ONTARIO SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

COUNSEL SLIP/ENDORSEMENT

COURT FILE NO.: CV-24-00713245-00CL **HEARING DATE:** **January 31, 2024**

NO. ON LIST:

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:

1. The court granted an initial order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA") on January 23, 2024 (the "Initial Order") in respect 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. (collectively, the "Applicants"). The reasons for the granting of the relief in the Initial Order are set out in the court's endorsement of January 23, 2024 (the "First Endorsement").
2. Capitalized terms not otherwise defined in this endorsement shall have the meanings ascribed to them in the First Endorsement.
3. The Applicants now seek an extension and expansion of the relief provided under the Initial Order to facilitate and advance these CCAA proceedings by their motion returnable January 31, 2024 (the "Come-Back Motion"), including:
    a. extending the Initial Stay Period to and including March 28, 2024;
    b. authorizing but not requiring the Applicants to pay, with the consent of the Monitor (as defined below), certain amounts owing for goods and services actually supplied to the Applicants prior to the date of the Initial Order;
    c. approving the retention of Howards Capital Corp. ("HCC") as financial advisor to the Applicants (the "Financial Advisor") pursuant to a Financial Advisor Engagement Agreement dated January 24, 2024 (the "Financial Advisor Engagement Agreement"), between the Applicants and HCC, and granting the Financial Advisor Charge to secure the Completion Fee (each as defined below)

and the Applicants' indemnification obligations under the Financial Advisor Engagement Agreement;

d. approving the Applicants' ability to borrow under a debtor-in-possession credit facility (the "DIP Facility") pursuant to a DIP Agreement dated January 26, 2024 (the "DIP Agreement"), between the Applicants and Harbour Mortgage Corp. (the "DIP Lender"), and granting the DIP Lender's Charge (as defined below) to secure all of the Applicants' obligations under the DIP Agreement and the DIP Facility; and

e. expanding the scope of the Administration Charge (as defined below) to include certain fees of the Financial Advisor which are not secured by the Financial Advisor Charge, and increasing the maximum amount of the Administration Charge from $750,000 to $1,500,000.

4. The Applicants continue to believe that these CCAA proceedings present the only viable means to preserve and maximize the value of the Business for the benefit of the Applicants' stakeholders. They seek the relief in the ARIO to afford themselves the breathing space needed to pursue a comprehensive refinancing or restructuring and implement a consensual plan of arrangement, if one can be achieved.
5. Two of the secured Lenders represented by Mr. Nash, supported by other secured lenders represented by Mr. Marshall and Ms. Taylor (collectively, the "Concerned Secured Lenders"), seek an adjournment of this motion for two primary purposes:
    a. To further investigate the Applicants' assertion, in paragraph 43 of their factum and elsewhere, that: "the Applicants operate as an integrated company ... " and that they meet the criteria set out in section 3 of the CCAA;
    b. To further consider whether there is a commonality of interests such that it is appropriate for all Lenders, both secured and unsecured, to be included in the same class of creditors and represented by the same Lenders' Representative Counsel, having regard to s. 22(2) of the CCAA, and to ascertain whether the secured lenders' rights to enforce their security, including to sell the mortgaged properties, is at odds with the interests of unsecured creditors whose interests might be better protected by the mortgaged properties not being sold. To this end, there is a desire to hold a meeting among just the secured Lenders.
6. The court made the following observations in the First Endorsement with respect to the appointment of Lenders' Representative Counsel:
    a. [at para. 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.
    b. [at para. 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.
7. Part of the relief sought on the Come-Back Motion was for the approval of a $12 Million DIP Facility that, if approved, will have a super priority over the secured Lenders' mortgage security. The Concerned Secured Lenders asked that the Come-Back Motion be adjourned and that the decision regarding the DIP Facility ranking ahead of their mortgage security be deferred until after they have had a chance to further pursue their investigation and consideration of the above matters. Mr. Nash requested a four week adjournment initially and later indicated he was asking for three weeks.
8. The adjournment request was contested. Concerns were raised about the ability of the Applicants to continue to carry on business even during a brief adjournment period.

9. The court heard fulsome submissions from counsel for all interested parties who appeared, after which it was determined that a brief adjournment of the Come-Back Motion would be granted to February 15, 2024. The court determined that certain limited relief and terms of the brief adjournment were necessary and appropriate to preserve the *status quo* and ensure that the intended benefits of these CCAA proceedings are not lost while the Concerned Secured Lenders are given some time to further investigate and consider their positions. The limited relief and terms of adjournment are as follows:
    a. The Stay Period under the Initial Order is extended to February 16, 2024.
    b. On the basis of the Monitor's submissions that there is an urgent need for funding between now and February 16, 2024, the court approved a reduced interim DIP Facility and corresponding DIP Charge of up to a maximum of $4 million.
    c. The DIP Financing shall be used only to satisfy: (i) the conditions of the DIP Lender to the advance of funds (including with respect to the payment of outstanding property tax arrears and an interest reserve), (ii) urgent payments of necessity that arise and must be addressed in this intervening time frame; and (iii) professional fees for services rendered that are the subject of the Administrative Charge.
    d. The court's authorization for payment of pre-filing indebtedness to essential suppliers is similarly restricted to payments required to address urgent items of necessity that arise and must be addressed in this intervening time frame.
    e. While the DIP Charge applies to all property of the Applicants, the Applicants have represented, and the Monitor has confirmed, that they are not and will not seek substantive consolidation and that their intention is for the DIP Facility be allocated proportionally and charged against the specific Property of the Applicants that it was used for, to the extent possible.
    f. The following wording has been provided by the parties for inclusion in this endorsement to reflect this intention:

> To the extent possible, the Monitor shall track the costs of these proceedings, including the utilization of the proceeds of the DIP Facility and the incurrence of the costs and liabilities subject to any of the Charges in respect of each of the Applicants and their respective Property, and will provide a recommendation to the Court with respect to the allocation of such amounts among the applicable Properties, which proposed allocation is to be subject to approval by this Court on notice to the Service List in these proceedings. The rights of any interested parties to make arguments as to the appropriate allocation of such amounts among the applicable Properties are hereby reserved, provided that, in all cases, such allocation must provide for the payment in full of all amounts and obligations secured by the Charges.

    g. If the Concerned Secured Lenders still have unanswered questions about the proposed DIP Facility and how the proposed priority of the DIP Charge will work in practice, they may put those questions to the Monitor and the Applicants in writing by 5 p.m. on February 2, 2024 and those questions shall be responded to in writing by 5 p.m. Sunday February 4, 2024.[1]

[1] The "affiliates" issue that was raised by the Concerned Secured Lenders (previously addressed in paragraph 43 of the Applicants' factum relied upon for the Initial Order, and considered in paragraph 19 of the court's First Endorsement) was addressed by the submissions about the satisfaction of the requirements of s. 3(2) of the CCAA and the assurances that substantive consolidation is not being sought. The concerns about the rights of secured vs. unsecured Lenders appear to be property specific not company specific.

h. On the basis of the Monitor's submissions that some of the DIP Facility may need to be used to fund outstanding professional fees that were the subject of the Administrative Charge (that was previously granted with the expectation that there would be a DIP Facility put in place after the initial Stay Period to be used to start paying professionals who have performed services in connection with these CCAA proceedings, as reflected in, for example, paragraphs 48 and 49 of the First endorsement), and that those fees may, by February 16, 2024, exceed the current Administrative Charge, the court approved an increase in the Administrative Charge from $750,000 to $1 million.

i. Having regard to the court's observations and directions, in the intervening period the following shall occur:

    i. The Monitor shall coordinate with the Concerned Secured Lenders to arrange a meeting of secured Lenders based on an agenda to be prepared by Mr. Nash and Mr. Marshall and their clients, which shall include, without limitation, proposed ground rules for communications among and between secured Lenders and any confidentiality considerations going forward and the question of whether secured lenders wish to appoint separate representative counsel at this time. The Monitor will be in charge of the list of invitees and all communications with secured Lenders about the meeting in advance of the meeting. If need be, Chaitons LLP (appointed as Lenders' Representative Counsel under the Initial Order) shall provide the Monitor with the current contact list for the secured Lenders. All who receive an invitation to that meeting shall be told that if they attend they shall have the right to ask that their names not be publicly disclosed without their permission;

    ii. The secured Lenders are asked to keep in mind when they consider their immediate position that, as interested parties, the draft order sought on the Come-Back Motion provides that they will still have the ability to come back to seek a variation to the proposed ARIO (if granted) at a later point in time even if they decide that it is not presently necessary for them to seek an order for the appointment of their own representative counsel at this time (for example, if their interests diverge from those of unsecured Lenders when it comes time to vote on a plan);

    iii. The meeting of secured Lenders shall take place by no later than next Monday Feb. 5, 2024. The Monitor shall attend this meeting;

    iv. If, following that meeting, any secured Lenders wish to move now to seek to appoint their own separate representative counsel, they shall serve their motion record for such relief by no later than Friday February 9, 2024. To be clear, the court has not pre-determined that this relief will be granted, if requested. The adjournment is simply to afford the secured Lenders the opportunity to consider their position and make the request if the deem it to be advisable;

    v. If any of the secured Lenders wish to oppose the Come-Back Motion and proposed ARIO on any ground, then they shall file their responding motion record(s) by Friday February 9, 2024, including their responding factum(s).

    vi. Since the main objection to the Clarke affidavit(s) filed by the Applicants was that it appears to be on information and belief and is not the "best evidence", that shall be addressed in their factum(s) by way of argument;

    vii. The Applicants' responding/reply motion record(s) and factum(s) shall be delivered by February 12, 2024 (ideally these will be consolidated into a single motion record and factum addressing all that has been raised by the objecting parties);

    viii. The Monitor shall deliver a further report to provide any updates to the court that it deems appropriate and also to provide the details of any use of the DIP Facility in this intervening time; and

ix. All materials for the Come-Back Motion and any other motions returnable on February 15, 2024 shall be uploaded onto CaseLines by the February 13, 2024.

j. The court's orders and directions provided in this endorsement and the interim Order dated January 31, 2024 are without prejudice to any further motion that may be brought or opposition that may be raised at the Comeback Hearing.

10. The remaining issues that have been raised for the court's consideration on the Come-Back Motion, such as whether:
    a. to further extend the Initial Stay Period;
    b. the Applicants should be authorized (beyond urgent matters) to make pre-filing payments with the consent of the Monitor;
    c. HCC should be appointed as Financial Advisor;
    d. the Administration Charge should be further increased, and the Financial Advisor Charge should be granted; and
    e. the full amount of the DIP Facility should be approved and the DIP Lender's Charge should be granted,

    will be determined at the hearing of the Come-Back Motion on February 15, 2024, together with any other issues raised by motion or opposition through the delivery of materials provided in the terms of adjournment (above).

Order

11. For the foregoing reasons, I will sign an interim order dated January 31, 2024 to implement the relief granted in the context of the adjournment of the Come-Back Motion, limited only matters that require amendments or supplements to the Initial Order during the brief adjournment period.
12. The balance of the relief sought on the Come-Back Motion is adjourned to February 15 2024 commending at 11:00 a.m. for two hours.

KIMMEL J.
February 2, 2024