Court File No. CV-2300696017-00CL

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 THE APPLICANT / MOVING PARTY
(MOTION RETURNABLE JUNE 13 AND 14, 2024)

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PART I - OVERVIEW

1. On November 5, 2021, Alliance Data Systems Corporation ("ADS"), now known as Bread Financial Holdings, Inc. ("Bread"), implemented a spin-out of its subsidiary, the Applicant LoyaltyOne, Co. ("LoyaltyOne"), and another subsidiary (the "Spin Transaction"). The Spin Transaction stripped LoyaltyOne of certain assets and caused it to suffer severe financial decline.

2. Less than 18 months later, as a direct result of the manner in which Bread structured the Spin Transaction, LoyaltyOne sought and was granted protection under the CCAA.

3. Through a sale and investment solicitation process, LoyaltyOne sold substantially all of its operating assets, including the AIR MILES rewards program it had operated, to affiliates of BMO.

4. LoyaltyOne's remaining assets – which are insufficient to repay its creditors – consist of (i) the undistributed remaining net proceeds from the sale of its assets and cash on hand, all of which is subject to a security interest in favour of its secured creditors, and (ii) a claim against the CRA for reimbursement of certain taxes paid by LoyaltyOne in 2013.

5. Proceedings by LoyaltyOne against the CRA are ongoing (the "Tax Dispute"), with the trial scheduled to begin in September 2024. If successful, LoyaltyOne will receive reimbursement of up to approximately CAD$96 million from the CRA (the "Tax Proceeds").

6. However, Bread seeks to strip LoyaltyOne of its assets yet again, this time by asserting that if LoyaltyOne is successful in the Tax Dispute, it must pay the Tax Proceeds to Bread.[1] Bread's claim is based on provisions in a tax matters agreement (the "TMA") imposed by Bread as part of the Spin Transaction.

7. LoyaltyOne is not now, and has never been, bound to the terms of the TMA. Although the agreement purports to bind "the members of the Loyalty Ventures Group", the TMA was neither signed nor authorized by LoyaltyOne, the signatories to the agreement lacked authority to bind LoyaltyOne, and no consideration was ever provided to LoyaltyOne.

8. Additionally, as set out in the Monitor's factum, even if the TMA was binding, Bread has no provable claim whatsoever with respect to the Tax Proceeds because the TMA is void on the basis that it gives rise to a transfer at undervalue.

9. Out of an abundance of caution, with the support and consent of the Monitor, LoyaltyOne provided Bread with notice of its intention to disclaim or resiliate the TMA under section 32 of the CCAA without prejudice to its position that it is not bound by the TMA. Although Bread objected to the disclaimer, there is no valid basis for that objection.

10. In any event, even if the TMA were binding on LoyaltyOne, which it is not, and whether disclaimed or not, it gives Bread, at most, a provable pre-filing unsecured claim, not a right to cut in front of LoyaltyOne's creditors.

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[1] If LoyaltyOne were required to pay Bread an amount equal to the Tax Proceeds, that amount would not include LoyaltyOne's reasonable costs of pursuing the Tax Dispute: TMA section 8(c), Affidavit of Cynthia Hageman affirmed November 9, 2023 ("Hageman 1") Exhibit A, LoyaltyOne Motion Record dated November 9, 2023 ("L1 MR") Tab 2.

11. Bread's brazen assertion of entitlement is emblematic of its pattern of stripping assets, siphoning cash, and encumbering LoyaltyOne with significant debt on onerous terms, all while providing little or no value in return. The Spin Transaction benefited Bread exclusively while ultimately pushing LoyaltyOne into this CCAA Proceeding. Bread now seeks to take a specific entitlement of LoyaltyOne – and in doing so deprive LoyaltyOne and its creditors of that benefit – without any legal basis whatsoever.

PART II - THE FACTS

A. LoyaltyOne Built an Independent and Successful Business: AIR MILES

12. For three decades, LoyaltyOne operated AIR MILES, one of Canada's first and leading loyalty programs. Through AIR MILES, LoyaltyOne built strong relationships with millions of Canadian consumers enrolled in the program (known as "collectors") and LoyaltyOne's customers (known as "partners" or "sponsors"). When these proceedings began, there were over 10 million active collector accounts and hundreds of partners participating in the AIR MILES program.[2]

13. LoyaltyOne functioned as an independent, wholly-owned subsidiary of ADS. It had its own executive team located in Canada that was responsible for managing day-to-day operations. LoyaltyOne had 750 employees in Canada.[3]

14. Following ADS's decision to divest itself of LoyaltyOne (and other subsidiaries), LoyaltyOne continued to operate independently as a majority-owned subsidiary of Loyalty Ventures Inc. ("LVI"). LVI had no operations of its own and was incorporated only (i) to hold interests in various spun-out subsidiaries previously owned by ADS and (ii) to take on debt that benefitted ADS and ultimately encumbered LoyaltyOne.[4]

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[2] Hageman 1 para. 20, L1 MR Tab 2; Affidavit of Jeffrey Fair affirmed November 9, 2023 ("Fair") para. 11, L1 MR Tab 3.
[3] Hageman 1 para. 21, L1 MR Tab 2; Cross-examination of Cynthia Hageman ("Hageman Cross") Qs. 123-129; Cross-examination of Joseph Motes ("Motes Cross") Qs. 12-14.
[4] Hageman 1 paras. 32, 44, L1 MR Tab 2; Motes Cross Qs. 143-145, 157-159, Exhibits 56, Q, UA No. 6, Tab 1 (p. 6).

15. ADS made minimal contributions to LoyaltyOne's business, but took numerous decisions that negatively affected LoyaltyOne's finances, ultimately leading to this CCAA proceeding.[5]

B. ADS Devised the Spin Transaction to Strip, then Dump, LoyaltyOne

(i) ADS Knew about LoyaltyOne's Major Sponsor Loss in Advance of the Spin

16. Historically, ADS held a portfolio of businesses organized into three primary divisions: (i) a private label credit card and banking business (the "Card Business"); (ii) marketing services (known as "Epsilon"); and (iii) customer loyalty programs, including AIR MILES.[6]

17. In 2018, ADS decided to shift its focus to the Card Business because the ADS board of directors (the "ADS Board") viewed the Card Business as its highest-growth asset. Accordingly, decisions were made to sell Epsilon and the loyalty programs.[7] Epsilon was sold in 2019. Efforts to sell LoyaltyOne and other non-card subsidiaries were paused for a variety of reasons, including the pandemic, but ADS resumed marketing LoyaltyOne for sale in the fall of 2020. It only received six expressions of interest. Several of them "dropped quickly due to [s]ponsor concentration concerns, with BMO and Sobeys' representing nearly [redacted]" of AIR MILES' sponsors.[8]

18. Ultimately, only two highly conditional non-binding bids were made for LoyaltyOne. They required, respectively, no additional sponsor losses and a minimum seven-year contract renewal with Sobeys Inc. ("Sobeys"). Sobeys was the national grocery partner and was the second largest AIR MILES partner when ADS began to market LoyaltyOne for sale.[9]

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[5] Fresh as Amended Affidavit of Cynthia Hageman affirmed April 17, 2024 ("Hageman 2") paras. 6-20, 56-59, Amended Reply Record of LoyaltyOne dated May 3, 2024 ("L1 ARR") Tab 1; Hageman 1 paras. 27, 54-57, L1 MR Tab 2.
[6] Hageman 1 para. 19, L1 MR Tab 2.
[7] Fair paras. 12-13, Exhibit A (p. 17), L1 MR Tab 3; Hageman 1 para. 22, L1 MR Tab 2.
[8] Hageman 1 paras. 19, 22-25, L1 MR Tab 2; Hageman 2 paras. 29-34, L1 ARR Tab 1; Cross-examination of Scott Davidson ("Davidson") Exhibit 23 (p.3); Motes Cross Q. 51; Examination of Blair Cameron ("Cameron") Qs. 20-21.
[9] Hageman 2 paras. 30-33, 40, L1 ARR Tab 1; Davidson Qs. 89-102, Exhibits 21(2), 22. Subsequently, in early January 2021, [redacted] submitted a non-binding proposal to purchase LoyaltyOne "at an enterprise value of [redacted] normalized 2020 EBITDA", meaning that the purchase price was unknown as of the offer date. On cross-examination, Bread's expert confirmed that LoyaltyOne's normalized EBITDA would undoubtedly be lower if [redacted] knew that Sobeys would be withdrawing from the AIR MILES program: Davidson Qs. 547-554, 567-572, Exhibits 23 (p.3), 26.

19. At that time, rumours about Sobeys' potential departure from the AIR MILES program had spread. One interested party described the concern that Sobeys was "looking to do something different" as "very scary for what could be in the coming years", stating that "if Sobeys goes away it's 'game over,' there is no plan B for this business if a major anchor spins out."[10] Another interested party made its bid conditional on [redacted] support as a minority investor, but even [redacted] expressed concerns with the loss of a "major [s]ponsor" and the "impact" of that loss on the sales process.[11]

20. While reviewing and discussing bids, ADS and LoyaltyOne tried but failed to negotiate a waiver of Sobeys' early termination right because ADS knew that Sobeys' potential exercise of that right would impede any efforts to sell LoyaltyOne, as any purchaser would want the assurance of a continuing sponsor relationship with AIR MILES' national grocery sponsor.[12]

21. To make matters worse, in January 2021, Sobeys "relayed its intention" to terminate its relationship with, and withdraw from, the AIR MILES program by the end of 2022. Sobeys' intention to withdraw was initially communicated in a conversation between Michael Medline, President and CEO of Sobeys' parent company, and Charles Horn, a senior executive of ADS. It was then confirmed in e-mail correspondence from Mr. Horn to Mr. Medline, and further confirmed in conversations between Blair Cameron, CEO of LoyaltyOne, and executives at Sobeys.[13] On cross-examination, Bread's affiant, Joseph L. Motes III, who was LoyaltyOne's sole director and a senior executive officer of ADS at the time admitted as follows:

> Q. Sobeys had indicated that its present intention was to leave the program?
>
> A. Yes.[14]

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[10] Cameron Qs. 26-33, Exhibit 2; Davidson Exhibit No. 21(2).
[11] Davidson Exhibits 22, 23 (p. 3).
[12] Motes Cross Qs. 43-49, Exhibit 52 (pp. 2, 5); Cameron Qs. 34-55, 199-200, Exhibits 3, 4, 5, 6; Hageman 2 para. 46, L1 ARR Tab 1; Hageman Cross Qs. 131, 296.
[13] Hageman 2 para. 49, Exhibit D (p. 2), L1 ARR Tab 1; Hageman Cross Exhibit 30; Davidson Exhibit 23 (p.3); Motes Cross Exhibit 53 (p. 19), Exhibit M (p. 2); Cameron Qs. 57-59, 61-68, Exhibits 7, 8.
[14] Motes Cross Q. 104.

22. In light of Sobeys' intention to withdraw, ADS determined that the only way to ensure it could receive value for LoyaltyOne was to divest itself through a spin-out "with no counterparty" (*i.e.* purchaser) so that ADS "would control" the terms and structure for its own benefit.[15] ADS acted quickly to complete the Spin Transaction, before Sobeys could provide formal notice of withdrawal from the AIR MILES program, so that no public or other disclosure would be required.[16]

23. Only two days after Mr. Horn had confirmed his understanding that Sobeys intended to exit the AIR MILES program, ADS prepared a presentation relating to the Spin Transaction, which it called "Project Legacy". That presentation recorded (i) that "Sobey's [*sic*] relayed its intention to terminate by the end of 2022", (ii) that "without Sobey's (2nd largest sponsor), moving forward with [sale] process is unlikely", and (iii) that "[r]eplacement of Sobey's [*sic*]" would be necessary.[17]

24. Shortly thereafter, on January 22, 2021, Mr. Horn reported to the ADS Audit Committee that management had "received notice of Sobey's intent to terminate by the end of 2022, while also requesting significant reductions in its 2021 and 2022 servicing fees" and that "management is identifying options for a new grocery sponsor".[18] When the ADS Audit Committee met on February 16, 2021, development of the Spin Transaction was well underway.[19]

25. In March 2021, Sobeys amended the early termination provision of its agreement with LoyaltyOne. The former provision let Sobeys terminate at its discretion on six months' prior written notice but required Sobeys to first engage in discussions with LoyaltyOne about remaining in the AIR MILES program before giving notice. The provisions were removed in the amendment, which simply provided that the agreement "shall be terminated […] no earlier than July 1, 2022 and no later than February 1, 2023". With that amendment, the departure of Sobeys was no longer

[15] Hageman 2 paras. 33-34, Exhibit D (p. 2), L1 ARR Tab 1; Motes Cross UA No. 6, Tab 1 (p. 4).
[16] Hageman 2 paras. 50-51, Exhibit D (p. 8), L1 ARR Tab 1; Davidson Exhibit 23 (p. 3).
[17] Hageman 2 para. 26, Exhibit D (pp. 2, 8), L1 ARR Tab 1.
[18] Davidson Exhibit 23 (p. 3).
[19] Motes Cross Qs. 109-110, Exhibit 54; Motes Cross UA No. 6, Tab 1 (p. 2).

contingent, but a contractual certainty – which ADS never communicated to its financial advisors, lenders, or rating agencies.[20]

26. Although Sobeys had made its decision, LoyaltyOne was "desperate" to keep Sobeys affiliated with AIR MILES in some way. It dedicated resources to developing various unsuccessful "Hail Mary" options to try to maintain the partnership due to the "significant impact", "dramatic downward effect", and "material downdraft" that a Sobeys departure would – and ultimately did – have on LoyaltyOne.[21]

(ii) ADS Entirely Disregarded LoyaltyOne's Interests in Effecting the Spin

27. The Spin Transaction was implemented in November 2021, seven months after its announcement, through a series of agreements made between ADS and LVI, including the TMA. Those agreements resulted in:

(a) the spin-off of LVI as an independent public company that would hold certain of ADS's subsidiaries (the "Spun-Out Subsidiaries"), including LoyaltyOne;

(b) LVI entering into a loan agreement to borrow significant funds as term loans, but then transferring substantially all of the term loan proceeds to ADS at closing of the Spin Transaction to improve ADS's financial position;

(c) LoyaltyOne "guaranteeing" the loan to LVI;[22]

(d) the distribution of about 80% of LVI's shares to ADS's shareholders, with ADS retaining approximately 19% of LVI's outstanding shares; and

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[20] Davidson Exhibit G; Hageman 2 paras. 42-46, L1 ARR Tab 1; Motes Cross Exhibit L; Cameron Exhibit 15.
[21] Cameron Qs. 249-255, 287-290, 404-407; Davidson Qs. 34-44, 51-53, 102.
[22] Under the Credit Agreement, LoyaltyOne was, "as primary obligor and not as surety", responsible for "the prompt payment of the Obligations in full when due". In addition, if payments were not made when due, LoyaltyOne was obligated to "promptly pay the same, without any demand or notice whatsoever, and that in the case of any extension of time of payment or renewal of any of the Obligations, the same will be promptly paid in full when due": Credit Agreement, Article XI, section 11.01, Hageman 1 Exhibit P, L1 MR Tab 2; Harington Qs. 141-144.

(e) ADS's ostensible claim under the TMA to payment in an amount equal to the Tax Proceeds received by LoyaltyOne (notwithstanding that LoyaltyOne did not sign, authorize, or accept the TMA).[23]

28. Although ADS told investors that the Spin Transaction would position LoyaltyOne "for future growth",[24] ADS took no steps to ensure that growth – while aware of Sobeys' imminent departure and the very significant negative impact that departure would have (and did have) on LoyaltyOne after the Spin Transaction. Instead, ADS used its complete control over the Spin Transaction to sacrifice LoyaltyOne to improve its own financial position.

29. ADS retained sophisticated counsel at Davis Polk & Wardell LLP to structure the Spin Transaction and prepare the required agreements. Neither LVI nor LoyaltyOne were represented by independent counsel.[25]

30. Shortly after the Spin Transaction was announced, ADS created a "SpinCo Team" composed of legacy ADS employees who had historically been responsible for merger and acquisition transactions. Mr. Horn was the point person and leader of the SpinCo Team. By the time the SpinCo Team had been established, he had retired as a senior executive of ADS, but was recruited from retirement due to his experience and knowledge of the rewards business. Aside from Mr. Horn, the members of the SpinCo Team were current employees of ADS.[26]

31. To ensure that ADS would retain control over the terms of the Spin Transaction, the SpinCo Team reported to ADS's Chief Financial Officer and provided updates to the ADS Audit Committee.[27] At the outset, the SpinCo Team took several steps to initiate and organize the Spin

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[23] Hageman 1 paras. 9, 28, 46-52, L1 MR Tab 2; Hageman 2 paras. 35-37, L1 ARR Tab 1.
[24] Fair Exhibit B, L1 MR Tab 3.
[25] Hageman 1 para. 30, L1 MR Tab 2.
[26] Hageman 1 para. 31, L1 MR Tab 2; Hageman 2 para. 72, L1 ARR Tab 1; Motes Cross Qs. 15-24; Hageman Cross Q. 55.
[27] Motes Cross Qs. 208-213, Exhibit 56. The ADS Audit Committee and ADS Board also received updates prior to the constitution of the SpinCo Team: Motes Cross Exhibits 54, 55; Hageman Cross Exhibit 31.

Transaction, including by arranging for the incorporation of LVI to act as parent company for the Spun-Out Subsidiaries. However, shortly after the creation of the SpinCo Team, the relationship between that team and ADS executives deteriorated.[28]

32. Throughout the summer and fall of 2021, the SpinCo Team raised concerns and objected to unreasonable and unfair terms proposed by ADS which would result in LVI (and ultimately LoyaltyOne) taking on significant debt for the benefit of ADS while ADS reaped the benefit of millions of dollars in cash sweeps in the form of dividends from LoyaltyOne.[29]

33. The SpinCo Team told ADS executives that the terms of the Spin Transaction were one-sided, expressed concerns with ADS's decision to increase the amount of debt that would be foisted on the Spun-Out Subsidiaries, and recommended reducing the amount of cash that ADS proposed to take from the Spun-Out Subsidiaries.[30] In response, ADS:

(a) excluded members of the SpinCo Team from meetings about the Spin Transaction;

(b) told the SpinCo Team to "line up" behind the terms of the Spin Transaction proposed by ADS, including the higher debt and cash sweep amounts, and that supporting ADS's terms would be beneficial to their compensation; and

(c) told the SpinCo Team that ADS was relying on Bank of America to "deliver ADS targets" because if the debt raise were only USD$600 million, there was "a high probability [the] transaction [would] not occur".[31]

34. ADS recognized that its approach and design "puts the [S]pinco [T]eam in a tough spot",[32] but nevertheless pressed on with the transaction it wanted, on its terms, because the "sole

[28] Hageman 2 paras. 74-77, L1 ARR Tab 1; Hageman 1 paras. 32, 35-52, L1 MR Tab 2; Hageman Cross Q. 53.
[29] Hageman 1 paras. 35-52, 74-77, L1 MR Tab 2.
[30] Hageman 1 paras. 35-40, L1 MR Tab 2.
[31] Hageman 1 paras. 35-47, Exhibits H, I, J, K, L, M, L1 MR Tab 2; Motes Cross Q. 230.
[32] Hageman 1 Exhibit H, L1 MR Tab 2.

purpose of Spinco [*i.e.* LVI] was to maximize funds raised" for ADS.[33] Those terms continued to evolve as ADS tried to force more and more debt onto the Spun-Out Subsidiaries and take more and more cash from the Spun-Out Subsidiaries.[34]

35. In parallel, ADS implemented another asset-stripping initiative by modifying the initial terms of the TMA. The original purpose of the TMA was to preserve the tax-free nature of the Spin Transaction for United States federal income tax purposes and to eliminate related tax risk to ADS. Even in fulfilling that purpose – which is common in spin transactions – the TMA was more restrictive than necessary.[35]

36. The initial draft TMA did not contain terms entitling ADS to claim payments from LoyaltyOne following receipt by LoyaltyOne of tax refunds. However, shortly after the SpinCo Team began to raise objections with the terms of the Spin Transaction, ADS revised the TMA to include a provision entitling it to claim payments from LoyaltyOne in an amount equal to the Tax Proceeds. ADS imposed that change (i) despite the concerns expressed by the SpinCo Team and (ii) without any tax or business rationale, apart from wanting to take for its own benefit more money from LoyaltyOne as part of the Spin Transaction.[36]

37. By disregarding the concerns of the SpinCo Team and forcing the terms of the Spin Transaction on LoyaltyOne, ADS prevented the SpinCo Team from having any meaningful input or impact. Moreover, Mr. Motes as sole director of LoyaltyOne provided no meaningful check on ADS's power or control over the Spin Transaction. Rather, the ADS Board and senior executives, including Mr. Motes, remained singularly focused on ADS's interests throughout the development and execution of the Spin Transaction, ignoring the adverse impact on LoyaltyOne.[37]

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[33] Motes Cross Q. 143-145, Exhibit Q, UA No. 6, Tab 1 (p. 6); Hageman 1 Exhibit H, L1 MR Tab 2.
[34] Hageman 1 paras. 38-44, Exhibits J, K, L, L1 MR Tab 2.
[35] Fair paras. 18-19, L1 MR Tab 3.
[36] Fair paras. 18-20, Exhibit C, L1 MR Tab 3.
[37] Hageman 2 paras. 74-77, L1 ARR Tab 1.

38. ADS's approach to the Spin Transaction led members of the SpinCo Team to characterize the discussions as "David negotiating against Goliath".[38] ADS was so focused on shovelling debt and expenses into the Spun-Out Subsidiaries that the SpinCo Team found it necessary to expressly caution ADS against doing so to "avoid the appearance of a 'dumping ground' which investors would see in the Form 10 and which the [S]pinco [T]eam would need to 'sell-through' during the debt raise and the equity roadshow".[39]

(iii) ADS Misrepresented LoyaltyOne's Post-Spin Debt Capacity

39. ADS controlled the information provided to financial advisors, lenders, and credit ratings agencies. The information provided was incomplete and inaccurate.[40]

40. ADS retained Ernst & Young LLP ("EY") in late August 2021 to prepare a report to assess the amount of debt that LoyaltyOne could bear following the Spin Transaction (the "EY Report"). EY rushed to complete its report for presentation to the ADS Audit Committee.[41] Since the EY Report was an after-thought, it suffered from material deficiencies that impacted its conclusions about the amount of debt LoyaltyOne could carry following the Spin Transaction.

41. First, EY was never told about Sobeys' withdrawal from the AIR MILES program despite ADS's knowledge of that imminent calamity. ADS acknowledged to EY that the Sobeys contract was "key", but misstated the Sobeys withdrawal as a contract "that expire[s]…in February 2023" that could lead to "concerns around renewal risk" instead of the definite exit from the AIR MILES program which (i) had been communicated to ADS seven months earlier, (ii) was memorialized in the March amendment, and (iii) would take effect as early as 2022.[42] As summarized above, the loss of the program's second-largest sponsor was the key catalyst driving the Spin

[38] Hageman 1 para. 35, L1 MR Tab 2.
[39] Hageman 1 Exhibit H, L1 MR Tab 2.
[40] Hageman 2 paras. 54, 56-59, 62-63, 70, 74-77, L1 ARR Tab 1; Hageman 1 Exhibit I, L1 MR Tab 2; Motes Cross Exhibit T, UA No. 12; Cameron Q. 95.
[41] Hageman 2 paras. 56, 68, L1 ARR Tab 1; Motes Cross Exhibits 57, R, S, 58.
[42] Hageman 2 paras. 56-59, Exhibit R, L1 ARR Tab 1; Motes Cross Exhibits 57, R, S (p. 14).

Transaction because ADS knew that LoyaltyOne's value and revenue stream would be severely and adversely impacted by that loss.[43] Without that information – which ADS failed to provide – EY could not possibly prepare an accurate assessment of LoyaltyOne's post-spin debt-capacity.

42. Second, none of the ADS executives meaningfully considered (or directed others at ADS to consider) the actual cash LoyaltyOne needed to successfully run the business. Nor did they ask any questions of anyone on the SpinCo Team or the LoyaltyOne management to obtain that information. As a result, none of that information was communicated to EY and nobody from EY conducted independent due diligence to obtain that information.[44]

43. Third, EY's recommendation of "a TLB debt raise of $650-$700mm at 5-5.5% coupon and 1% amortization, along with a cash sweep of $100-$125mm, to land at total proceeds to ADS of $750mm+" was based on preliminary terms for the Spin Transaction. Those terms did not attract enough market interest. They were therefore amended significantly, and became more onerous for LVI and LoyaltyOne, but the EY Report was never updated to reflect those material changes.[45]

44. The EY Report ultimately concluded that the "debt level in the $650mm to $700mm range" was a reasonable debt load and would "provide an acceptable total dividend amount to RemainCo" (*i.e.* ADS). Aside from confirming the transparent strategy of loading up LVI and LoyaltyOne with debt for the benefit of a massive payment to ADS, EY's conclusion was based on incorrect and incomplete information.[46]

45. ADS similarly controlled the information provided to the lenders and credit ratings agencies to ensure "the right outcome", being the "optimal outcome" for ADS.[47] When ADS's CFO

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[43] Hageman 2 paras. 30-32, 51, Exhibit D (pp. 2, 8), L1 ARR Tab 1; Davidson Exhibit 23 (p. 3); Motes Cross Qs. 104-105, Exhibit 53 (p. 19).
[44] Hageman 2 para. 62, L1 ARR Tab 1; Hageman 1 Exhibit H, L1 MR Tab 2.
[45] Hageman 2 paras. 62-63, Exhibit B, L1 ARR Tab 1.
[46] Hageman 2 paras. 57-58, 62-63, L1 ARR Tab 1; Motes Cross Exhibit 59; Affidavit of Joseph L. Motes affirmed February 9, 2024 ("Motes 1") Exhibits D (p. 8), I, Bread Motion Record dated February 14, 2024 ("Bread MR") Tab 2.
[47] Hageman 2 paras. 59, 74-75, L1 ARR Tab 1; Motes Cross Exhibit Q.

met with Bank of America, he acknowledged that the "circumstances are uncommon" with "key people from ADS leading the deal" who would then be "named new execs at [LVI]".[48] Although the CFO would remain at ADS following the Spin Transaction, he established himself as "firmly the client and in-charge",[49] requested a sensitivity analysis be prepared in connection with the "Spinco debt, cash, and value of [ADS's] 19% stock post spin", and emphasized that it was "ultimately [an] ADS board decision to determine optimal outcome for Alliance Data".[50]

C. The Spin Transaction Caused LoyaltyOne to Suffer Complete Financial Collapse

(i) The Spin Transaction Caused Immediate and Severe Harm to LoyaltyOne

46. Despite the many concerns raised by the SpinCo Team, the information concealed from EY, the lenders, and credit rating agencies, and the fundamental one-sidedness of the Spin Transaction, the ADS Board approved the Spin Transaction on October 13, 2021.

47. The final agreements implementing the Spin Transaction were executed by ADS and LVI on November 3 and 5, 2021, including the Credit Agreement, pursuant to which (i) LVI agreed to borrow USD$675 million in term loans with a revolving facility for working capital and other corporate purposes of an additional USD$150 million and (ii) LoyaltyOne executed a guarantee of the indebtedness under the Credit Agreement.[51] ADS also received USD$650 million of the proceeds of the Credit Agreement and an additional USD$100 million (of which USD$68 million was from LoyaltyOne) in a cash sweep from the Spun-Out Subsidiaries. These funds were used by ADS to reduce its own debt and improve its leverage, resulting in an improved balance sheet.[52]

48. In connection with the Spin Transaction and at the direction of the ADS Board, Mr. Motes caused LoyaltyOne to declare and pay a dividend of CAD$88.3 million to ADS (including the cost

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[48] Motes Cross Exhibit Q.
[49] Motes Cross Exhibit Q.
[50] Motes Cross Exhibit Q.
[51] Hageman 1 paras. 48-49, Exhibit P, L1 MR Tab 2; Credit Agreement, Article XI, section 11.01, Hageman 1 Exhibit P, L1 MR Tab 2.
[52] Hageman 1 para. 53, L1 MR Tab 2.

of the tax LoyaltyOne was required to pay to the CRA arising from the dividend on behalf of ADS).[53] That dividend followed on the heels of a CAD$107.5 million dividend that ADS caused LoyaltyOne to pay a few months earlier to cover an indemnification liability which ADS had agreed to relating to the sale of its marketing business, which was entirely unrelated to LoyaltyOne.[54]

49. Although ADS publicly described the Spin Transaction as a win-win for itself, LVI, and the Spun-Out Subsidiaries, it was very much a win for ADS only. ADS's own lawyers expressed their surprise at the minimal resources ADS had dedicated to completing the Spin Transaction and establishing the infrastructure of LVI and the Spun-Out Subsidiaries.[55]

50. Not surprisingly, the deterioration of LoyaltyOne's financial circumstances accelerated following Sobeys' inevitable formal notice of withdrawal from the AIR MILES program in June 2022. The consequences of that loss (which were apparent to ADS at the time it structured the Spin Transaction) negatively impacted LoyaltyOne's operations and cashflow. Other significant AIR MILES sponsors then used Sobeys' announcement as leverage to extract more favourable pricing terms, which led to an annual cashflow decrease of at least USD$40 million per year.[56]

51. Despite the decrease in cashflow, LoyaltyOne was obliged to make dividend payments to LVI to service its USD$675M in debt and corporate costs since LVI had no operations of its own.[57]

52. Only six months after Sobeys' departure and the resulting cash crunch, LVI notified LoyaltyOne that it lacked sufficient funds to make a required payment pursuant to the Credit Agreement in the amount of USD$3 million. LVI sent similar notices to LoyaltyOne on January 25 and January 27, 2023 in respect of additional amounts owing under the Credit Agreement, which it was unable to pay. LoyaltyOne paid all of those amounts pursuant to its "guarantee" in

[53] Hageman 1 para. 47, L1 MR Tab 2.
[54] Hageman 1 paras. 23-24, 26-27, L1 MR Tab 2.
[55] Hageman 1 para. 35, L1 MR Tab 2; Fair Exhibit B, L1 MR Tab 3.
[56] Hageman 2 paras. 38-39, 53-55, L1 ARR Tab 1.
[57] Hageman 2 para. 23, L1 ARR Tab 1; Harington Cross Qs. 141-144, 405-421; Davidson Qs. 615-618.

connection with the Credit Agreement.[58] By March 9, 2023, the day before LoyaltyOne commenced this CCAA proceeding, the lenders were owed approximately USD$656 million under the Credit Agreement.[59] The lenders are still owed more than USD$600 million. Regardless of the outcome of the Tax Dispute and this motion, they will never be paid in full.

(ii) Bread Now Seeks to Inflict Further Harm through a "Tax Matters Agreement"

53. The TMA purports to provide ADS with a contingent contractual claim to payment of up to approximately CAD$96 million from LoyaltyOne (*i.e*. an amount equal to the Tax Proceeds):

> (c) A Company (a "Tax Refund Recipient") receiving (or realizing) a Tax Refund to which another Company is entitled hereunder shall pay over **the amount** of such Tax Refund (including interest received from the relevant Taxing Authority, but net of any Taxes imposed with respect to such Tax Refund or the payment of such Tax Refund and any other reasonable costs associated therewith incurred after the Distribution Time, including third-party expenses incurred after the Distribution Time in connection with the application for or any Tax Proceeding with respect to such Tax Refund) within thirty (30) days of receipt thereof (or from the due date for payment of any Tax reduced thereby) […][60]

54. ADS's claim to that payment from LoyaltyOne seeks to capitalize on the circumstances ADS engineered by trying to take more money from an already financially devastated LoyaltyOne. However, LoyaltyOne did not sign the TMA. Nor did it authorize anyone to sign on its behalf or take any of the necessary corporate steps to authorize it.[61]

PART III - LAW & ARGUMENT

55. The only issue on this motion is whether the TMA binds LoyaltyOne. It does not. It was never binding or is void. But even if it were enforceable, the disclaimer of the TMA should be approved. In any event, leaving aside enforceability and disclaimer, at the very highest, Bread cannot have anything more than a provable pre-filing unsecured claim.

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[58] Hageman 1 paras. 54-56, L1 MR Tab 2.
[59] Hageman 1 para. 61, L1 MR Tab 2.
[60] TMA section 8(c), Hageman 1 Exhibit A, L1 MR Tab 2. [emphasis added]
[61] Hageman 1 paras. 13, 51-52, L1 MR Tab 2; Fair paras. 21-22, L1 MR Tab 3.

A. The Tax Matters Agreement (TMA) Does Not Bind LoyaltyOne

56. LoyaltyOne did not sign the TMA or authorize anyone else to sign the TMA on its behalf. It was signed by ADS and LVI only. Jeffrey Fair, who had no authority to sign the TMA for LoyaltyOne, signed the TMA on behalf of ADS and also signed the TMA in his capacity as Senior Vice President of LVI, ostensibly for "Loyalty Ventures on its own behalf and on behalf of the members of the Loyalty Ventures Group". The "Loyalty Ventures Group" was defined in a separate agreement – which LoyaltyOne also did not sign – to include LoyaltyOne.[62]

57. Bread's insistence that it is entitled to payment from LoyaltyOne pursuant to an agreement that LoyaltyOne did not sign, authorize, or accept ignores that LVI and LoyaltyOne are separate legal entities and must be treated as such as a matter of law. There is nothing inherent in their parent-subsidiary relationship that gives LVI (the parent) the authority to bind LoyaltyOne (the subsidiary) to a contract.[63]

58. Bread's position not only requires this court to ignore the legal reality that LoyaltyOne and LVI are two separate and distinct corporations, but also the practical reality that LoyaltyOne and LVI existed as two separate and distinct corporations. LVI had no control over the operations of LoyaltyOne (which had operated for three decades before LVI was incorporated). It was simply a corporate vehicle used by ADS to implement the Spin Transaction by holding interests in the Spun-Out Subsidiaries and to provide funding for ADS.[64]

59. Moreover, even if the TMA was binding on LoyaltyOne, it amounted to a transfer at undervalue contrary to the CCAA. It is therefore void and unenforceable. Accordingly, Bread does

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[62] Hageman 1 paras. 13, 51-52, L1 MR Tab 2; Fair paras. 21-22, L1 MR Tab 3; TMA, Hageman 1 Exhibit A, L1 MR Tab 2; Separation and Distribution Agreement, section 1.01, Schedule 1.01(i), Hageman 1 Exhibit O, L1 MR Tab 2.
[63] A subsidiary is only bound by a contract it expressly signs, authorizes another entity to sign on its behalf, or ratifies – none of which occurred here: *1229-1605 Québec Inc. v. R.*, 1997 CanLII 26437 (TCC), paras. 49-52, 55; *Yaiguaje v. Chevron Corporation*, 2018 ONCA 472, paras. 57, 61, 68, 70, 76-77; *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.,* 1996 CanLII 7979 (ON SC), paras. 13-14.
[64] Hageman 1 paras. 21, 29, 32, 44, L1 MR Tab 2; Motes Cross Qs. 143-145, Exhibit Q, UA No. 6, Tab 1 (p. 6).

not have a provable prefiling unsecured claim. LoyaltyOne adopts the Monitor's submissions in their entirety in that regard and does not repeat that argument here.

B. In the Alternative, LoyaltyOne's Disclaimer of the TMA Should Be Approved

60. On October 27, 2023, LoyaltyOne provided Bread with notice of its intention to disclaim or resiliate the TMA pursuant to section 32 of the CCAA, without prejudice to LoyaltyOne's position that the TMA is not binding and/or otherwise void and unenforceable.[65]

61. If this court determines that the TMA is binding on LoyaltyOne and not void, it should approve LoyaltyOne's disclaimer of the TMA. If this court approves the disclaimer, Bread only has a provable pre-filing unsecured claim – and nothing more.

62. The objective of section 32 is to take into account the interests of all creditors to ensure an equitable result dictated by the guiding principles of the CCAA, including maximizing available recoveries for stakeholders.[66] Section 32(4) sets out a non-exhaustive list of factors that the court must consider when deciding whether to make an order that an agreement not be disclaimed:

(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.[67]

63. Each of those factors supports LoyaltyOne's disclaimer of the TMA. First, the Monitor has approved the disclaimer because the amount of the Tax Proceeds is a "significant remaining

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[65] Hageman 1 Exhibit S, L1 MR Tab 2.
[66] CCAA, section 32; *Target Canada Co. (Re)*, 2015 ONSC 1028 ("*Target*"), para. 24; *Timminco Limited (Re)*, 2012 ONSC 4471 ("*Timminco*"), para. 62; *Laurentian University of Sudbury*, 2021 ONSC 3272 ("*Laurentian*"), paras. 44, 46.
[67] CCAA, section 32(4).

source of potential recovery for LoyaltyOne's creditors".[68] Second, the disclaimer would "enhance the prospects of a viable compromise or arrangement" that may be made in respect of LoyaltyOne. This factor has been interpreted broadly:

> […] the scope of the CCAA and the various protections it affords debtor companies should not be interpreted so narrowly as to apply only in the context of a restructuring process leading to a plan arrangement for a newly restructured entity […] In my view, the section 32 (4)(b) requirement that a disclaimer of an agreement with a debtor company enhance the prospects of a viable compromise or arrangement being made should be interpreted with a view to the expanded scope of the statute. In this particular case, the overriding objective of the CCAA must be to ensure that creditors in the same classification are treated equitably. Such treatment will enhance the prospects of a viable compromise or arrangement being made in respect of the debtor company.[69]

64. The court can approve a disclaimer in the absence of a filed plan in the context of an "inevitable" liquidation because doing so would allow the applicant to "focus on an asset realization and a maximization of return to creditors on a timely basis."[70] The disclaimer of the TMA is "advantageous and beneficial" to LoyaltyOne because, if LoyaltyOne receives the Tax Proceeds, those proceeds will maximize the potential recovery available to LoyaltyOne's entire body of creditors and "creditors in the same classification" will be treated equitably.[71]

65. Finally, Bread will not suffer significant financial hardship if the TMA is disclaimed. Bread's evidence is that it "has suffered *loss* and *hardship* arising from the *insolvency* of LVI and LoyaltyOne."[72] In that regard, it is in the same position as every other creditor of LoyaltyOne.

66. Significant financial hardship is a high threshold. It requires that the party opposing the disclaimer provide evidence of its "individual characteristics and circumstances" in connection with its claim of financial hardship. No objective test of financial hardship exists because imposing

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[68] CCAA, section 32(4)(a); Fifth Report of the Monitor dated November 23, 2023, section 6, paras. 1-4.
[69] CCAA, section 32(4)(b); *Timminco*, paras. 51-53. [emphasis added]
[70] *Target*, paras. 22-24; *Aveos Fleet Performance Inc./Aveos Fleet performance aéronautique inc. (Arrangement relatif à)*, 2012 QCCS 6796, paras. 47-49, 52.
[71] *Timminco*, paras. 53-54; *Target*, paras. 24-25.
[72] Motes 1 paras. 98-99, Bread MR Tab 2. [emphasis added]

that type of test would "make it difficult [for] debtor companies to disclaim large contracts regardless of the financial ability of the counter parties to absorb the resultant losses [and] such a result would be contrary to the purpose [and] principles of the CCAA."[73]

67. Bread does not, and cannot, seriously argue that it has met the high threshold of establishing significant financial hardship. Nor has it provided any evidence of its "individual characteristics and circumstances"[74] to demonstrate that it is unable to absorb the loss of a contingent contractual claim to an amount equal to the Tax Proceeds.[75]

68. Instead, Bread relies on (i) the loss of value in connection with its 19% interest in LVI, (ii) the rental payments it must make as guarantor of LoyaltyOne's lease of corporate offices in Toronto, and (iii) a vague assertion that the disclaimer will result in "further financial hardship" to Bread – with no explanation of the "individual characteristics and circumstances" giving rise to that hardship – because it gave up the LoyaltyOne business on the basis that the transaction would be effected pursuant to the agreements.[76]

69. These are not examples of "significant financial hardship", let alone significant financial hardship caused by disclaimer of the TMA. Rather, to the extent they are examples of anything, they are examples of loss giving rise to a provable claim pursuant to section 32(7) of the CCAA.[77]

C. In Any Event, Bread's TMA Claim to Payment Is Pre-Filing and Unsecured at Best

70. Even if the TMA is binding on LoyaltyOne and the court does not approve the disclaimer, Bread has only a pre-filing unsecured claim to an amount equal to the Tax Proceeds.

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[73] *Timminco*, para. 60.
[74] *Timminco*, para. 60; *Target*, para. 26.
[75] In Bread's Quarterly Report for the period ended March 31, 2024, Bread reported cash and cash equivalents on its balance sheet totalling USD$3.789 billion (p. 25). In the investor presentation accompanying the Quarterly Report, Bread reported "financial highlights" including USD$1 billion (p. 6) in revenue.
[76] Motes 1 paras. 98-100, Bread MR Tab 2.
[77] CCAA, section 32(7).

71. Bread asserts that the TMA creates an agency relationship between "Loyalty Ventures Group, as agent, on behalf of the Bread Group, as principal",[78] in respect of an amount equal to the Tax Proceeds. It further claims that if Loyalty Ventures Group fails to pay that money to Bread, it is entitled to the remedy of a constructive trust imposed over the Tax Proceeds. Based on the terms of the TMA and the law applicable to the imposition of constructive trusts, Bread is wrong.

72. Delaware law, which applies to the interpretation of the TMA, requires the TMA to be interpreted in accordance with its plain meaning.[79] It is plain and apparent from the TMA (i) that the proviso relating to "agency" does not apply to the Tax Proceeds and (ii) that even if it did, the proviso does not actually create an agency relationship. Additionally, and in any event, there is absolutely no basis for a claim of constructive trust.

(i) The "Agency" Proviso of the TMA Does Not Apply

73. Section 8 of the TMA sets out the ostensible basis for Bread's claim to a payment from LoyaltyOne in an amount equal to the Tax Proceeds: "ADS shall be entitled to all Tax Refunds[80] received by any member of the ADS Group or any member of the Loyalty Ventures Group, including but not limited to Tax Refunds resulting from the matters set forth on Schedule C."[81]

74. Schedule "C" includes reimbursements from taxation authorities from "LoyaltyOne, Co. income tax payments made in order to appeal and litigate the 2013 tax assessments (and additional assessments in 2014-2016) issued by both Canadian federal and provincial tax authorities" (*i.e.*, the Tax Proceeds).[82] The treatment of payments, including payments in the amount of the Tax Proceeds, is set out in section 12(b) of the TMA, which provides as follows:

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[78] Affidavit of Steve D. Solomon affirmed February 9, 2024, Exhibit A ("Solomon Report") para. 56, Bread MR Tab 3.
[79] Affidavit of Matthew O'Toole affirmed March 8, 2024, Exhibit A ("O'Toole Report") paras. 12-15, L1 ARR Tab 2.
[80] Defined as "any refund, reimbursement, offset, credit, or other similar benefit in respect of Taxes (including any overpayment of Taxes that can be refunded or, alternatively, applied against other Taxes payable), including any interest paid on or with respect to such refund of Taxes": TMA section 1, Hageman 1 Exhibit A, L1 MR Tab 2.
[81] TMA section 8(a), Hageman 1 Exhibit A, L1 MR Tab 2.
[82] Hageman 1 para. 11, L1 MR Tab 2; Motes 1 Exhibit T (Schedule C), Bread MR Tab 2.

> **[The Usual Rule:]** To the extent permitted by Applicable Tax Law, any payment made by ADS or any member of the ADS Group to Loyalty Ventures or any member of the Loyalty Ventures Group, or by Loyalty Ventures or any member of the Loyalty Ventures Group to ADS or any member of the ADS Group, pursuant to this Agreement, the Separation Agreement or any other Distribution Document that relates to Taxable periods (or portions thereof) ending on or before the Distribution Date shall be treated by the parties hereto for all Tax purposes as a distribution by Loyalty Ventures to ADS, or a capital contribution from ADS to Loyalty Ventures, as the case may be;
>
> **[The Proviso:]** provided, however, that notwithstanding anything to the contrary in this Section 12(b), any payment made pursuant to Section 2.08(c) of the Separation [and Distribution] 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.[83]

75. It is clear from this plain wording of section 12(b) of the TMA that the proviso will only apply, bringing the amount of the Tax Proceeds within the meaning of "as if the party required to make a payment of received amounts had received such amounts as agent for the other party", if the amount of the Tax Proceeds must be paid pursuant to section 2.08(c) of the Separation and Distribution Agreement. That agreement, in turn, provides 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.[84]

76. It is clear from the plain wording of section 2.08(c) of the Separation and Distribution Agreement that it does not apply, resulting in the application of the usual rule set out in section 12(b) of the TMA, as opposed to the proviso.

77. Section 2.08(c) only applies to payments "received after the Distribution Date [by one party] that relate to a business, asset, or Liability" of the other party. Payment of an amount equal to the Tax Proceeds is not a payment of that nature – it is not something received by one party

[83] TMA section 12(b), Hageman 1 Exhibit A, L1 MR Tab 2. [emphasis added]
[84] Separation and Distribution Agreement section 2.08(c), Hageman 1 Exhibit O, L1 MR Tab 2. [emphasis added]

that relates to the other. Rather, it is a payment received by one party after the Distribution Date that relates to the business, asset, or Liability of that same party – LoyaltyOne.[85]

78. Accordingly, the amount of the Tax Proceeds can only be treated as a monetary distribution by the Loyalty Ventures Group to the Bread Group under section 12(b) of the TMA, not as funds received in connection with any agency relationship.

(ii) Additionally, No Agency Relationship Exists under the TMA

79. Even if the Tax Proceeds were captured by section 2.08(c) of the Separation and Distribution Agreement such that the proviso in section 12(b) of the TMA applied, no agency relationship is actually established under that term of the agreement.

80. Section 12(b) of the TMA does not provide that a payment made pursuant to section 2.08(c) of the Separation and Distribution Agreement is received by the party required to make a payment of received amounts **as agent** for the other party. Rather, it provides that "any payment made pursuant to Section 2.08(c) of the Separation [and Distribution] 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." [86]

81. The plain wording of section 12(b) of the TMA, and in particular the words "as if", confirm that an agency relationship is not in fact created. Instead, the rough fiction of such a relationship is instituted which contrasts sharply with an actual agency relationship – there would be no need to treat payments "as if" they were received by an agent if they actually were received by an agent. This is consistent with ADS's understanding of the TMA at the time: that it "sets up a contractual

[85] Motes Cross Q. 243; Hageman 1 para. 6, L1 MR Tab 2; Fair paras. 7-10, L1 MR Tab 3.
[86] TMA section 12(b), Hageman 1 Exhibit A, L1 MR Tab 2 [emphasis added]; Separation and Distribution Agreement, section 2.08(c), Hageman 1, Exhibit O, L1 MR Tab 2.

payable to ADS for the tax receivable", being a "contractual asset for the amount expected to be received and a contractual liability for the amount expected to pay".[87]

(iii) Finally, No Constructive Trust Can Be Imposed

82. Even if Bread's interpretation of the TMA is correct, and the TMA creates an agency relationship whereby the Loyalty Ventures Group holds an amount equivalent to the Tax Proceeds as agent for the Bread Group, that relationship does not give rise to the creation of a trust over that money in favour of Bread. Agency and trust are distinct concepts. To establish a trust, Bread must show either that the TMA creates an express trust over the Tax Proceeds or that it meets the test to impose a remedial constructive trust over the Tax Proceeds. Bread can do neither.

83. First, the TMA does not create an express trust, and Bread cannot seriously argue that it does. The TMA does not contain any "definite, explicit and unequivocal words" nor are there "circumstances so revealing and compelling as to manifest the intention [to create a trust] with all reasonable certainty" creating a trust over the Tax Proceeds in favour of Bread.[88]

84. Second, Bread has not established any entitlement to the equitable remedy of a constructive trust. The Delaware Courts have recognized that claims for equitable remedies are outside of the choice of law provisions contained in a contract, which means this court should apply Canadian law in considering Bread's demand for a constructive trust.[89]

85. The Supreme Court of Canada has set out certain conditions that must be met before a constructive trust will be imposed. Among those is that there must be no factors which would render the imposition of a constructive trust unjust in all the circumstances of the case.[90] That

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[87] Motes Cross Exhibit 62. [emphasis added]
[88] O'Toole Report para. 20, L1 ARR Tab 2.
[89] Affidavit of Christopher Samis affirmed March 8, 2024, Exhibit A ("Samis Report") paras. 7-8, L1 ARR Tab 3.
[90] *Kingsett Mortgage Corp et al. v. Stateview Homes et al*., 2023 ONSC 2636 ("*Kingsett*"), para. 70.

factor is given "significant weight" in insolvency proceedings, specifically with respect to the "impact [of a constructive trust] on other creditors":

> If a constructive trust is ordered in respect of a bankrupt, there is an obvious impact on the other creditors of the bankrupt's estate. Accordingly, the use of a constructive trust as a remedy in insolvency proceedings is used "only in the most extraordinary cases" and the test to show that there is a "constructive trust in a bankruptcy setting is high:" *Creditfinance*, at paras. 32 and 33. In the instant case, there will likely not be enough funds for the secured creditors. Accordingly, any remedial constructive trust awarded by this court would upset the priority scheme under the BIA and effectively take funds from the secured creditors to pay certain unsecured creditors.[91]

86. Even if Delaware law applies, the result is the same. Under Delaware law, a constructive trust is an equitable remedy. It is not designed to effect the intention of the parties. It is imposed by construction of the court if one party has acted fraudulently, unfairly, or unconscionably and, as a result, "is enriched at the expense of another to whom he or she owes some duty".[92]

87. The Delaware Bankruptcy Court has recognized that the imposition of a constructive trust is a "drastic equitable remedy" requiring a "clear and convincing" standard that may only be imposed if doing so "does not disturb the equal treatment of similar creditors".[93] That is largely because the courts recognize that a constructive trust imposed by the court "can wreak […] havoc with the priority system ordained by the Bankruptcy Code".[94]

88. Bread has not met the high threshold needed to show that this is an extraordinary case requiring the imposition of a constructive trust giving it an equitable proprietary interest in the Tax Proceeds to the exclusion of all other creditors, especially given that it is not entitled to the Tax

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[91] *Kingsett*, paras. 71-72 [emphasis added]; *Hollinger Inc. (Re)*, 2013 ONSC 5431, paras. 32-34, 39-42 (leave to appeal denied: *Hollinger Inc. (Re)*, 2014 ONCA 282, para. 5); *Bellatrix Exploration Ltd. (Re)*, 2020 ABQB 809, paras. 77-78, 88, 98 (leave to appeal denied: *Bellatrix Exploration Ltd. (Re)*, 2021 ABCA 85).
[92] Samis Report para. 6, L1 ARR Tab 3.
[93] Samis Report para. 7, L1 ARR Tab 3.
[94] Samis Report para. 7, L1 ARR Tab 3.

Proceeds themselves under the TMA but instead only has a pre-filing unsecured claim in an equivalent amount.

PART IV - CONCLUSION & ORDER REQUESTED

89. Bread's insistence that it is entitled to the Tax Proceeds is a final attempt to strip LoyaltyOne of cash, without regard to the impact on LoyaltyOne and its creditors. Bread ignored LoyaltyOne's financial circumstances at the time of the Spin Transaction, choosing to dump more and more debt, and take more and more cash, pushing LoyaltyOne into these CCAA proceedings. Now, Bread is trying to further capitalize on the circumstances it created by using the TMA it devised to effectively jump in front of LoyaltyOne's creditors without basis in fact or law.

90. LoyaltyOne requests an order that the TMA is not binding on LoyaltyOne and that LoyaltyOne is not required to pay the Tax Proceeds or an amount equal to the Tax Proceeds to Bread or any member of the Bread Group. However, if the TMA is found to have been binding, LoyaltyOne requests an order that Bread has no provable claim against LoyaltyOne on the basis that the TMA gives rise to a transfer at undervalue and is therefore void.

91. In the alternative, LoyaltyOne requests an order approving its disclaimer of the TMA pursuant to section 32 of the CCAA and dismissing Bread's motion. In the further alternative, LoyaltyOne requests an order that Bread's claim to an amount equal to the Tax Proceeds is a provable pre-filing unsecured claim.

92. Finally, LoyaltyOne requests an order for costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 28th day of May, 2024.

CASSELS BROCK & BLACKWELL LLP

SCHEDULE "A"

LIST OF AUTHORITIES

1. *1229-1605 Québec Inc. v. R.*, 1997 CanLII 26437 (TCC)
2. *Aveos Fleet Performance Inc./Aveos Fleet performance aéronautique inc. (Arrangement relatif à),* 2012 QCCS 6796
3. *Bellatrix Exploration Ltd. (Re)*, 2020 ABQB 809
4. *Bellatrix Exploration Ltd. (Re)*, 2021 ABCA 85
5. *Hollinger Inc. (Re)*, 2013 ONSC 5431
6. *Hollinger Inc. (Re)*, 2014 ONCA 282
7. *Kingsett Mortgage Corp et al. v. Stateview Homes et al*., 2023 ONSC 2636
8. *Laurentian University of Sudbury*, 2021 ONSC 3272
9. *Target Canada Co. (Re)*, 2015 ONSC 1028
10. *Timminco Limited (Re)*, 2012 ONSC 4471
11. *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.*, 1996 CanLII 7979 (ON SC)
12. *Yaiguaje v. Chevron Corporation*, 2018 ONCA 472

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY - LAWS

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

Disclaimer or resiliation of agreements

32 (1) Subject to subsections (2) and (3), a debtor company may — on notice given in the prescribed form and manner to the other parties to the agreement and the monitor — disclaim or resiliate any agreement to which the company is a party on the day on which proceedings commence under this Act. The company may not give notice unless the monitor approves the proposed disclaimer or resiliation.

Court may prohibit disclaimer or resiliation

(2) Within 15 days after the day on which the company gives notice under subsection (1), a party to the agreement may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement is not to be disclaimed or resiliated.

Court-ordered disclaimer or resiliation

(3) If the monitor does not approve the proposed disclaimer or resiliation, the company may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement be disclaimed or resiliated.

Factors to be considered

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

(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.

Date of disclaimer or resiliation

(5) An agreement is disclaimed or resiliated

(a) if no application is made under subsection (2), on the day that is 30 days after the day on which the company gives notice under subsection (1);

(b) if the court dismisses the application made under subsection (2), on the day that is 30 days after the day on which the company gives notice under subsection (1) or on any later day fixed by the court; or

(c) if the court orders that the agreement is disclaimed or resiliated under subsection (3), on the day that is 30 days after the day on which the company gives notice or on any later day fixed by the court.

Intellectual property

(6) If the company has granted a right to use intellectual property to a party to an agreement, the disclaimer or resiliation does not affect the party's right to use the intellectual property — including the party's right to enforce an exclusive use — during the term of the agreement, including any period for which the party extends the agreement as of right, as long as the party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

Loss related to disclaimer or resiliation

(7) If an agreement is disclaimed or resiliated, a party to the agreement who suffers a loss in relation to the disclaimer or resiliation is considered to have a provable claim.

Reasons for disclaimer or resiliation

(8) A company shall, on request by a party to the agreement, provide in writing the reasons for the proposed disclaimer or resiliation within five days after the day on which the party requests them.

Exceptions

(9) This section does not apply in respect of

(a) an eligible financial contract;

(b) a collective agreement;

(c) a financing agreement if the company is the borrower; or

(d) a lease of real property or of an immovable if the company is the lessor.

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

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.

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT
TORONTO

FACTUM OF THE APPLICANT / MOVING PARTY
(MOTION RETURNABLE JUNE 13 AND 14, 2024)

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