



ONTARIO SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)

**COUNSEL/ENDORSEMENT SLIP**

COURT FILE NO.: CV-24-00713245-00CL

DATE: March 28<sup>th</sup> 2024

NO. ON LIST: 2

TITLE OF PROCEEDING: RE BALBOA INC. et al

BEFORE: JUSTICE KIMMEL

**PARTICIPANT INFORMATION**

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**ENDORSEMENT OF JUSTICE KIMMEL:**

- [1] The Applicants seek a second amended and restated initial order (the "Second ARIO") under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA"), among other things:
- a. extending the Stay of Proceedings to and including April 30, 2024;
  - b. appointing Goldman Sloan Nash & Harber LLP ("GSNH") as representative counsel (if appointed in such capacity, the "Unsecured Lender Representative Counsel") for all of the unsecured lenders of the Applicants other than (i) The Lion's Share Group Inc. ("Lion's Share") and (ii) any other unsecured lenders directly or indirectly controlled by, or under common control or otherwise affiliated with, Lion's Share or its principal, Claire Drage (collectively, the "Unsecured Lenders" and each, an "Unsecured Lender"), including, without limitation, all of the Unsecured Lenders that have RRSPs or other registered accounts administered by Olympia Trust Company, in these proceedings, any proceeding under the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended (the "BIA") or in any other proceeding respecting the insolvency of the Applicants that may be brought before this Court (collectively, the "Insolvency Proceedings"); and
  - c. authorizing the Applicants to pay the professional fees and disbursements of the Unsecured Lender Representative Counsel and expanding the scope of the Administration Charge (as defined below) to secure such professional fees and disbursements.

[2] Capitalized terms in this endorsement not otherwise defined herein shall have the meaning ascribed to them in the Applicants' factum on this motion.

[3] The relief sought by this motion is not opposed by any party and is supported by the Monitor, for the reasons set out in its second report dated March 26, 2024 (the "Monitor's Second Report").

**Appointment of Unsecured Lender Representative Counsel**

[4] This Court has already found that it was necessary and appropriate for Secured Lender Representative Counsel to be appointed. The same circumstances that weighed in favour of the

appointment of the Secured Lender Representative Counsel now weigh in favour of the appointment of the Unsecured Lender Representative Counsel.

[5] The Monitor is supportive of GSNH's appointment as Unsecured Representative Counsel in these proceedings for the following reasons:

- a. Unsecured Lenders had access to Court-appointed paid legal representation at the outset of these CCAA proceedings, but such representation ended when the mandate of Chaitons was amended such that they became counsel for the Secured Lenders only;
- b. there are over 800 promissory notes and 300 Unsecured Lenders. The Monitor believes that the appointment of Unsecured Representative Counsel and the terms thereof are in the best interests of the Applicants and all of their stakeholders. It will provide an efficient way to streamline communications and dealings with the Unsecured Lender group, absent which significant cost and confusion may result if individual counsel were to represent some or all of the Unsecured Lenders, many of which would likely not have the benefit of experience acting in complex CCAA proceedings;
- c. the proposed terms of GSNH's mandate mirror those of Chaitons, meaning the Unsecured Lenders are effectively being granted the same Court-ordered legal representation as they were afforded under the Initial Order, including that the costs of Unsecured Representative Counsel are to be borne by the Applicants and covered by the Administration Charge;
- d. Mr. Forte of GSNH is highly qualified for this role. He has extensive experience acting as representative counsel in complex CCAA proceedings;
- e. the Monitor has only heard positive feedback about Mr. Forte and/or GSNH from Unsecured Lenders following the townhall meeting on March 4, 2024;
- f. the Monitor understands that the Applicants support, and that the Lender Representatives consent to, the appointment of Mr. Forte of GSNH as Unsecured Representative Counsel;
- g. each Unsecured Lender will have the ability to opt-out of the proposed representation; and
- h. approximately 602 of the promissory notes were issued to Lion's Share, of which Ms. Drage is the Chief Executive Officer. The remaining promissory notes were issued in favour of various individual lenders sourced by The Windrose Group Inc. ("Windrose"), a mortgage brokerage, through its principal broker, Ms. Drage.

Given the potential conflicts resulting from claims made by certain Unsecured Lenders against Lion's Share, Windrose and/or Ms. Drage, the Monitor believes it is appropriate for these parties to be excluded from the group of Unsecured Lenders represented by Unsecured Representative Counsel. The Monitor has advised Ms. Drage of the proposed exclusion and understands that Lion's Share, Windrose and/or Ms. Drage are not opposed to the proposed relief in this regard.

[6] For these reasons and those outlined in the evidence and factum filed by the Applicants on this motion, I am satisfied that the appointment of the Unsecured Lender Representative Counsel is necessary and appropriate in the circumstances and will facilitate the administration of these CCAA proceedings. The court's exercise of its discretion under s.11 of the CCAA to do so now is on the same basis as indicated in the prior endorsements dealing with the appointment of (Secured) Lender Representative Counsel.

[7] The addition of the professional fees for the Unsecured Lender Representative Counsel to those that are secured by the Administration Charge is a logical extension of their appointment. No concerns were raised about the sufficiency of the existing Administration Charge to cover these additional professional fees at this time.

[8] The advantages of having counsel for the different stakeholder groups were emphasized by all counsel appearing today. Counsel for the Proposal Trustee of the Lion's Share Group Inc. and for an ad hoc group of Promissory Noteholders to The Lions Share Group Inc., who are significant stakeholders in the Lion's Share ongoing BIA proceedings, appeared today and indicated their intention and desire to engage with the Applicants, the Monitor and other stakeholders as well.

### Stay Extension

[9] The continued need for the Stay of Proceedings while the Applicants continue to work with the Monitor and stakeholders is apparent from the materials filed.

[10] The Monitor's reasons for supporting the Stay extension are detailed in its Second Report, as follows:

- a. the Applicants are acting in good faith and with due diligence to advance these CCAA proceedings;
- b. the Applicants have been working with Bennett Jones to respond to the Monitor's preliminary information requests in the context of the Investigation;
- c. the Investigation remains ongoing and the Monitor has not yet come to any conclusions;

- d. an extension of the Stay Period will provide the Applicants time to work with the Monitor, Lender Representative Counsel and Unsecured Representative Counsel (if appointed) to develop and implement (if approved) a sale and investment solicitation process ("SISP"). In this regard, the Monitor has assisted the Applicants to obtain proposals (or revised proposals) from a total of four firms to serve as a financial advisor for the principal purpose of executing a SISP under the oversight of the Monitor. The Applicants and the Monitor are speaking with those potential candidates and it is expected that a motion to approve a SISP will be brought as soon as possible and in any event prior to the proposed expiry of the Stay Period; and
- e. the Applicants have advised that they intend to work with the Monitor, Lender Representative Counsel and Unsecured Representative Counsel to formulate and seek Court approval of a claims process prior to the expiry of the Stay Period.

[11] Subsection 11.02(2) of the CCAA authorizes this Court to grant an extension of the Stay of Proceedings for "any period the court considers necessary". To grant such an extension, this Court must be satisfied that circumstances exist that make the order appropriate and that the Applicants have acted, and are acting, in good faith and with due diligence. See *Nordstrom Canada Retail, Inc.*, 2023 ONSC 1631 at para. 7. I am so satisfied, having regard to the evidence of the Applicants and the reasons set forth in their factum and in the Monitor's Second Report and for the same reasons as indicated when the Stay of Proceedings was granted and extended by the court's prior orders in this matter (including with respect to the Additional Stay Parties and Tolling Relief that is provided for in the Second Amended and Restated Initial Order).

[12] The Applicants' cash flow forecast supports the extension of the Stay of Proceedings to April 30, 2024.

[13] The Monitor has advised the Applicants that it will only support a stay extension until April 30, 2024 and that the Monitor and Secured Representative Counsel expect the Applicants to bring a motion to approve a SISP and claims process as soon as possible and in any event prior to the end of the Stay Period. The Applicants and the Monitor agreed that such motion requires input from Unsecured Lenders Representative Counsel and, accordingly, could not be sought prior to this motion.

### Next Steps

[14] The Applicants have indicated that they intend to bring a motion for the approval of the appointment of a financial advisor to assist in the development and implementation of a SISP and that they will then decide about the timing and mechanics of a proposed SISP.

[15] The Secured Lender Representative Counsel and the Monitor are concerned about timing and want to see a SISP approved before the end of the extended Stay Period. To that end, the Monitor intends to consult with the Applicants and stakeholders about the possibility of a Monitor led SISP and the appointment of a financial advisor to assist the Monitor in that process. While this consultation and any recommendations arising from it come within the existing powers of the Monitor (for example, see paragraphs 32 (b) and (c) of the ARIO), it is acknowledged that, if such a process is approved, there would need to be a companion request for the expansion of the Monitor's powers to implement any proposed SISP. The Secured Lender Representative Counsel supports the concept of a Monitor led SISP. If the Monitor decides to recommend this process, rather than SISP led by the Applicants with their proposed financial advisor, a motion will be brought returnable at the same time as the Applicants' motion for the approval of the appointment of a financial advisor and as an alternative to the Applicants' request.

[16] All parties are concerned about timing and agree that these issues need to be decided before the Stay next expires. These motions have been scheduled for a half day on April 12, 2024. I am not available that week or the next week, so these motions have been scheduled before another judge sitting on the Commercial List. Counsel shall agree on a timetable for the exchange of their materials for these motions to ensure that all materials have been served, filed and uploaded into the appropriate CaseLines bundle by no later than 2:30 p.m. on April 11, 2024.

[17] If the parties encounter difficulties in their efforts to brief and organize themselves for these April 12, 2024 motions I will make myself available next week for a case conference to provide further directions. That may be arranged through the Commercial List Office, with reference to this endorsement.

[18] The Second Amended and Restated Initial Order may issue in the form signed by me today.

A handwritten signature in cursive script that reads "Kimmel J.".

KIMMEL J.