageman Examination, Q193.
[143] Harington Examination, Q52-Q62.
[144] Mr. Cameron confirmed on cross-examination that Mr. Tusa was kept informed about discussions with Sobeys. See, Cameron Examination, Q166-169.
[145] Motes Affidavit #2 at para 21, Bread Reply MR, Tab 1.
[146] Hageman Examination, Q172.
[147] See e.g., affidavit of Cynthia Hageman affirmed November 9, 2023 at paras 36 and 39, motion record of LoyaltyOne, Tab 2.

80. Revenue from Sobeys continued to be assumed in projections made by LVI after the Spin Transaction – undoubtedly with the involvement of Messrs. Chesnut, Tusa and Taffe. Ms. Hageman admitted that she did not have knowledge about why such a decision was made:

> Q But one way or the other, [a slide from December 2021 summarizing LVI's projected revenue] is using a presumption, if you will, then, that Sobeys would continue or renew or continue to kick their termination right down the road; right?
>
> A. I don't know the specifics underlying the liquidity but I think it's fair to assume that that's what these numbers represent.
>
> Q. Okay. And presumably whoever prepared them felt it was appropriate to prepare them on that basis for the LVI board of directors?
>
> A. I can't speak for them, but it's in the deck. Or it's in this version.[148]

81. A financial forecast, "by its very nature, is but an estimate or projection made about a matter *in futuro*."[149] Forecasting is a matter of business judgment and the Court ought not substitute its opinion if a business decision is taken "within a range of reasonableness".[150] As Morawetz J. (as he then was) wrote in *Healy,* forecasting is "an art rather than a science" and "judgment is an appropriate part of the process."[151] The benefit of hindsight does not make an inclusion an incorrect judgment at the time.

82. Without the benefit of evidence from those who can most assist the Court, the Court should infer that at the time of the Spin Transaction that any departure of Sobeys from the AIR MILES program was speculative and uncertain and that it was reasonable to assume that the Sobeys relationship would be renewed or replaced in the normal course of business.

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[148] Hageman Examination, Q322-Q323.
[149] *J.R.K. Car Wash Ltd. v Gulf Canada Ltd*., 1992 CarswellOnt 765 at para 64, cited favourably in *Healy v Canadian Tire Corp*. 2012 ONSC 77 at para 35 ("***Healy***").
[150] *Kerr v Danier Leather Inc*., 2007 SCC 44 at para 54; see also *Healy* at para 41(a) and *Regency Mortgage Corp. v Buchan*, 1984 CarswellBC 1143 (BC SC) at paras 32 (decision by McLachlin J (as she then was).
[151] *Healy* at para 41(b).

vi. The Spin Transaction was fair and LoyaltyOne was solvent as at the Spin Date

83. Insolvency must be proved, and such proof must be "clear and convincing".[152] Where insolvency is not clearly established, courts have declined to find that a transferor was insolvent at the relevant time, even though there may be evidence of financial stress.[153]

84. The credible expert evidence before this Court is that the consideration received by LVI is not conspicuously less than the fair market value of the consideration given by LVI and that the companies and its subsidiaries were solvent as at the Spin Date. To find otherwise requires rigid application of severe and unrealistic assumptions and a narrow view of only one small part of a larger transaction. The TMA is not a transfer at undervalue.

C. The TMA ought not to be disclaimed

85. The Court has the express jurisdiction to prohibit the disclaimer or resiliation of an agreement under s. 32(2) of the *CCAA*. In considering whether to exercise this jurisdiction, the Court ought to consider the factors enumerated at s. 32(4):

(a) whether the monitor approved the proposed disclaimer or resiliation;

(b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and

(c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.[154]

86. The list of factors in s. 32(4) of the *CCAA* is not exhaustive and Courts have added the requirement that the disclaimer be fair, appropriate and reasonable in all circumstances.[155]

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[152] Houlden, Morawetz and Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed. (Toronto: Thomson Reuters, 2023) at §5:502; Frank Bennett, ed., *Bennett on Bankruptcy*, 25th ed., looseleaf (Toronto: LexisNexis Canada Inc., 2023) at Part IV.
[153] See e.g., *Re Rehman*, 2015 ONSC 188 at para 48.
[154] *CCAA*, s. 32.
[155] *Re Laurentian University of Sudbury*, 2021 ONSC 3272 at para 44 ("***Laurentian***")

i. The TMA disclaimer does not facilitate a compromise or restructuring

87. The proposed disclaimer of the TMA in no way increases the prospects of a viable compromise or arrangement: there is no compromise or arrangement to be made.

88. The present situation is unlike the circumstances of most other *CCAA* proceedings involving contentious disclaimers because LoyaltyOne is not restructuring. Its operating business has already been sold, its corporate entities are likely to wind-up, and there is no urgency while the tax litigation is pending. LoyaltyOne has not identified a single case where a disclaimer was granted so late in the process. Instead of facilitating a restructuring, LoyaltyOne is relying on the disclaimer provisions of the *CCAA* for the sole purpose of shifting value from Bread to the Lenders.

ii. The TMA disclaimer is not fair, appropriate and reasonable

89. The Court will prohibit a disclaimer where the debtor fails to offer sufficient evidence to establish that it is "fair and reasonable".[156] This was the case in *Re Doman Industries*, where the Court denied the debtor company's request to terminate certain contracts on the basis that the likely benefits of termination did not outweigh the likely prejudice suffered by the counterparties.[157]

90. The vast majority of LoyaltyOne's outstanding debt is owed under the Credit Agreement and it is the Lenders who will principally benefit from the disclaimer of the TMA and any proceeds of the Tax Refund. That the Lenders seek a disclaimer of the TMA is absurd. Not only did the Lenders have access to the TMA prior to extending credit and understand it was part of the Spin Transaction, it was in fact a condition of the Credit Agreement that LVI and its subsidiaries enter into the TMA.[158] The Lenders are seeking a disclaimer of an agreement that less than three years ago they required LoyaltyOne to enter into. The outcome is unfair and inappropriate.

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[156] *Re Doman Industries et al.,* 2004 BCSC 733, at para 38 ("***Doman***").
[157] *Doman*, at para 38.
[158] Motes Affidavit #1, Exhibit S, s.4.01(a)(xii) and (xviii) and s. 8.01(m), Bread Responding MR, Tab 2.

91. Moreover, while the Lenders would now like to recoup their losses through receipt of the Tax Refund, the Credit Agreement was explicit that Tax Refunds did not form part of the Lenders' security.[159] With full knowledge of these terms, the Lenders accepted this arrangement.

92. The Lenders argue that the disclaimer is appropriate in light of "Bread's conduct to date" though the only example provided is that Bread purportedly failed to make adequate disclosure of Sobeys' potential exit. For the reasons set out above, Bread and the Spin Team reasonably believed Sobeys would be renewed or replaced. Regardless, there is no evidentiary basis for the Lenders to claim that they did not receive adequate disclosure. No Lender tendered evidence. The Lenders had ample warning that the loss of a key sponsor was a principal risk of the AIR MILES program and the evidence indicates that stakeholders were told that Sobeys was in the final years of its participation agreement.[160]

93. The Lenders seek a disclaimer of the TMA to unwind a transaction that unfortunately did not work out the way everyone expected. Contrary to their submissions, it is equitable to leave the agreement in place and for the parties to be left with the agreement they bargained for.

iii. The TMA disclaimer causes significant financial hardship to Bread

94. The s. 32(4) factors require a balancing of proposed benefit against detrimental impact.[161] Here, the financial hardship to Bread will be more significant than the benefits to the Lenders. It is patently obvious from a review of the public filings of Bread and any of the Lenders (which include some of the biggest financial institutions in the world, like Bank of America and JP Morgan), that the loss of the Tax Refund will have a disproportionately more significant impact on

[159] Motes Affidavit #1, Exhibit S, s.101 "Excluded Property" sub-definition (k), Bread Responding MR, Tab 2.
[160] Motes Affidavit #1, Exhibits N and O, Bread Responding MR, Tab 2; Cameron Examination, Exhibit 17.
[161] *Re Laurentian University of Sudbury*, 2021 ONSC 3272 at para 44.

Bread than the Lenders. Furthermore, Bread has the most to lose as the Tax Refund is larger than any individual Lenders' claim.[162]

95. Disclaiming the TMA also denies the CRA the opportunity to be made whole if further tax obligations are ordered against LoyaltyOne, as Bread's indemnity obligations will be extinguished in circumstances where neither LoyaltyOne nor the Lenders will pay any additional tax.

iv. The TMA disclaimer was issued in bad faith

96. Section 18.6 of the *CCAA* provides that all parties have a duty to act in good faith, and that the Court may make any order that it considers appropriate where a party fails to do so:

> 18.6 (1) Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.
>
> (2) If the court is satisfied that an interested person fails to act in good faith, on application by an interested person, the court may make any order that it considers appropriate in the circumstances.

97. Good faith, appropriateness, and due diligence are "baseline considerations" that the Court ought to consider in adjudicating disputes in *CCAA* proceedings:

> […] the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority.[163]

98. The TMA disclaimer was sprung on Bread months after the completion of the sale of LoyaltyOne's assets and months after LoyaltyOne had already sought to disclaim a different Spin Transaction document.[164] No attempts to negotiate in good faith or explain the impediment of the TMA to LoyaltyOne's restructuring were made. Instead LoyaltyOne's position was that Bread was undeserving (as a creditor or otherwise) of the Tax Refund and that the sophisticated Lenders should be preferred.

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[162] See, Motes Affidavit #1, Exhibits L and M, Bread Responding MR, Tab 2.
[163] *Century Services Inc. v Canada (Attorney General)*, 2010 SCC 60 at para 70, see also *9354-9186 Québec Inc. v Callidus Capital Corp.*, 2020 SCC 10, para 49.
[164] Motes Affidavit #1 at paras 93 and 94, Bread Responding MR, Tab 2.

99. LoyaltyOne is using the disclaimer provisions in the *CCAA* for an improper purpose: to advantage the Lenders over Bread. This is an abuse of the *CCAA*, which requires that the Court apply special policy considerations.[165] As Doherty J.A. has stated (dissenting in part):

> A debtor company should not be allowed to use the Act for any purpose other than to attempt a legitimate reorganization. **If the purpose of the application is to advantage one creditor over another, to defeat the legitimate interests of creditors, to delay the inevitable failure of the debtor company, or for some other improper purpose, the Court has the means available to it, apart entirely from s. 3 of the Act, to prevent misuse of the Act.** In cases where the debtor company acts in bad faith, the Court may refuse to order a meeting of creditors, it may deny interim protection, it may vary interim protection initially given when the bad faith is shown, or it may refuse to sanction any plan which emanates from the meeting of the creditors. [emphasis added][166]

By proceeding with the TMA Disclaimer, LoyaltyOne has breached its duty of good faith and fair dealing towards Bread.

100. Based on the foregoing, the Court has more than sufficient cause to reject LoyaltyOne's request to disclaim the TMA.

D. Bread is entitled to the Tax Refund

101. The TMA is a valid and binding agreement that should not be disclaimed. The Monitor and LoyaltyOne assert that even if that is the case, Bread is left with nothing but a pre-filing unsecured claim. The Monitor further alleges that the only way Bread can prove otherwise is to prove a trust relationship. These allegations are incorrect.

102. Bread is entitled to the full amount of the Tax Refund (less legal costs) on either one of two bases: i) that Bread has a proprietary interest in the Tax Refund and a constructive trust should be imposed; or ii) a debtor in *CCAA* proceedings is obliged to adhere to an agreement it has attempted and failed to disclaim.

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[165] *Re Dallas/North Group Inc*. 2001 CanLII 3636 (Ont CA) at para 14.
[166] *Elan Corp. et al. v Comiskey*, 1990 CarswellOnt 139, 1 OR (3d) 289, at para 84.

i. A constructive trust is a just remedy in the circumstances

103. In Ontario, a constructive trust will be imposed when the following conditions are satisfied:

(a) The defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his hands;

(b) The assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff;

(c) The plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties; and

(d) There must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case; e.g., the interests of intervening creditors must be protected.[167]

104. As the TMA is governed by Delaware law, the question of whether the agreement creates an equitable obligation via the creation of a principal-agent relationship is a matter of Delaware law. The test generally, and the decision to impose a constructive trust within an insolvency proceeding remains a matter of Ontario law.

(a) LoyaltyOne has an equitable obligation to Bread

105. When the TMA is read as a whole, the clear intent of the parties is to transfer property rights to the Tax Refund to Bread and to designate LoyaltyOne as Bread's agent until the refund crystallizes and is provided to Bread.

106. First, the TMA specifies that Bread is entitled to the Tax Refund and that LoyaltyOne must make payment of the amount (less legal costs) within thirty days.[168] Given the very short time period for payment, the clear implication is that LoyaltyOne may not use the funds for any ulterior purpose, rather the funds belong to Bread and are to be paid promptly to it. This is fundamentally different than a normal debtor-creditor relationship where either the funds: 1) have been provided

[167] *Soulos v Korkontzilas*, 1997 CanLII 346 (SCC), [1997] 2 SCR 217 at para 45.
[168] Motes Affidavit #1, Exhibit T, s. 8(c), Bread Responding MR, Tab 2.

by the creditor for the debtor's use; or 2) belong to the debtor and are being provided to the creditor as consideration for goods or services.

107. Second, prior to receipt of the Tax Refund, LoyaltyOne is to prosecute the Tax Appeal to maximize the Tax Refund and Bread has the right to take over the prosecution if LoyaltyOne is failing to abide by this obligation.[169] In other words, LoyaltyOne has the obligation to act in the manner that maximizes Bread's benefit, and Bread has ultimate control.

108. Third, LoyaltyOne is to receive the amount as agent for Bread. Section 12(b) of the TMA includes the following:

> … notwithstanding anything to the contrary in this Section 12(b), any payment made pursuant to Section 2.08(c) of the Separation Agreement shall instead be treated as if the party required to make a payment of received amounts had received such amounts as agent for the other party…[170]

Section 2.08(c) states as follows:

> As between ADS and Loyalty Ventures (and the members of their respective Groups) all payments received after the Distribution Date by either party (or member of its Group) that relate to a business, asset or Liability of the other party (or member of its Group), shall be held by such party for the use and benefit and at the expense of the party entitled thereto. …[171]

The Monitor characterizes this as a "misdirected payments" provision that is not applicable to the Tax Refund. This is not correct. Pursuant to the TMA, the Tax Refund is an asset of Bread's and is captured by s. 2.08(c). Accordingly, the caveat at s. 12(b) applies and LoyaltyOne accepts the payment as if it was Bread's agent.

109. The opinion of Mr. Solomon is that the TMA imposes an equitable obligation on LoyaltyOne under Delaware law.[172] Under Delaware law an agency relationship is one "which

[169] Motes Affidavit #1, Exhibit T, s. 15(d), Bread Responding MR, Tab 2.
[170] Motes Affidavit #1, Exhibit T, s. 12(b), Bread Responding MR, Tab 2.
[171] Motes Affidavit #1, Exhibit R, s. 2.08(c), Bread Responding MR, Tab 2.
[172] Solomon Report at paras 56-64, Bread Responding MR, Tab 2.

results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act."[173] The TMA creates such a relationship by mandating that LoyaltyOne will act as Bread's agent and provide the Tax Refund proceeds to Bread.

110. As the Monitor correctly points out, tax refunds are not assignable. The agreement is therefore constructed in a way to give Bread possession and control over the tax refund while working within this limitation. LoyaltyOne's expert on Delaware law, Mr. Matthew O'Toole, opines that the existence of a property right under Delaware law must be determined on a case-by-case basis.[174] Here, the TMA is clearly structured so that immediately upon receipt of the Tax Refund by LoyaltyOne it becomes the property of Bread.

(b) The other constructive trust factors are satisfied

111. LoyaltyOne and the Monitor do not appear to dispute that if the Tax Refund is the property of Bread, the second and third conditions have been satisfied. Nor would they have a legitimate basis to do so. If LoyaltyOne fails to provide the Tax Refund to Bread, it would be a clear violation of its role as agent. The need for a proprietary remedy is obvious if Bread's rights are proprietary.

112. Instead, both LoyaltyOne and the Monitor emphasize the fourth factor: whether a constructive trust is unjust in the circumstances. This condition too is easily satisfied.

113. The situation at hand is analogous to the case of *Re Redstone Investment Corporation*.[175] In that case, Maplebrook Capital Corp. ("**Maplebrook**") was a short-term lender to small businesses and Redstone Investment Corporation ("**RIC**") acted as a form of broker. At the outset of a lending relationship, RIC would enter into an assignable promissory note with a borrower and then assign the note to Maplebrook. The lenders continued to make payment to Maplebrook who

[173] Solomon Report at para 59, citing RESTATEMENT (SECOND) OF AGENCY § 1, Bread Responding MR, Tab 3.
[174] Report of Matthew O'Toole dated March 8, 2024 at para 23, L1 Reply MR, Tab 2.
[175] *Redstone Investment Corporation (Re)*, 2015 ONSC 533 ("***Redstone***").

would then remit to RIC. When RIC entered into *CCAA* proceedings, it held over $1 million in funds that were to be remitted to Maplebrook.

114. Morawetz J. (as he then was) held that the imposition of a constructive trust was called for in the circumstances.[176] While the agreement between the RIC and Maplebrook did not expressly invoke trust language or require the segregation of the funds, Morawetz J. held that these elements were not required and that it would in fact be unjust not to impose a trust:

> In my view, if these post-CCAA collections were to form part of RIC's assets, RIC's creditors would receive a windfall; RIC had no beneficial entitlement to these funds, and neither the Receiver nor RIC's creditors can have any higher claim.[177]

115. The same rationale holds here. Not only has LoyaltyOne had no beneficial entitlement to the Tax Refund since November 5, 2021, but its creditors – who by quantum are predominantly the sophisticated lending syndicate – would receive a true windfall. When they provided debt financing to LVI, it was on the express understanding that that the Tax Refund belonged to Bread and would not form part of the Lenders' secured collateral.[178] It cannot be unjust to now enforce the agreed bargain.

116. While the Monitor and LoyaltyOne argue that in the insolvency context constructive trusts should be imposed sparingly, this ignores cases where the Court has held in the insolvency context that a constructive trust is the just outcome.[179] Both the Monitor and LoyaltyOne rely on the recent case of *Kingsett Mortgage Corporation v Stateview Homes*, but this case had the inverse facts. In *Kingsett*, the parties seeking a constructive trust had expressly agreed at an earlier juncture that the company's other lenders would have priority over their interest.[180] Here,

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[176] *Redstone* at paras 68-73.
[177] *Redstone* at para 73.
[178] *Redstone*; *Bonnie Cummings v Peopledge HR Services Inc.* 2013 ONSC 2781 ("***Cummings***").
[179] See e.g., *Redstone*; *Cummings*.
[180] *Kingsett Mortgages Corp et. al. v Stateview Homes et. al.,* 2023 ONSC 2636 at para 5.

it is the Lenders who expressly agreed that the Tax Refund would not form part of their collateral. The fairness of the situation is completely reversed.

117. The Tax Refund belongs to Bread and in the circumstances a constructive trust provides the just outcome.

ii. A debtor cannot breach an agreement it cannot disclaim

118. In the alternative, should this Court decline to impose a constructive trust, it should require LoyaltyOne to comply with its contractual obligations to Bread.

119. If the TMA is held not to transfer the proprietary interest in the Tax Refund, then its structure is most sensibly that of a service relationship. Bread provides ongoing indemnity obligations to LoyaltyOne for pre-spin tax obligations in exchange for the benefit of any pre-spin tax receivables. It is, in effect, an insurance service for LoyaltyOne that limits downside exposure in exchange for consideration. Bread has offered this service since the separation and has provided previous tax reimbursements to LoyaltyOne.[181] Bread is obligated pursuant to paragraph 20 of the Amended and Restated Initial Order to continue offering this service to LoyaltyOne.

120. Accordingly, any payment that becomes due to Bread (i.e., the Tax Refund proceeds) is a post-filing obligation for ongoing services. LoyaltyOne and the Monitor appear to have recognized this when they sought disclaimer of the TMA as disclaiming a contract that only has pre-filing obligations for the insolvent company serves no purpose at all. Even if disclaimed, Bread would continue to have a provable claim and the parties end up back in the same position. The Monitor admits in its factum that the disclaimer serves no economic purpose.[182]

121. As any future payment of the Tax Refund is a post-filing obligation, LoyaltyOne and the Monitor proceeded down the procedurally correct path in the circumstances and sought to

[181] Motes Affidavit #1 at para 80, Bread Responding MR, Tab 2.
[182] Monitor Factum at para 6.

disclaim the agreement. If this Court decides the agreement should not be disclaimed, then it follows that LoyaltyOne cannot elect to breach the agreement and leave Bread with only an unsecured claim against an insolvent company while saddling it with the obligation to indemnify LoyaltyOne for any adverse finding in the Tax Litigation (an obligation Bread is prevented from breaching). As Duggan and Siebrasse wrote for the Insolvency Institute of Canada:

> Refusing disclaimer in effect requires the debtor to specifically perform the contract, even though the counter-party may not have been entitled to specific performance outside bankruptcy. The justification is that, outside bankruptcy, the counterparty can recover damages for the debtor's breach of contract, whereas inside bankruptcy, the counterparty has only a provable claim, which may amount to no more than a few cents on the dollar.[183]

122. To decide otherwise – that a debtor can breach an agreement that it cannot disclaim – would render s. 32 of the CCAA meaningless and purposeless. There would be no practical distinction between agreements that can and cannot be lawfully disclaimed.

123. LoyaltyOne's stated intention is to treat Bread as a pre-filing unsecured creditor if its attempt to disclaim fails. In essence, its position is that even if it loses on the merits it can proceed as if it won. In fact, its position would be better: should LoyaltyOne win the Tax Appeal it would not have an obligation to pay the funds to Bread, but if it lost it could call on Bread's indemnity.

124. Section 11 of the *CCAA* grants this Court the broad and remedial jurisdiction to issue a declaration that the TMA must be enforced. The Court also has such jurisdiction in s. 18.6(2) of the *CCAA* on the basis that if LoyaltyOne breaches the TMA after being prohibited from disclaiming it, then its conduct will constitute callous disregard for the provisions of the *CCAA* and fall well below any baseline considerations of good faith.

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[183] Anthony Duggan and Norma Siebrasse, "The Disclaimer, Affirmation and Assignment of Intellectual Property Licences in Insolvency", *Insolvency Institute of Canada* IIC-ART Vol. 3-8 at footnote 30

125. Parliament chose to place limits on the right of a debtor to disclaim contracts and to make any such disclaimer subject to the supervision of the court. If a debtor can simply breach any contract it is prohibited from disclaiming without consequence, then the disclaimer rules in the *CCAA* are a nullity. The clear implication of the statutory disclaimer provisions in the *CCAA* is that a debtor is required to perform its obligations under executory contracts unless and until those contracts can be validly disclaimed under s. 32 of the *CCAA*. No other interpretation makes sense.

PART V - ORDER REQUESTED

126. Bread requests that the motion of LoyaltyOne and the Monitor be dismissed and requests an order that the TMA is not disclaimed pursuant to the Notice of Disclaimer of LoyaltyOne dated October 27, 2023. Bread further seeks an order either (i) imposing a constructive trust over the Tax Refund, with Bread as the beneficiary; or (ii) declaring that LoyaltyOne is bound by the TMA and is obligated to perform its obligations thereunder. Finally, Bread requests an order for costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of June, 2024.

STIKEMAN ELLIOTT LLP
Lawyers for Bread Financial Holdings, Inc.

Schedule "A"
Spin Transaction Figures

Figure 1: Organization of ADS pre-2019

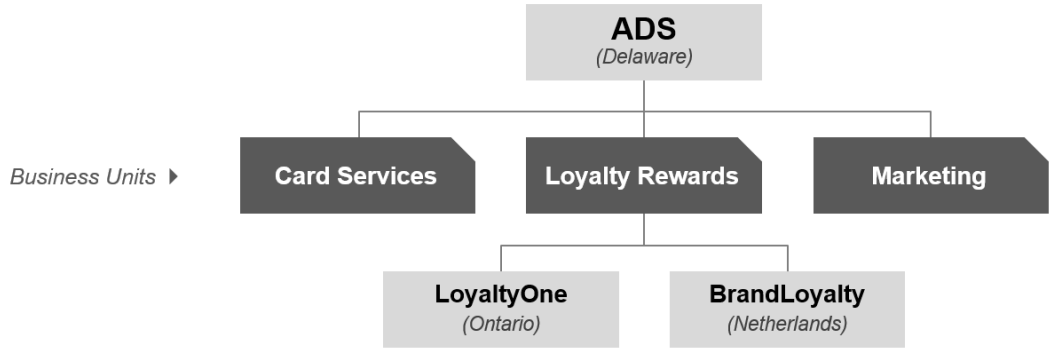


Figure 2: Outcome of ADS "pure play" strategy

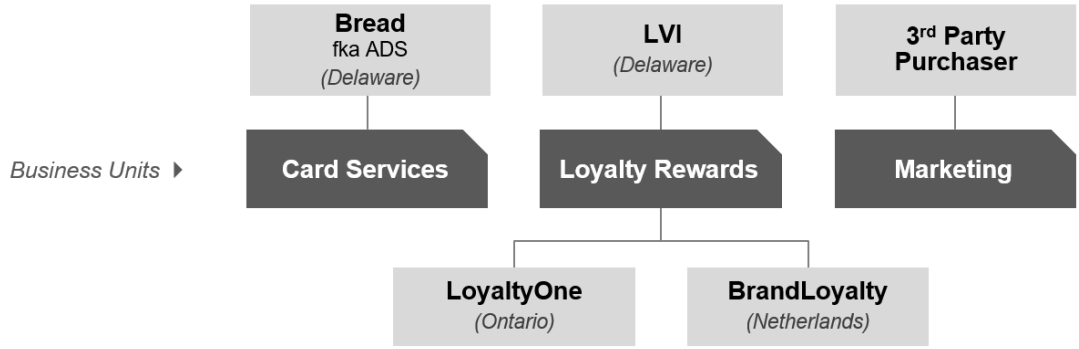
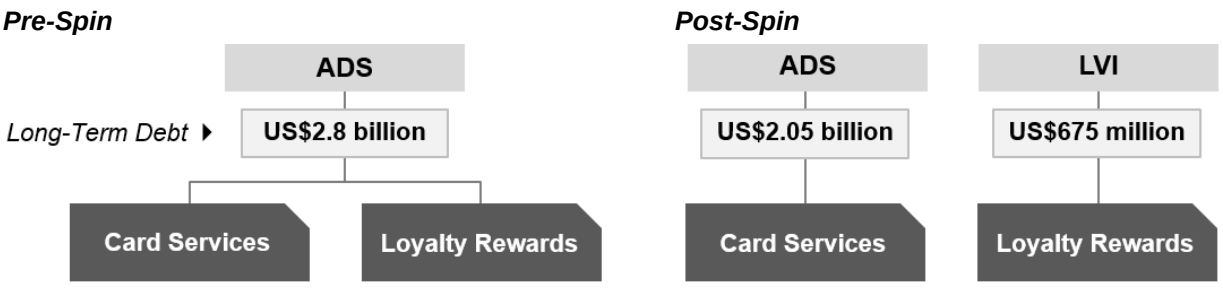


Figure 3: Long-term debt pre and post Spin Transaction



Source: Motes Affidavit #1 at pars 39-41 and 70(d) and 70(h), Bread Responding MR, Tab 2.

SCHEDULE "A"

LIST OF AUTHORITIES

Jurisprudence	
1	*801962 Ontario Inc. v. MacKenzie Trust Co*., 1994 Carswell Ont 6168 OJ No. 2105 (Ont. Gen. Div.)
2	*9354-9186 Québec Inc. v Callidus Capital Corp*., 2020 SCC 10
3	*Bonnie Cummings v. Peopledge HR Services Inc.*, 2013 ONSC 2781
4	*Canada v McLarty*, 2008 SCC 26
5	*Century Services Inc. v Canada (Attorney General)*, 2010 SCC 60
6	*Elan Corp. et al. v. Comiskey*, 1990 CarswellOnt 139, 1 OR (3d) 289
7	*Healy v. Canadian Tire Corp*. 2012 ONSC 77
8	*J.R.K. Car Wash Ltd. v. Gulf Canada Ltd*., 1992 CarswellOnt 765
9	*Kerr v Danier Leather Inc.*, 2007 SCC 44
10	*Kingsett Mortgages Corp et. al. v. Stateview Homes et. al.*, 2023 ONSC 2636
11	*Peoples Department Stores Inc. (Trustee of) v. Wise*, 2004 SCC 68
12	*Re Dallas/North Group Inc*. 2001 CanLII 3636 (Ont CA)
13	*Re Doman Industries et al.,* 2004 BCSC 733
14	*Re Ian Ross McSevney*, 2023 ONSC 5555
15	*Re Laurentian University of Sudbury*, 2021 ONSC 3272
16	*Re Rehman*, 2015 ONSC 188

17	*Re SemCanada Crude Co.*, 2009 ABQB 90
18	*Re Urbancorp Toronto Management Inc.*, 2019 ONCA 757
19	*Redstone Investment Corporation (Re)*, 2015 ONSC 533
20	*Regency Mortgage Corp. v Buchan*, 1984 CarswellBC 1143 (BCSC)
21	*Soulos v. Korkontzilas*, 1997 CanLII 346 (SCC), [1997] 2 SCR 217
22	*Teti and ITET Corp. v Mueller Water Products*, 2015 ONSC 4434
Authorities	
23	Frank Bennett, ed., *Bennett on Bankruptcy*, 25th ed., looseleaf (Toronto: LexisNexis Canada Inc., 2023) at Part IV.
24	Anthony Duggan and Norma Siebrasse, “The Disclaimer, Affirmation and Assignment of Intellectual Property Licences in Insolvency”, *Insolvency Institute of Canada* IIC-ART Vol. 3-8
25	Houlden, Morawetz and Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed. (Toronto: Thomson Reuters, 2023) at §5:502

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY - LAWS

1	*Bankruptcy and Insolvency Act*, RSC 1985, c B-3
2	*Companies' Creditors Arrangement Act*, RSC 1985, c C-36

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 LOYALTYONE, CO.

Court File No. CV-23-00707017-0000

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERICAL LIST
Proceeding Commenced at Toronto

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