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COURT FILE NUMBER	2301-08305
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, RSC 1985, c C-36, as amended AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF WALLACE & CAREY INC., LOUDON BROS LIMITED, and CAREY MANAGEMENT INC.
APPLICANT	KSV RESTRUCTURING INC., in its capacity as Court-appointed Monitor of Wallace & Carey Inc., Loudon Bros Limited and Carey Management Inc.
RESPONDENTS	DIGIFLEX INFORMATION SYSTEMS INC. and MOHAMAD ZÄHED MARDUKHI
DOCUMENT	BENCH BRIEF OF KSV RESTRUCTURING INC., in its capacity as Court-appointed Monitor of Wallace & Carey Inc., Loudon Bros Limited and Carey Management Inc.
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**Cassels Brock & Blackwell LLP** 3810, Bankers Hall West 888 3 Street SW Calgary, AB T2P 5C5 **Attention: Jeffrey Oliver** P: 403.351.2921 E: *joliver@cassels.com* File No.: 54670-3

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I. INTRODUCTION

1. This brief is filed in support of an application (the "**Application**") by KSV Restructuring Inc. in its capacity as Court-appointed Monitor (in such capacity, the "**Monitor**") of Wallace & Carey Inc. ("**Wallace & Carey**"), Loudon Bros Limited ("**Loudon Bros**"), and Carey Management Inc. ("**CMI**", and together with Wallace & Carey and Loudon Bros, the "**Companies**"), for an order (the "**Order**"), among other things:

   (a) if necessary, abridging the time for service of this Application and the supporting fourteenth report of the Monitor, dated December 13, 2024 (the "**Fourteenth Report**") and declaring service to be good and sufficient;

   (b) declaring that DigiFlex Information Systems Inc.'s ("**DigiFlex**") purported termination, price increases and all other amendments to the DigiFlex Agreements (as defined in the Fourteenth Report) and any other agreement for services between DigiFlex and the Companies are in breach of paragraphs 18 and 19 of the Amended and Restated Initial Order pronounced June 30, 2023 (the "**ARIO**") and of no force and effect;

   (c) requiring DigiFlex to continue to provide the Companies with services and software on the terms and in the manner prescribed by the DigiFlex Agreements, and at an annual rate that shall not exceed $290,093.70, representing 103.5% of the 2024 rates (the "**Allowable Rate Increase**"), unless otherwise agreed to by DigiFlex, the Companies and the Monitor in writing;

   (d) restraining DigiFlex and Mohamad Zahed Mardukhi ("**Mardukhi**"), or any other parties on direction from DigiFlex or Mardukhi, from terminating, amending or otherwise interfering with the terms of the DigiFlex Agreements and the services provided thereunder; and

   (e) ordering DigiFlex and Mardukhi, jointly and severally, to pay the Monitor's costs of this application on a solicitor and own client, full indemnity basis in the amount of $35,000.

2. DigiFlex is a software provider located that is registered in Alberta pursuant to the Alberta *Business Corporations Act*. Its sole director and shareholder is Mardukhi.[1]

3. The enterprise resource planning software licenced to Wallace & Carey under the DigiFlex Agreements (the "**DigiFlex Software**") is integral to its operations as it is utilized for all aspects of Wallace & Carey's operations including, distribution, financial reporting, and business management. If Wallace & Carey lost access to the DigiFlex Software, it would not be able to continue to operate,

[1] Fourteenth Report of the Monitor dated December 13, 2024 [the "**Fourteenth Report**"], para 1.0.9.

making it impossible for it to service, among others, its largest customer, which is 7-Eleven Canada Inc. ("**7-Eleven**").

4. DigiFlex is seeking to increase the annual fees payable pursuant to the DigiFlex Agreements by approximately 300.5% over the fee increases permitted under the DigiFlex Agreements, which increases are tied to certain consumer price indices ("**CPI**").[2] If such excessive amounts are not paid, DigiFlex will terminate various services under the DigiFlex Agreements, effective January 1, 2025. DigiFlex has refused to negotiate these issues with the Monitor, and even said that it would proceed to terminate its support, maintenance and helpdesk services on January 1, 2025 "…regardless of the court outcome."[3]

5. The actions of DigiFlex and Mardukhi are clearly and manifestly contrary to the ARIO. Urgent relief from this Court is required to prevent the significant and detrimental impact that DigiFlex's actions would have on Wallace & Carey and its stakeholders.

6. Capitalized terms not otherwise defined herein shall have the same meaning ascribed to them in the Application or the Fourteenth Report, as applicable.

II. FACTS

A. Background

7. CMI is an Alberta corporation and the sole shareholder of Wallace & Carey, which is the sole shareholder of Loudon Bros.[4] Wallace & Carey is an Alberta corporation that is extra-provincially registered to conduct business in most provinces and territories in Canada.[5] Loudon Bros, located in Thunder Bay, Ontario, is an Ontario corporation that is wholly owned by Wallace & Carey, which, until late 2023, operated as Wallace & Carey's Northwestern Ontario branch.[6] As part of the downsizing of their businesses during these proceedings, Wallace & Carey discontinued the Loudon Bros business and realized on all of its assets.

8. On June 22, 2023, the Companies obtained protection from their creditors under the *Companies Creditors Arrangement Act,* RSC 1985, c. C-36 (the "**CCAA**"),[7] pursuant to an Initial Order of the

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[2] *Ibid*, paras 1.0.10 & 4.0.4.
[3] *Ibid*, para 4.0.15.
[4] Twelfth Report of the Monitor dated August 13, 2024 ["**Twelfth Report**"], para 2.0.1.
[5] *Ibid*, para 2.0.2.
[6] *Ibid*, para 2.0.3.
[7] *Companies' Creditors Arrangement Act,* RSC 1985, c C-36 [***CCAA***] [Tab 1].

Court of King's Bench of Alberta (the "**Court**") (the "**Initial Order**"). The ARIO was pronounced on June 30, 2023.

9. Pursuant to an order issued by the Court on August 23, 2023, the Companies carried out a sale and investment solicitation process that resulted in a transaction (the "**Transaction**") between the Companies and 7-Eleven that was approved by the Court on November 17, 2023 pursuant to an approval and vesting order (the "**Transaction Approval and Vesting Order**") and other orders (together with the Transaction Approval and Vesting Order, the "**Transaction Orders**").[8]

10. Pursuant to the Transaction Orders, the Court among other things:[9]

    (a) approved a sale of certain of the Companies' property, assets and undertakings to 7-Eleven;

    (b) approved a transition services agreement (the "**TSA**") among CMI, Wallace & Carey, the Monitor and 7-Eleven, as more fully discussed in the Sixth Report of the Monitor dated November 8, 2023; and

    (c) appointed KSV as receiver of all of the assets, undertakings, and properties of certain subsidiaries of CMI.

11. Wallace & Carey is 7-Eleven's largest distributor. Wallace & Carey continues to carry on day-to-day business during these proceedings. Pursuant to the TSA, 7-Eleven is responsible to fund substantially all of Wallace & Carey's operational costs during the within proceedings, including employee costs, real property and personal property leases and other contracts, as well as certain of the fees and costs of the Monitor, its counsel, and the Companies' counsel. The term of the TSA is 15 months and nine months for the Western Business and the Eastern Business (both as defined in the TSA), respectively, from November 21, 2023 (i.e., the Effective Date of the TSA), subject in each case to two 90-day extensions that are available to 7-Eleven.[10]

12. 7-Eleven carries on business across Canada. Servicing 7-Eleven's business is a large and complex undertaking. It requires that Wallace & Carey have a workforce of approximately 450 full-time employees to service 7-Eleven stores located from British Columbia to Ontario.[11]

[8] SISP Order granted by the Honourable Justice Hollins on August 23, 2023 ["**SISP Order**"]; Approval and Vesting Order granted by the Honourable Justice M.E. Burns on November 17, 2023 ["**Transaction Approval and Vesting Order**"].
[9] Transaction Approval and Vesting Order, *ibid*, paras 3 & 16.
[10] Twelfth Report *supra* note 4, para 4.0.3.
[11] *Ibid*, para 2.0.5.

B. The ARIO

13. Pursuant to paragraph 19 of the ARIO, suppliers are compelled to provide services to the Companies during the CCAA Proceedings in accordance with the terms of existing agreements. Paragraph 19 of the ARIO states (emphasis added):

> 19. During the Stay Period, **all persons having**:
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> (a) statutory or regulatory mandates for the supply of goods and/or services; or
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> (b) oral or written agreements or arrangements with the [Companies], including without limitation all supply arrangements pursuant to purchase orders and historical supply practices, **computer software,** communication and other data services, centralized banking services, payroll services, insurance, transportation, services, utility or other services to the Business or the [Companies],
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> **are hereby restrained until further Order of this Court from discontinuing, altering, interfering with, suspending or terminating the supply of such goods or services** as may be required by the [Companies] or exercising any other remedy provided under such agreements or arrangements. The [Companies] shall be entitled to the continued use of their current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the **usual prices or charges for all such goods** or services received after the date of this Order are paid by the [Companies] in accordance with the payment practices of the [Companies], or such other practices as may be agreed upon by the supplier or service provider and each of the [Companies] and the Monitor, or as may be ordered by this Court. [12]

14. Further, paragraph 18 of the ARIO states (emphasis added):

> 18. During the Stay Period, **no person shall** accelerate, suspend, discontinue, **fail to honour**, alter, interfere with, repudiate, **terminate** or cease to perform **any right, renewal right, contract, agreement, licence or permit in favour of or held by the [Companies],** except with the written consent of the [Companies] and the Monitor, or leave of this Court.[13]

C. The DigiFlex Agreements

15. DigiFlex and Wallace & Carey have a long-standing business relationship spanning approximately 24 years whereby DigiFlex licenses software and provides helpdesk support to Wallace & Carey

[12] Amended and Restated Initial Order granted by Honourable Justice Burns on June 30, 2024 [“**ARIO**”], para 19.
[13] *Ibid,* para 18.

pursuant to the terms of a Software Agreement and Support Agreement (collectively, with other agreements for services between DigiFlex and the Companies, the "**DigiFlex Agreements**").[14]

16. The key terms of the Software Agreement are, among others, the following:

(a) Wallace & Carrey paid $300,000 for an unlimited-use license to use agreement, paid by an initial payment of $150,000 on April 23, 2012 and the rest upon execution of the Software Agreement on August 19, 2013;

(b) all rates specified in the Software Agreement (including the fees payable under the Maintenance Agreement) are fixed for the first 12-month period (starting in August 2013), after which DigiFlex may increase the price payable by Wallace & Carey upon providing at least 30 days advance written notice to Wallace & Carey. The percentage increase shall not exceed the CPI for that period as published by Statistics Canada for the City of Calgary, or in the alternative, the province of Alberta or Canada;

(c) Wallace & Carey is also responsible for certain service fees on an hourly basis. Historically, hourly service fees are invoiced to and paid by Wallace & Carey as soon as the service request is completed by DigiFlex;[15] and

(d) the Software Agreement does not automatically expire or terminate. Rather, DigiFlex is entitled to terminate the Software Agreement if Wallace & Carey owes unpaid amounts to DigiFlex in the event of bankruptcy or insolvency by Wallace & Carey.[16]

17. The key terms of the Maintenance Agreement are, among others, the following:

(a) Wallace & Carey agreed to pay an annual maintenance services fee for three software packages in an amount of $28,350 ($9,450 per software package) for one year, to be paid in advance (the "**Maintenance Charge**"). Additional fees apply to install the software packages in multiple branches on additional server systems;

(b) the term of the Maintenance Agreement began on the date of software installation and automatically renews for successive one-year terms to be agreed upon by the parties at the time of renewal, unless the agreement is terminated. The Maintenance Agreement is terminated by either party serving written notice to the other at least 30 days prior to the

[14] Fourteenth Report, *supra* note 1, para 3.0.2.
[15] *Ibid,* para 3.0.9(c).
[16] This clause is inoperable as a result of s. 34(1) and s. 34(5) of the *CCAA supra* note 7. Section 34(1) of the CCAA provides that no person may terminate or amend, or claim an accelerated payment or forfeiture of the term under, any agreement, including a security agreement, with a debtor company by reason only that proceedings commenced under the CCAA or that the company is insolvent. Section 34(1) of the CCAA provides that any provision in an agreement that has the effect of providing for, or permitting, anything that, in substance, is contrary to section 34 is of no force or effect.

expiration of the initial term or renewal, in which case the Maintenance Agreement terminates at the end of that term or renewal; and

(c) the Maintenance Charge is fixed for a 12-month period, after which DigiFlex may increase the price payable by Wallace & Carey upon providing at least 30 days advance written notice prior to the end of the then current term to Wallace & Carey. The percentage increase shall not exceed the CPI for that period as published by Statistics Canada for the City of Calgary, or in the alternative, the province of Alberta or Canada. Historically, DigiFlex invoiced renewal fees for the Maintenance Agreement in February of each calendar year.[17]

18. As 7-Eleven is responsible for paying the operational costs of Wallace & Carey until February 2025 under the terms of the TSA, 7-Eleven has been funding Wallace & Carey to pay invoices rendered by all vendors, including DigiFlex since the Transaction closed on November 19, 2023.[18]

19. In October 2024, representatives of 7-Eleven, on behalf of Wallace & Carey, requested that the DigiFlex Agreements for Wallace & Carey be renewed for a one-year term. In response, Mardukhi advised that DigiFlex would renew the Support Agreement for a one-year term for $201,599.54 ($192,000 plus applicable taxes) (the "**Support Agreement Renewal Invoice**") but stated that it believed that a new license-to-use agreement with 7-Eleven may be required in order to renew. Representatives of 7-Eleven responded that (i) it did not intend to purchase or enter into new licensing agreements; (ii) the existing DigiFlex Agreements with Wallace & Carey were to remain in full force and effect during the CCAA proceedings; and (iii) DigiFlex should consult with legal counsel.[19]

20. On November 12, 2024, DigiFlex sent to 7-Eleven, on behalf of 7-Eleven Distribution Canada Corporation ("**SEDCC**") (which is a new entity created with the intention of eventually assuming the distribution role currently performed by Wallace & Carey) among other things, the New License Agreement (as defined in the Fourteenth Report), which provided for the payment of $3.23 million for an unlimited use license, and a Maintenance Agreement that required an annual payment of $847,875. Following that email, on November 14, 2024, Mardukhi, on behalf of DigiFlex, sent SEDCC invoices for license fees (the "**License Fee Invoice**") and one year of maintenance (the "**Maintenance Agreement Renewal Invoice**", and together with the Support Agreement Renewal Invoice, the "**Renewal Invoices**"). The Renewal Invoices total approximately $1,049,474.84,

[17] Fourteenth Report *supra* note 1, para 3.0.11.
[18] *Ibid,* para 3.0.12.
[19] *Ibid,* para 4.0.2.

representing an increase of approximately 304% from what was payable by Wallace & Carey the prior year under the DigiFlex Agreements.[20]

21. DigiFlex presented the Renewal Invoices to SEDCC as opposed to its contractual counterparty, Wallace & Carey. This is critical, because the entire purpose of the TSA is to grant 7-Eleven the time necessary to determine which contracts are required for the business moving forward and which ones are not. The transition periods contained in the TSA are reflective of the fact that the Wallace & Carey business is extremely large and complex, and 7-Eleven requires the time to ensure that a future transition of the business is done in an orderly fashion that does not disrupt its business.

22. Notwithstanding the ARIO, DigiFlex has terminated the DigiFlex Agreements effective January 1, 2025 unless the Renewal Invoices are paid.[21]

23. All efforts by the Monitor to engage in discussions with DigiFlex have been refused. On December 3 and 9, 2024, the Monitor attempted to contact Mardukhi by phone to (i) negotiate mutually acceptable terms for renewal of the DigiFlex Agreements; and (ii) explain the applicable provisions of the ARIO. Mardukhi refused to engage in discussion. The Monitor's counsel subsequently sent the December 3 Letter and December 12 Letter (as defined in the Fourteenth Report) which further explained DigiFlex's breach of the ARIO and recommended DigiFlex and Mardukhi obtain counsel.

24. On December 9, 2024, and since then, Mardukhi, on behalf of DigiFlex, informed the Monitor he would not discuss the DigiFlex Agreements.

25. On December 11, 2024, Mardukhi sent an email on behalf of DigiFlex to representatives of 7-Eleven which reads, in part: "Since you have decided to proceed with court action (see email below), this is our formal notice that we will stop our support, maintenance and helpdesk services on January 1st, 2025. This will be the case regardless of the court outcome."[22]

III. ISSUES

26. The issues to be determined by this Honourable Court are whether:

    (a) the Court should issue a declaration that DigiFlex purported termination, price increases and all other amendments to the DigiFlex Agreements and any other agreements between

[20] *Ibid,* para 4.0.4.
[21] *Ibid,* para 4.0.15.
[22] *Ibid*, para 4.0.18.

DigiFlex and the Companies are in breach of paragraphs 18 and 19 of the ARIO and of no force and effect;

(b) DigiFlex and Mardukhi should be required to continue to provide the Companies with services and software on the terms and in the manner prescribed by the DigiFlex Agreements; and

(c) DigiFlex, Mardukhi and any other party on direction from DigiFlex or Mr. Mardukhi, should be restrained from terminating or otherwise interfering with the terms of the DigiFlex Agreements and the services provided thereunder.

IV. LAW AND ARGUMENT

A. The Remedial Nature of the CCAA

27. This Court's jurisdiction to grant the Order is found in section 11 of the CCAA which provides that, on application made by any person interested in the matter, the Court may make any order that it considers appropriate in the circumstances.[23] The general language of the CCAA should not be read as being restricted by the availability of more specific orders.[24]

28. Appropriateness is a baseline consideration in any court exercising CCAA authority and is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA.[25]

29. The overarching purpose of the CCAA is to enable companies to compromise or otherwise restructure their debts to avoid the devastating social and economic effects of insolvency and enabling the company to carry on its business in a manner intended to cause the least amount of harm to the company, its creditors, its employees and the communities in which it carries on and carried on operations.[26] In the interim, a judge has great discretion under the CCAA to make an order so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors.[27]

30. One of the most important ways the CCAA provides protection to a debtor company is by virtue of its protections regarding suppliers and existing contractual arrangements. To ensure these protections, the standard CCAA initial order includes a continuation of services provision which

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[23] *CCAA* *supra* note 7, s 11 [TAB 1].
[24] *Century Services Inc. v Canada (Attorney General)*, 2010 SCC 60, para 70 [TAB 3].
[25] *Ibid* [TAB 3].
[26] *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia*, 86 DLR (4th) 621, para 3, [1991] OJ No 2288 (QL) [TAB 7].
[27] *Lehndorff General Partner Ltd. (Re)*, 1993 CarswellOnt 183, para 5, [1993] O.J. No. 14, [TAB 4].

prohibits a supplier from discontinuing, failing to renew, altering, interfering, with or terminating such goods and services as may be required by the debtor company. In return, service providers are compensated at their expected rate, which can include normal course price increases. Service providers are further granted the opportunity to apply to the court to appeal or amend an order of the court, but unless an application is successful, the service provider must comply with the order.

B. DigiFlex's purported termination and price increases are in breach of the ARIO and should be of no force and effect

31. The Monitor is seeking a declaration that DigiFlex's purported termination, extraordinary price increases and all other amendments to the DigiFlex Agreements and any other agreement for services between DigiFlex and the Companies are in breach of paragraphs 18 and 19 of the ARIO and of no force and effect.

32. Courts take lack of compliance with court orders very seriously. Even when non-compliance of a CCAA order does not harm or affect the outcome of proceedings, the CCAA process itself is harmed when parties take it upon themselves to breach a court order.[28]

33. Throughout these CCAA proceedings, this Court has ordered other suppliers to perform the obligations of their agreements with Wallace & Carey as required by the ARIO. On November 9, 2023, the Court granted an Order, among other things, requiring A&M Enterprise Ltd. ("**A&M**") to pay $497,521.26 to Wallace & Carey for paid but undelivered post-filing product, plus costs to Wallace & Carey (the "**Freshslice Order**").[29] This conduct was contrary to the ARIO.

34. A&M applied to stay the Freshslice Order while it pursued an application for leave to appeal. On December 12, 2024, the Honourable Justice Sidnell dismissed A&M's application to stay the Freshslice Order and awarded the Applicants $20,000 in costs and the Monitor $5,000 in costs.[30] On January 24, 2024, the Court of Appeal of Alberta denied A&M's application for leave to appeal the Freshslice Order, and costs were awarded against A&M.[31]

35. On June 27, 2024, the Honourable Justice R. Neufeld granted an order (the "**June 27 Order**") for summary judgement against A&M, Freshslice Holdings Ltd. and RF Franchising Inc. (collectively, the "**Freshslice Group**"), and declaring that Wallace & Carey was entitled to costs related to its

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[28] *Royal Bank of Canada v. Fracmaster Ltd.*, 2000 ABQB 110, para 115 [TAB 6].
[29] Sixth Affidavit of Pat Carey, sworn on November 19, 2024 ["**Sixth Carey Affidavit**"], paras 21-26.
[30] *Ibid*.
[31] *Ibid*.

application.[32] As the parties were unable to reach agreement as to costs in the timeframe imposed by the June 27 Order, the parties provided the Court with submissions as to costs.

36. On November 18, 2024, Justice Neufeld ordered costs against the Freshslice Group in the amount of $36,000, on a joint and several basis. In his reasons, Justice Neufeld wrote, in part: "In this case, the conduct of Freshslice has been disrespectful and has undermined the CCAA process as ordered and overseen by the Court."[33]

37. This Court has also granted summary judgment in these CCAA Proceedings against Dakin News Systems Inc. dba INS News ("I**NS News**") relating to breach of the ARIO. The Companies brought an application for summary judgment against INS News after INS News neglected or refused to pay certain outstanding accounts payable to Wallace & Carey, contrary to the ARIO.[34]

38. On May 16, 2024, the Honourable Justice B.B. Johnston granted summary judgment in the amount of $616,340.56 against INS News, costs in the amount of $30,000 to Wallace & Carey and costs of $5,000 to the Monitor.[35]

39. In *SkyDome (Re),* the Ontario Court of Justice was faced with the question of whether a creditor is entitled to refuse to observe the terms of a CCAA initial order without appealing the order successfully or having it varied. The "short and obvious answer, of course, is that it is not entitled to do so."[36]

40. Parties affected by a CCAA Order are not entitled to ignore that Order, much less to flout it, simply because they don't like the effect on them.[37]

41. The Renewal Invoices issued to 7-Eleven demanding extraordinary increased fees, along with the termination of the DigiFlex Agreements effective January 1, 2025, are direct breaches of paragraphs 18 and 19 of the ARIO. The increased fees constitute an "alteration" to the supply of services contrary to paragraph 19, and paragraphs 18 and 19 both prohibit a termination of the DigiFlex Agreements.

42. The Monitor submits that DigiFlex is clearly and intentionally breaching the terms of the ARIO, and absent intervention by this Court and perhaps notwithstanding this Court's intervention, DigiFlex and Mardukhi appear to have no intention of observing the ARIO. Mardukhi, on behalf of DigiFlex has

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[32] *Ibid*, paras 28-35.
[33] *Wallace & Carey Inc (Re)*, 2024 ABKB 672, para 13 [TAB 9].
[34] Sixth Carey Affidavit, *supra* note 29, paras 42-46.
[35] *Ibid*, para 44.
[36] *SkyDome Corp. (Re)*, 1999 CarswellOnt 208 [*SkyDome*], para 2, [1999] O.J. No. 221 [TAB 8].
[37] *Ibid*, para 20 [TAB 8].

been notified of the breaches of the ARIO by Monitor's counsel in the December 3 Letter. DigiFlex's response in the December 5 Email gave two options going forward, each of which breach the terms of the ARIO. DigiFlex's December 9 Email to Wallace & Carey explicitly terminated the DigiFlex Agreements effective January 1, 2025.[38]

43. Mardukhi has been explicit that DigiFlex will be terminating the DigiFlex Agreements effective January 1, 2025, and that he will not comply with any Court order issued which would require continuation of the DigiFlex Agreements.[39]

44. Simply stated, DigiFlex is willing to put the business of Wallace & Carey at risk, in the hope of leveraging a price increase of 304%, notwithstanding what is contractually permissible and what the ARIO says.[40] This conduct is reprehensible and worthy of sanction by this Honourable Court.

45. The Monitor requests that this Honourable Court declare that DigiFlex's purported termination, price increases and all other non-normal course amendments to the DigiFlex Agreements and any other agreement for services between DigiFlex and the Companies are in breach of paragraphs 18 and 19 of the ARIO and of no force and effect.

C. DigiFlex and Mardukhi should be required to continue to provide the Companies with services and software on the terms and in the manner prescribed by the DigiFlex Agreements

46. The Monitor is seeking an order to compel DigiFlex and Mardukhi, as sole director and voting shareholder of DigiFlex, to respect this Court's order and continue providing services and software on the terms and in the manner prescribed by the DigiFlex Agreements and consistent with paragraphs 18 and 19 of the ARIO.

47. During the period of the CCAA stay, it is typical that suppliers will be prohibited from terminating their supply contracts provided the "normal prices or charges" for all such goods or services are paid by the applicant.

48. In *Air Canada (Re),* the Ontario Superior Court of Justice was asked to enforce the terms of a CCAA initial order and compel the Greater Toronto Airport Authority to honour a memorandum of understanding with Air Canada, as a debtor company.[41] The parties entered the memorandum of understanding prior to Air Canada seeking CCAA protection. That Court found that the agreement between the Greater Toronto Airport Authority and Air Canada was subject to the terms of the initial

[38] Fourteenth Report *supra* note 1, para 4.0.11.
[39] *Ibid,* para 4.0.15.
[40] *Ibid,* para 4.0.4.
[41] *Air Canada (Re),* [2004] CarswellOnt 870 [*Air Canada*], 47 CBR (4th) 189 [TAB 2].

order.[42] As such, an order to compel the breaching entity to comply with the CCAA order and uphold their prior agreement was granted.[43]

49. When a creditor shows wilful disregard of a court's order it is a matter of concern for the Court and militates strongly against the creditor's position.[44] Creditors who knowingly defy CCAA Orders do not come before the court with clean hands and can be barred from equitable remedies.[45]

50. Orders that have not been appealed or varied must comply with the terms of CCAA orders.[46]

51. DigiFlex has ongoing obligations to Wallace & Carrey in the DigiFlex Agreements. As noted by DigiFlex in the December 5 Email, the two parties had a long-term relationship. The ARIO is clear that DigiFlex's obligations carry throughout these CCAA proceedings. Similar to *Air Canada (Re),* this Court should hold DigiFlex to its commitments contained in the DigiFlex Agreements.

52. DigiFlex has not applied to amend or appeal paragraphs 18 or 19 of the ARIO and is thus bound to the terms of the ARIO. DigiFlex's continued correspondence with Wallace & Carey, the Monitor, the Monitor's counsel and 7-Eleven, as detailed in section 4 of the Fourteenth Report, shows wilful disregard for the terms of the ARIO. DigiFlex needs to comply with the ARIO like any other stakeholder in this proceeding.

D. <u>DigiFlex, Mardukhi and any other party on direction from DigiFlex or Mr. Mardukhi should be restrained from terminating or otherwise interfering with the terms of the DigiFlex Agreements and the services provided thereunder</u>

53. The Monitor seeks an order restraining DigiFlex, Mardukhi and any other party on direction from DigiFlex or Mr. Mardukhi from terminating, interfering with, or unilaterally amending the terms of the DigiFlex Agreements and services provided thereunder provided that Wallace & Carey pays DigiFlex the amounts to which it is entitled under the DigiFlex Agreements. The Monitor also seeks an order requiring Mardukhi to cause DigiFlex to comply with the ARIO so that the services DigiFlex provides to Wallace & Carey continue without disruption.

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[42] *Ibid,* para 26 [TAB 2].
[43] *Ibid,* para 27https://www.canlii.org/en/on/onsc/doc/2004/2004canlii13717/2004canlii13717.html?resultId=17f1c1ade2c1439f8d6b4cefce9ef956&searchId=2024-12-09T15:32:38:598/ad928963434b48c2a1e2d2547d2aea45 [TAB 2].
[44] *Re Philip's Manufacturing Ltd.*, (1991) 9 C.B.R. (3d) 17, para 25, reversed on other grounds (1992), 9 C.B.R. (3d) 25, 67 B.C.L.R. (2d) 84 [TAB 5].
[45] *SkyDome supra* note 36, para 22 [TAB 8].
[46] *Ibid*, para 20 [TAB 8].

54. In *SkyDome Corp. (Re),* SkyDome's exclusive advertising agent was required by its preferred supplier's contract to remit any and all moneys it had received on behalf of SkyDome from advertising less its base commission. An initial order was granted requiring the agent to perform and observe the terms and conditions of the existing contract during the CCAA period. The preferred supplier believed that SkyDome was intent on terminating its status as such under the protection of the Act and declined to remit the revenues in order to set-off against potential claims it may have had against SkyDome. Justice Blair held that the preferred supplier was not entitled to refuse to observe the terms of the initial order without appealing the order successfully or having it varied. In doing so he stated:

> This position is untenable in my view, however. It is based upon a misconception of the effect of the CCAA Orders, which is to require existing contracts to be honoured provided that the CCAA applicant pays the normal prices or charges for the goods and services provided during the stay period in accordance with the payment and practices then in effect (or as otherwise negotiated). In the case, CMC was arranging advertising contracts for SkyDome and was collecting SkyDome's revenues for that advertising, with the obligation to remit those revenues, after deducting their commissions to SkyDome. CMC was required under the Initial Order to "continue to perform and observe [those] terms and conditions" contained in the CMC Agreement, absent a successful appeal from or variation of the Order. Any other result - apart from the implications of sanctioning the failure to obey an outstanding order - would deprive SkyDome of an integral part of its revenue base, and potentially cripple its ability to continue to operate during the CCAA period while it attempts to negotiate a restructuring with its creditors as a whole.[47]

55. Parties affected by a CCAA Order are not entitled to ignore that Order because they wish to use the difficulties caused to the CCAA debtor by their non-compliance as a lever to enhance their bargaining position with the debtor company.[48]

56. DigiFlex, Mardukhi and any other party on direction from DigiFlex or Mr. Mardukhi, are not entitled to amend or terminate the DigiFlex Agreements. DigiFlex and Mardukhi have refused to comply with such terms when notified of the effect of the ARIO in the December 3 Letter. As such, the Monitor requests this Court restrain DigiFlex, Mardukhi and any other party on direction from DigiFlex or Mr. Mardukhi, from further breaching paragraphs 18 and 19 and order that Mardukhi cause DigiFlex to comply with the ARIO.

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[47] *Ibid*, para 17 [TAB 8].
[48] *Ibid*, para 20 [TAB 8].

V. CONCLUSION

57. For the reasons set out herein, the Monitor respectfully requests that this Court grant the proposed form of Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of December 2024.

CASSELS BROCK & BLACKWELL LLP

Per: Jeffrey Oliver

Jeffrey Oliver
Counsel for the Applicant

LIST OF AUTHORITIES

REGULATIONS

Tab	Authority
1.	*Companies' Creditors Arrangement Act*, RSC 1985, c C-36

JURISPRUDENCE

Tab	Authority
2.	*Air Canada (Re)*, [2004] CarswellOnt 870, 47 CBR (4th) 189
3.	*Century Services Inc v Canada (AG)*, 2010 SCC 60
4.	Lehndorff General Partner Ltd. (Re), 1993 CarswellOnt 183, [1993] O.J. No. 14
5.	*Re Philip's Manufacturing Ltd.* (1991), 9 C.B.R. (3d) 17, 4 B.L.R. (2d) 134, 1991 CarswellBC 503 (B.C. S.C.)
6.	*Royal Bank of Canada v. Fracmaster Ltd*., 2000 ABQB 110
7.	*Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia*, 1991 CarswellOnt 220, 86 DLR (4th) 621, [1991] OJ No 2288 (QL)
8.	*SkyDome Corp. (Re)*, 1999 CarswellOnt 208, [1999] O.J. No. 221
9.	*Wallace & Carey Inc (Re)*, 2024 ABKB 672