

**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.

(the "**Applicant**")

**MOTION RECORD
(SETTLEMENT AUTHORIZATION)**

September 16, 2024

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**ONTARIO
SUPERIOR COURT OF JUSTICE
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(the "**Applicant**")

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(as of September 13, 2024)

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INDEX

Tab	Description
1	Notice of Motion, dated September 16, 2024
2	Draft Order

TAB 1

**ONTARIO
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IN THE MATTER OF THE *COMPANIES' CREDITORS
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(the "**Applicant**")

**NOTICE OF MOTION
(SETTLEMENT AUTHORIZATION)**
(returnable September 26, 2024)

The Applicant will make a Motion before the Honourable Justice Conway of the Ontario Superior Court of Justice (Commercial List) (the "**Court**") on Thursday, September 26, 2024 at 9:30 a.m., or as soon after that time as the Motion can be heard.

PROPOSED METHOD OF HEARING: The motion is to be heard

- In writing under subrule 37.12.1(1) because it is
[insert on consent, unopposed or made without notice];
- In writing as an opposed motion under subrule 37.12.1(4);
- In person;
- By telephone conference;
- By video conference.

THE MOTION IS FOR

- (a) An order (the "**Settlement Authorization Order**") substantially in the form attached at Tab 2 of the Applicant's Motion Record,

- (i) approving the Consent to Judgment and Minutes of Settlement (as defined below) between the Applicant and His Majesty the King in connection with the proceeding pending before the Tax Court of Canada (the “**Tax Court**”) (2020-1038(IT)G) (the “**Tax Dispute**”) in the form attached as an Appendix (the “**Appendix**”) to the Eighth Report of the Monitor, to be filed (the “**Eighth Report**”) with any such minor amendments as may be approved by the Court and, subject to entry by the Tax Court of an order consistent with the Consent to Judgment, directing the Applicant and His Majesty the King to comply with the terms thereof, the Minutes of Settlement and the Consent to Judgment; and
 - (ii) authorizing, empowering and directing KSV Restructuring Inc., in its capacity as Monitor of the Applicant (the “**Monitor**”), *nunc pro tunc*, to cause the Applicant to enter into the Consent to Judgment and Minutes of Settlement and do those things necessary to give effect to (i) above; and
- (b) such further and other relief as to this Court may deem just.

THE GROUNDS FOR THE MOTION ARE

Background

- (a) On June 1, 2023, the Applicant closed a transaction with Bank of Montreal (“**BMO**”) to sell substantially all of its business and operations to affiliates of BMO pursuant to an asset purchase agreement approved by this Court on May 12, 2023 (the “**Sale Transaction**”);

- (b) pursuant to an Ancillary Relief Order granted by this Court on May 12, 2023 (the “**Ancillary Relief Order**”), upon closing of the Sale Transaction, the Applicant’s directors and officers were deemed to have resigned (other than certain officers of the Applicant who remained employed by the Applicant upon closing but later became employees of BMO) and the Monitor was authorized and empowered to exercise any powers which may be properly exercised by a board of directors or any officers of the Applicant;
- (c) pursuant to paragraph 5(f) of the Ancillary Relief Order, the Monitor requires the consent of certain of the Applicant’s secured lenders or further Order of this Court to cause the Applicant to settle or compromise any proceedings instituted with respect to the Applicant, including the Tax Dispute;
- (d) the Tax Dispute relates to relief sought by the Applicant in the Tax Court to appeal a reassessment that was issued by the Minister of National Revenue in respect of the Applicant’s taxation year ending December 31, 2013 on the basis that the Applicant correctly computed reserves for that taxation year. A trial in respect of the Tax Dispute was scheduled to begin on September 9, 2024;
- (e) As the parties were preparing for trial, the Canada Revenue Agency (“**CRA**”) approached the Applicant with an offer to resolve the Tax Dispute that provides that CRA will agree entirely with the Applicant’s position. The agreement as ultimately negotiated between the parties is reflected in a consent to judgment (the “**Consent to Judgment**”) and related minutes of settlement (the “**Minutes of Settlement**”) the terms of which are set out in the Appendix attached to the Monitor’s Eighth Report;

- (f) the Minutes of Settlement are subject to this Court approving same and the Consent to Judgment (the “**Settlement Authorization Order**”);
- (g) the effect of the Consent to Judgment and Minutes of Settlement is that the CRA will agree to reassess the Applicant’s 2013 tax return on the very basis sought by the Applicant in the Tax Dispute, without costs;
- (h) the Minutes of Settlement and Consent to Judgment mean that the Applicant will be entirely successful on the Tax Dispute without the attendant risks (and additional costs) of litigating this issue. The Applicant would be compromising its rights to seek costs against CRA should the Applicant be successful at trial, however the Applicant understands that it is customary for tax cases to be settled without costs at the Tax Court and costs are discretionary in any event. Furthermore, if CRA is successful in reducing the amount of the Applicant’s reserve claim by even \$1, in light of the offer made by CRA the Tax Court rules provide that the court could use that factor as a reason not to award costs to the Applicant and could lead to the Applicant being responsible to pay costs to CRA;
- (i) in the circumstances, and given that the Consent to Judgment represents a complete victory for the Applicant on the Tax Dispute, the Applicant and the Monitor have determined to agree to the Consent to Judgment and Minutes of Settlement, subject to this Court’s approval;
- (j) the Applicant and the Monitor kept key stakeholders (including Bread Financial Holdings Inc. (“**Bread**”) and the Applicant’s secured lenders) apprised on a regular basis of all material developments in the Tax Dispute and consulted extensively with those stakeholders on the various drafts of the Consent to Judgment and

Minutes of Settlement received and negotiations with CRA over the month of August;

- (k) the Monitor is supportive of the Applicant entering into the Consent to Judgment and Minutes of Settlement with CRA, and is of the view that the settlement of the Tax Dispute on the terms described therein is in the best interests of the Applicant and all of its stakeholders;
- (l) on September 3, 2024 (being the date scheduled for a pre-hearing conference in the Tax Dispute), the Applicant and His Majesty the King appeared before the Tax Court to update the court on the settlement reached by the parties and to seek an adjournment of the trial while the Applicant brought a motion before this Court to seek approval of the Consent to Judgment and Minutes of Settlement. Subject to this Court granting the Settlement Authorization Order, it is anticipated that the Tax Court will grant an order resolving the Tax Dispute in favour of the Applicant on the terms provided in the Consent to Judgment shortly after informing the Tax Court that the Settlement Authorization Order has been granted. The parties are required to come back to the Tax Court on or prior to October 4, 2024;
- (m) on July 10, 2024, this Court made an endorsement (the “**TMA Litigation Endorsement**”) in connection with motions brought by the Applicant and the Monitor on the one hand, and Bread on the other, in which the Court, among other things:
 - (i) determined that the Applicant is a party to the Tax Matters Agreement dated November 5, 2021 (the “**TMA**”) between Bread and Loyalty Ventures

Inc. (“LVI”) (the Applicant’s indirect parent holding company) and that a disclaimer of the TMA was not permitted;¹ and

- (ii) did not grant Bread’s request for a constructive trust or proprietary claim over proceeds (if any) received by the Applicant in connection with the Tax Dispute (the “**Tax Proceeds**”) and found that it was premature to address Bread’s request for an order directing the Applicant to comply with the TMA;
- (n) on July 31, 2024 the Applicant and the Monitor filed a motion for leave to appeal certain aspects of the order to be made pursuant to the TMA Litigation Endorsement;
- (o) as a result of the Consent to Judgment, it is the Applicant’s expectation that a refund will be payable to the Applicant for the 2013 taxation year and that CRA will reassess applicable pre-filing taxation years subsequent to 2013 in a consistent manner. To the extent any post-2013 consequential assessments result in an overpayment of tax for a particular taxation year which would result in a net refund, such refunds should also be payable to the Applicant;
- (p) in May of 2024 CRA advised the Applicant, the Monitor and Bread that, to the extent the Applicant is entitled to a tax refund for the 2013 taxation year, CRA may seek to set-off such refund (and other amounts owing to the Applicant) against amounts owing, if any, by the Applicant to CRA (the “**Setoff Claims**”),² subject to obtaining the consent of the Applicant and the Monitor or further order of the Court;

¹ The TMA purports to provide Bread with the right to claim for payment of certain tax proceeds.

² As described in more detail in section 4.0 the Seventh Report of the Monitor dated June 10, 2024.

- (q) CRA's position on the amount of Tax Proceeds (and amounts for subsequent pre-filing years) payable to the Applicant is presently unclear including as it relates to the effect of any alleged Setoff Claims on such amounts;
- (r) given the potential for Setoff Claims as asserted by CRA and their assurances that they would seek consent of the Applicant and the Monitor or further order of this Court should they attempt to set off against the Tax Proceeds (and/or other amounts), the order being sought on this motion provides that it is without prejudice to the right, if any, of CRA to seek by further order of this Court to set-off amounts owing to the Applicant against amounts that are alleged to be owing to CRA by the Applicant, and the right of the Applicant and any other party in interest (including for greater certainty the Applicant's secured lenders and/or Bread) to oppose such set-off;
- (s) provided the Settlement Authorization Order is granted and after an order is received from the Tax Court consistent with the Consent to Judgment, the Applicant intends to work with the CRA and the Applicant's key stakeholders (including its secured lenders and Bread) to determine the quantum of the Tax Proceeds owing as a result of the Settlement Reassessment (as defined in the Minutes of Settlement) and any other amounts payable to the Applicant for related reassessments for tax years subsequent to 2013;
- (t) if CRA asserts Setoff Claims, those claims, and the ability of CRA to effect a setoff, may need to be addressed by this Court to determine the amounts, if any (including any Tax Proceeds and/or other amounts), to be received by the Applicant in respect of such reassessments and the Applicant and the other parties in interest reserve all rights with respect to any alleged Setoff Claims; and

Other Grounds

- (u) in addition to the other grounds discussed in this Notice of Motion, the Applicant relies on:
 - (i) the provisions of the CCAA, including section 11, and the inherent and equitable jurisdiction of this Honourable Court;
 - (ii) rules 1.04, 1.05, 2.03, 3.02, 16 and 37 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended, and section 137 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended; and
 - (iii) such further and other grounds as the lawyers may advise.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the Motion:

- (a) The Eighth Report and the appendices attached thereto; and
- (b) such further and other evidence as the lawyers may advise and this Court may permit.

September 16, 2024

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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-23-00696017-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

PROCEEDING COMMENCED AT
TORONTO

**NOTICE OF MOTION
(SETTLEMENT AUTHORIZATION)**

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TAB 2

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

THE HONOURABLE) THURSDAY, THE 26th
)
JUSTICE CONWAY) DAY OF SEPTEMBER, 2024

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.

(the "**Applicant**")

SETTLEMENT AUTHORIZATION ORDER

THIS MOTION made by the Applicant, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"), for an order, *inter alia*, (i) approving the Consent to Judgment by the Applicant and His Majesty the King (the "**Consent to Judgment**") and the Minutes of Settlement between the Applicant and His Majesty the King (the "**Minutes of Settlement**"), all in connection with the proceedings pending before the Tax Court of Canada (2020-1038(IT)G) (the "**Tax Dispute**") and in the form attached as Appendix [●] to the Eighth Report of the Monitor, dated September ●, 2024 (the "**Eighth Report**") and directing the Applicant and His Majesty the King to comply with the terms thereof; (ii) authorizing, empowering and directing KSV Restructuring Inc., in its capacity as Monitor of the Applicant (the "**Monitor**"), *nunc pro tunc*, to cause the Applicant to enter into the Minutes of Settlement and do those things necessary to give effect to (i) above; and (iii) granting certain related relief, was heard this day by Zoom videoconference.

ON READING the Notice of Motion of the Applicant, the Eighth Report, filed, and on hearing the submissions of counsel for the Applicant, counsel for the Monitor, counsel for the Consenting Stakeholders, counsel to His Majesty the King, counsel to Bread Financial Holdings

Inc. and such other counsel as were present, no one else appearing although duly served as appears from the affidavit of service of [●] sworn September ●, 2024, filed.

SERVICE AND DEFINITIONS

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

2. **THIS COURT ORDERS AND DECLARES** that all terms not otherwise defined herein shall have the meaning ascribed to them in the Amended and Restated Initial Order dated March 20, 2023 or the Eighth Report, as applicable.

CONSENT TO JUDGMENT AND MINUTES OF SETTLEMENT

3. **THIS COURT ORDERS** that the Consent to Judgment and Minutes of Settlement are hereby approved with any such minor amendments as may be approved by the Court, and, subject to entry by the Tax Court of an order consistent with the Consent to Judgment, the Applicant and His Majesty the King are directed to comply with the terms thereof, the Minutes of Settlement and the Consent to Judgment.

4. **THIS COURT ORDERS** that pursuant to paragraph 5(f) of the Ancillary Relief Order of this Court made in this proceeding, the Monitor is hereby authorized, empowered and directed, *nunc pro tunc*, to cause the Applicant to do those things necessary to enter into the Minutes of Settlement and Consent to Judgment and to give effect to paragraph 3 of this order.

5. **THIS COURT ORDERS** that this order is without prejudice to the right, if any, of Canada Revenue Agency (“**CRA**”) to seek by further order of this Court to set-off amounts owing to the Applicant by CRA against amounts that are asserted to be owing to CRA by the Applicant, and the right of the Applicant and any other party in interest (including for greater certainty the Applicant’s secured lenders and/or Bread) to oppose such set-off.

GENERAL

6. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give

effect to this Order and to assist the Applicant, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicant and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicant and the Monitor and their respective agents in carrying out the terms of this Order.

7. **THIS COURT ORDERS** that the Applicant and the Monitor be at liberty and are each hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order.

8. **THIS COURT ORDERS** that this Order and all of its provisions are effective as of 12:01 a.m. Toronto time on the date of this Order.

Conway, J.

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-23-00696017-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

PROCEEDING COMMENCED AT
TORONTO

SETTLEMENT AUTHORIZATION ORDER

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**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

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TORONTO

**MOTION RECORD
(SETTLEMENT AUTHORIZATION)**

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