ONTARIO SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

COUNSEL SLIP/ENDORSEMENT

COURT FILE NO.: CV-24-00713254-00CL **DATE:** **23 January 2024**

NO. ON LIST: **5 (12:00pm)**

TITLE OF PROCEEDING: **IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF BALBOA INC., DSPLN INC., HAPPY GILMORE INC., INTERLUDE INC., MULTIVILLE INC., THE PINK FLAMINGO INC., HOMETOWN HOUSING INC., THE MULLIGAN INC., HORSES IN THE BACK INC., NEAT NESTS INC., AND JOINT CAPTAIN REAL ESTATE INC.**

BEFORE JUSTICE: **KIMMEL**

PARTICIPANT INFORMATION

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ENDORSEMENT OF JUSTICE KIMMEL:

The Applicants' Business, Indebtedness and Liquidity Crisis

1. Balboa Inc., DSPLN Inc., Happy Gilmore Inc., Interlude Inc., Multiville Inc., The Pink Flamingo Inc., Hometown Housing Inc., The Mulligan Inc., Horses In The Back Inc., Neat Nests Inc., and Joint Captain Real Estate Inc. (collectively, the "Applicants"), all Canadian privately held companies, seek relief pursuant to an order (the "Initial Order") under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA").
2. The Applicants are all subsidiaries of (i) One Happy Island Inc. ("Happy Island"), (ii) Keely Korp Inc. ("Keely Korp"), (iii) 2657677 Ontario Inc. ("265 Inc."), or (iv) Sail Away Real Estate Inc. ("Sail Away", and collectively, the "Non-Applicant Parent Cos."), or some combination thereof. These companies are each, in turn, directly or indirectly controlled and managed by one or more of three individuals, Aruba Butt, Dylan Suitor, and Ryan Molony who are variously the indirect shareholders, directors and officers (the "Affiliated Individuals" also later referred to as the "Additional Stay Parties").
3. The Applicants currently only have one employee who is employed full-time by The Mulligan Inc. The Mulligan Inc. has approximately $55,000 in unpaid source deductions.
4. The Applicants specialize in the acquisition, renovation and leasing of distressed residential real estate in what they considered to be undervalued markets throughout Ontario (the "Business"). The Applicants currently own 405 residential properties (collectively, the "Properties" and each, a "Property"), containing 631 rental units, including 424 currently-tenanted rental units, and a single non-operating golf course.
5. The purchase, renovation and related costs of the Properties were financed through (i) first and second mortgage loans, and (ii) unsecured promissory notes. This debt is predominantly held by hundreds of individual real estate investors (the "Lenders"). The Applicants also have an estimated 1,000 tenants in their Properties. The applicants and their affiliates (collectively, the "Companies") are one of the largest holders of residential real estate in Ontario.
6. As of December 31, 2023, there is approximately $81,455,930 in principal outstanding under 390 First Mortgage Loans. As of December 31, 2023, there is approximately $8,642,697 in principal outstanding under the Second Mortgage Loans. The majority of these First and Second Mortgage Loans are in default. Substantially all of the First and Second Mortgage Loans were executed by the Affiliated Individuals, purportedly in their capacity as guarantor[1].
7. The Applicants have collectively issued approximately 802 unsecured promissory notes (as amended from time to time, the "Promissory Notes"). Approximately 602 of the Promissory Notes were issued to

[1] The Applicants have indicated that there may be challenges to the validity and scope of guarantees provided by the Affiliated Individuals in respect of the First and Second Mortgage Loans and the Promissory Notes.

The Lion's Share Group Inc., an affiliate of the Hamilton-based mortgage brokerage, The Windrose Group Inc. ("Windrose"), which was the broker that sourced and placed the First Mortgage Loans. The remaining Promissory Notes were issued to First Mortgage Lenders directly. The majority of these Promissory Notes are currently in default. They were also signed by the Individual Affiliates purportedly as guarantors. As of December 31, 2023, the Applicants currently owe the principal amount of $54,236,109.51 pursuant to the Promissory Notes.

8. Commencing in 2022, the Applicants undertook various refinancing and sale initiatives, with some modest success. However, they were unable to find a comprehensive solution to their mounting debt and lower than anticipated revenues and they have suffered substantial losses in the past eighteen months. They have been trying since August 2023, with the assistance of a professional financial advisor, Howards Capital Corp. ("HCC"), to obtain a comprehensive refinancing solution for their funded indebtedness.
9. They now face a severe liquidity crisis and are generally unable to meet their obligations as they become due under their funded debt (some of which is secured and some of which is not) and they also have significant tax and other unsecured obligations to trade creditors, affiliates, and utilities. The ability of the Applicants to earn revenue or profits from their Business has been negatively impacted by their lack of capital to fund renovations.
10. As of December 31, 2023, the funded indebtedness of the Applicants totaled approximately $144,350,000. The estimated total book value of their collective assets, based on available financial statements for years ended 2021 and 2022 (as the case may be) was approximately $127,858,943.
11. Between them, the Applicants currently have less than $100,000 cash on hand.
12. In recent months, the Applicants have received over 50 demand letters, notices of default, notices of intention to enforce security and notices of sale under mortgage, among other demands and notices, and are named in approximately 32 statements of claim that have been filed in the Ontario Superior Court of Justice. In 27 of these instances, an Affiliated Individuals is also named as a defendant. These actions remain unresolved and the Applicants and the Affiliated Individuals have not responded to or taken any material steps in connection therewith.
13. In light of their current liquidity crisis, limited cash on hand, and numerous defaults and related enforcement proceedings, the Applicants have concluded that they can no longer continue to operate the Business absent the relief sought under the Initial Order. The Proposed Monitor, KSV Restructuring Inc. ("KSV"), believes that the relief sought is reasonable and necessary in the circumstances and supports the Applicants' requested Initial Order.

The CCAA Application

14. The Applicants believe these CCAA proceedings present the only viable means to preserve and maximize the value of the Business for the benefit of the Applicants' stakeholders. The relief sought in the Initial Order will allow the Applicants the breathing space needed to pursue a comprehensive refinancing or restructuring and implement a consensual plan of arrangement, if one can be achieved.
15. The issues raised by the relief sought are whether:
    a. The Applicants meet the criteria for CCAA protection, including the Initial Stay, and have proposed a qualified Monitor;
    b. The proceedings should be stayed against the Affiliated Individuals (a.k.a., the Additional Stay Parties);
    c. The Lender Representative Counsel should be appointed; and
    d. The Administration Charge (as defined below) should be granted.

Analysis

a) The CCAA Applies and the Initial Stay and Proposed Monitor are Appropriate

16. Section 9(1) of the CCAA provides that an application under the CCAA may be made to the court that has jurisdiction in the province where the debtor company has its "head office or chief place of business." The CCAA applies to a "debtor company" or "affiliated debtor companies" that is, among other things, "insolvent", which has been interpreted to include companies that are reasonably expected to run out of liquidity in the time it may take to implement a restructuring. See *Re Just Energy Corp.*, 2021 ONSC 1793, at para. 49.
17. These criterion have been satisfied.
18. The Applicants were all incorporated pursuant to the OBCA, and their business and assets are exclusively in Ontario. As such, each of the Applicants are a "company" within the ambit of the CCAA. Given that each of the Applicants' registered offices is located in Ontario, and the Business is carried out exclusively in Ontario, Ontario is the appropriate venue for these proceedings and this Court has jurisdiction to hear this application.
19. Pursuant to subsection 3(2) of the CCAA, "companies are affiliated companies if one of them is the subsidiary of the other or both are subsidiaries of the same company or each of them is controlled by the same person". The Applicants operate as an integrated Company, and various of the Applicants are "affiliated companies" through their shared ownership by the Non-Applicant Parent Cos. Their indebtedness far exceeds $5 million.
20. In order for the CCAA to apply, the debtor company must also be insolvent under the definition of "insolvent person" set out in the *Bankruptcy and Insolvency Act*, R.S.C. c. B-3, as amended (the "BIA").
21. Courts have also recognized the expanded definition of insolvency provided in *Re Stelco*, 2004 CanLII 24933 at paras 25-26, which provides that a company is also insolvent for purposes of the CCAA if there is a looming liquidity crisis such that it is reasonably foreseeable that the debtor will run out of cash unless its business is restructured. Applied here, the Applicants are individually and as a whole insolvent. The Applicants are facing a significant liquidity crisis and cannot satisfy their liabilities as they come due.
22. Section 11.02(1) of the CCAA permits this court to grant an initial stay of up to 10 days on an application for an initial order, provided the applicant establishes that such a stay is appropriate and that the applicant has acted with due diligence and in good faith (s. 11.02(3)(a-b)). The primary purpose of the CCAA stay is to maintain the *status quo* for a period while the debtor company consults with its stakeholders with a view to continuing its operations for the benefit of its creditors.
23. A stay of proceedings will be appropriate where it maintains the status quo and provides applicants with breathing room while they seek to restore solvency and emerge from the CCAA on a going-concern basis. See *Century Services Inc v Attorney General (Canada)*, 2010 SCC 60, at para. 14.
24. The Stay of Proceedings will preserve the status quo and afford the Applicants the breathing space and stability required to advance their restructuring efforts, including their intention to negotiate and seek approval of a debtor-in-possession facility, to seek approval to appoint HCC as financial advisor, and to develop a plan of compromise or arrangement and/or explore other restructuring transaction alternatives. Additionally, it will permit the Applicants to continue to operate the Business as a going concern with minimal disruption. The continued and uninterrupted operation of the Business and the avoidance of uncoordinated and distressed sales or forced liquidations of the Properties will preserve value for the Applicants' stakeholders and is in the best interests of all stakeholders, including the Lenders and the Applicants' tenants.
25. In the circumstances of this case, that the Stay of Proceedings is in the Applicants' best interests and the best interests of their stakeholders, consistent with the purposes of the CCAA, and appropriate in the circumstances.

26. KVS is a "trustee" within the meaning of subsection 2(1) of the BIA, it is established and qualified and has consented to act as monitor. KVS's involvement as the court-appointed monitor will lend stability and assurance to the Company's stakeholders. KVS is not subject to any of the restrictions set out in s. 11.7(2) of the *CCAA*.
27. In December, 2023, KSV Advisory Inc. (an affiliate of KSV) was engaged by the Applicants and has been working with the Applicants' management team, financial advisor and legal counsel since that time to assist them to prepare for this filing. During its engagement, KSV has obtained an understanding of the Applicants' Business. This knowledge will assist KSV to fulfil its duties as Monitor.

b) Extending the Stay to the Additional Stay Parties

28. The Additional Stay Parties purportedly provided guarantees in respect of substantially all of the First Mortgage Loans, Second Mortgage Loans, and Promissory Notes. The Applicants' defaults have already resulted in at least 27 claims being filed against the Additional Stay Parties. If the Non-Applicant Stay is not granted, it is conceivable that hundreds of claims could be filed against the Additional Stay Parties in connection with the Applicants' Business. The Applicants are concerned that this will occur within the initial 10 day period before the come-back hearing.
29. Section 11.04 of the CCAA provides that a stay pursuant to section 11.02 will not affect claims against third party guarantors of an applicant company, and section 11.03(2) provides that a stay pursuant to section 11.02 does not affect an action against a director on a guarantee given by the director relating to the company's obligations or an action seeking injunctive relief against a director in relation to the company. So it is clear that, absent some specific order, the CCAA stay in favour of the Applicants under s. 11.02 would not protect the Additional Stay Parties who have provided guarantees.
30. Such a stay was denied in favour of a non-applicant director, ostensibly at least in part on jurisdictional grounds, in *Cannapiece Group Inc. v. Marzili, 2022 ONSC 6379*, but such stays have been granted in favour of non-applicants, including director guarantors, in other cases. See for example *Nordstrom Canada Retail, Inc.*, 2023 ONSC 1422, at paras 40-42; *BBB Canada Ltd*., 2023 ONSC 1014 at paras 32-34 and *McEwan Enterprises Inc*., 2021 ONSC 6453 at para 45, the latter being the most analogous case involving a stay in favour of a non-applicant director/guarantor.
31. In *Cannapiece*, the court was concerned about the breadth of the wording of the proposed non-applicant stay in favour of the director but was also able to make a procedural order that accomplished the same result in the one already existing proceeding against that director guarantor against whom there was an already crystalized claim.
32. I agree with the applicant that this case is more akin to the circumstances in *BBB* and *Nordstrom* and particularly *McEwan* where the third party stays were granted in complex situations in which non-parties could be facing significant distractions from their important restructuring work if they were having to respond to and fend off guarantee claims against them personally that overlap with the claims against the Applicants themselves. The Additional Party Stay here is limited to claims that relate to the Applicants or obligations of the Applicants. It only applies to Related Claims, being claims with respect to any guarantee, contribution or indemnity obligation, liability or claim in respect of or that relates to any agreement involving any of the Applicants or the obligations, liabilities and claims of and against any of the Applicants.
33. While "the issue [of non-party stay orders] is not free from doubt", as Chief Justice Morawetz noted in both the *BBB* and *Nordstrom* decisions, he ultimately granted a stay in favour of certain non-applicant guarantors on an initial CCAA application, notwithstanding the language of section 11.04.
34. It is not in the best interests of the Applicants' stakeholders or the administration of justice for the Additional Stay Parties to be forced to respond to uncoordinated actions in respect of their purported guarantees of the very indebtedness that the Applicants are attempting to restructure under the CCAA. The Non-Applicant Stay is consistent with the "single-proceeding model" that favours the resolution of

claims within a CCAA process and avoids the "inefficiencies and chaos" that could otherwise result from uncoordinated attempts at recovery. See *Century Services*, at para 59.

35. This is an order that is within the discretion of the court to make when it is considered just and convenient to do so, and I find it to be so in this case. This jurisdiction is derived from s. 11 of the CCAA and further embodied in section 106 of the *Court of Justice Act*, R.S.O. 1990, c. C.43
36. The plaintiffs and potential plaintiffs should only be minimally prejudiced by this temporary stay, which does not settle their actions or provide any release of claims against the Additional Stay Parties. If, however, there are objections to this continuing after the Initial Stay Period, those can be addressed at the come-back hearing.

c) The Appointment of Lender Representative Counsel

37. There are over 300 individual Lenders to the Applicants under approximately 390 First Mortgage Loans, 121 Second Mortgage Loans and 802 Promissory Notes. The Lenders are predominantly individual real estate investors. The Applicants seek the appointment of Chaitons LLP as Lender Representative Counsel. If appointed, Lender Representative Counsel may identify up to six Lenders to be nominated as Court-appointed representatives (the "Lender Representatives") to advise and, where appropriate, instruct Lender Representative Counsel. Lenders who do not opt-out of Lender Representative Counsel's representation pursuant to the Initial Order would be bound by the actions of the Lender Representative Counsel and the Lender Representatives, if any.
38. These Lenders are vulnerable stakeholders and creditors of the Applicants because there are so many of them and their individual claims may not each be material in the context of this CCAA, but are no doubt important to them given that they are mostly individuals (or private holding companies). The cost to them individually to retain counsel and obtain legal advice about these CCAA proceedings could be cost-prohibitive and the Applicants, the Monitor and the court will all be greatly assisted by the streamlining of positions that will be accomplished through the involvement of representative counsel.
39. Chaitons LLP, the proposed Lender Representative Counsel, is very experienced in this area and I have every confidence in their qualifications. These are among the relevant factors that I have considered in reaching the conclusion that the court should exercise its broad discretion under Section 11 of the CCAA and the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, to appoint representative counsel for the Lenders in this case. See for example, *Canwest Publishing Inc.*, 2010 ONSC 1328 at para 21.
40. The only hesitation that I had was about whether the appointment of Lender Representative Counsel is needed and warranted at this Initial Order stage and whether it was fair to appoint the Representative Counsel that had been proposed by the Applicants without affording the Lenders to choose their own counsel. However, having heard and further considered the submissions of counsel for the Applicants, the proposed Lender Representative Counsel and the proposed Monitor, I am satisfied that an appointment is appropriate at this early stage, specifically to assist in the transmission of information and preliminary advice to the Lenders in advance of the come-back hearing which the proposed Lenders Representative Counsel will take on the responsibility for doing, including at a virtual town hall meeting (without the Applicants) that they plan to hold early next week.
41. The proposed Monitor is of the view that appointing representative counsel for the Lenders at the outset of these proceedings will also enable the Monitor to immediately put in place an efficient and effective communication plan, provide a single means through which the inquiries and concerns of hundreds of Lenders can be addressed and facilitate the efficient administration of these proceedings. In the proposed Monitor's view, it is important that representative counsel for the Lenders be appointed at the outset of these proceedings rather than at the Comeback Motion due to the volume of inquiries expected to be received in the coming days should the Court grant the Initial Order.
42. Counsel have helpfully referred me to some other cases in which representative counsel were appointed at the time of the Initial Order in CCAA restructurings, for example: *Law Society of Ontario v Derek*

Sorrenti and Sorrenti Law Professional Corporation, Nordstrom Canada Retail, Inc., 2023 ONSC 1422 and Target Canada Co. (Re), 2015 ONSC 303.

43. I take further comfort in the fact that any Lenders that do not wish to be represented may opt-out in accordance with the Initial Order. They also have full come-back rights in respect of this appointment so it is not set in stone.
44. I am satisfied that this relief is necessary and appropriate in the circumstances.
45. Counsel have advised that the specific paragraphs of the Initial Order dealing with this are taken from precedents in other cases in which representative counsel have been granted, tailored to the circumstances of this case.

d) The Administration Charge

46. The Applicants are seeking a Court-ordered charge over the Applicants' Property in the amount of $750,000 to secure the professional fees and disbursements of the Proposed Monitor, along with counsel to the Proposed Monitor and the Applicants, and the Lender Representative Counsel at their standard rates and charges, incurred prior and subsequent to the granting of the Initial Order (the "Administration Charge").
47. Section 11.52 of the CCAA vests this Court with jurisdiction to grant an administration charge on notice to the secured creditors likely to be affected thereby in favour of, among others, a Court-appointed monitor, its legal advisors and any legal experts engaged by the debtor company. This Court has recognized that it is essential to the success of any CCAA restructuring "to order a super-priority in respect of charges securing professional fees and disbursements". See *US Steel Canada Inc (Re)*, 2014 ONSC 6145, at paras. 20 and 22. See also *Laurentian University of Sudbury*, 2021 ONSC 659, at paras. 49-50 and *Re Lydian International Limited*, 2019 ONSC 7473, at para. 28.
48. The Administration Charge reflects an estimate of fees for professionals whose services will be essential to the Applicants' restructuring efforts. Some of the beneficiaries of the Administration Charge have already engaged in a significant amount of work in connection with this CCAA application, and are expected to continue to provide restructuring and insolvency advice, developing a restructuring plan, preparing the Cash Flow Statement, and negotiating the DIP Term Sheet. The professionals will continue to play a key role in advancing the CCAA proceedings. Certain beneficiaries of the Administration Charge have modest retainers and significant arrears and the Applicants have no other means of retaining the beneficiaries of the Administration Charge, and each beneficiary is performing distinct functions in these CCAA proceedings to assist the Applicants with continuing and operating the Business in the ordinary course.
49. At this time there is no DIP financing and the Applicants have no cash flow with which to pay these professionals, so they require the Administration Charge as security for future payment of their fees and disbursements that will continue to accrue over the next ten days during the Initial Stay Period.
50. The Proposed Monitor has reviewed the past and projected fees of these professionals over the Initial Stay Period and considers the Administration Charge of $750,000 to be reasonable and proportionate. It is approved.

Order

51. For the foregoing reasons, I have signed the form of Initial Order submitted to the court today. Aside from the specific points discussed above, the draft order is for the most part consistent with the form of Commercial List model order, with some changes that have becomes standard and accepted in these types of orders and some changes made to reflect the specific nature of the Business and the Applicants (for example, the Initial Order does require the co-operation of the loan originators to ensure that the Lenders all receive the CCAA materials and that the Lender Representative Counsel can communicate with them).
52. The comeback hearing has been scheduled before me on January 31, 2024 at 9:30 a.m.

KIMMEL J.