

**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 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.

Applicants

**FACTUM OF THE APPLICANTS
(Returnable April 12, 2024)**

April 11, 2024

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PART I: OVERVIEW

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**”) are seeking an order (the “**SISP Approval Order**”) 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 (as defined below) to and including June 24, 2024;
- (b) approving a sale, refinancing and investment solicitation process in the form attached as Schedule “A” to the SISP Approval Order (the “**SISP**”);
- (c) approving the retention of Howards Capital Corp. (“**HCC**”) and CBRE Limited (“**CBRE**”) as advisors to the Applicants (collectively in such capacities, the “**SISP Advisors**”) pursuant to engagement agreements between HCC and the Applicants and CBRE and the Applicants, respectively; and
- (d) authorizing and directing the Applicants, the SISP Advisors, and KSV Restructuring Inc., in its capacity as the Monitor of the Applicants (in such capacity, the “**Monitor**”), to implement the SISP pursuant to the terms thereof, and to perform their respective obligations thereunder.

2. The relief sought pursuant to the SISP Approval Order will allow the Applicants, with the assistance of the Monitor and the SISP Advisors, to pursue a value maximizing sale, refinancing, investment or restructuring solution for their stakeholders within the SISP, all while continuing to

operate their business in the ordinary course. The relief sought in the within motion is in the best interests of the Applicants and their stakeholders, and appropriate in the circumstances.

PART II: FACTS

3. The facts underlying this motion are more fully set out in the affidavit of Robert Clark sworn April 8, 2024 (the “**Clark Affidavit**”).¹ All capitalized terms used but not defined herein have the meanings ascribed to them in the Clark Affidavit.

A. Background on These CCAA Proceedings

4. The Applicants, together with SID Developments, SID Management, SID Renos, and certain non-Applicant affiliates (collectively, the “**Company**”), specialize in the acquisition, renovation and leasing of distressed residential real estate in undervalued markets throughout Ontario (the “**Business**”).² Since inception, the Company has acquired, renovated, leased and/or sold over 800 underutilized and strategically located properties in Ontario, that provide in aggregate over 1,200 rental units.³

5. The Applicants currently own 406 properties (collectively, the “**Properties**”) across secondary and tertiary markets in Ontario.⁴ The Properties contain 631 rental units, of which approximately 430 are tenanted, as well as a single non-operating 200-acre golf course, 40 acres of which are zoned for development.⁵

6. The acquisition and renovation of the Properties and the costs related thereto were financed through (i) first mortgage loans (the “**First Mortgage Loans**”) and second mortgage loans (the

¹ Affidavit of Robert Clark sworn on April 8, 2024 [Clark Affidavit], Applicant’s Motion Record dated April 8, 2024 at Tab 2 [Motion Record].

² *Ibid* at para 5, Motion Record at Tab 2.

³ *Ibid* at para 5, Motion Record at Tab 2.

⁴ *Ibid* at para 6, Motion Record at Tab 2. One such Property, being the Applicants’ non-operating 200-acre gold course is comprised of two parcels, each with its own municipal address.

⁵ *Ibid* at para 6, Motion Record at Tab 2.

“**Second Mortgage Loans**”) provided predominantly by numerous individual real estate investors, and (ii) unsecured promissory notes (the “**Promissory Notes**”) issued in favour of The Lion’s Share Group Inc. (“**Lion’s Share**”) and various individual real estate investors.⁶

7. The Applicants’ application for CCAA protection was driven by a severe liquidity crisis. Despite efforts to obtain a comprehensive sale or refinancing solution, as of the date of the application, the Applicants collectively had under \$100,000 cash on hand, were in default of substantially all of the First Mortgage Loans, Second Mortgage Loans and Promissory Notes, and were generally unable to meet their obligations as they became due.⁷

8. Having regard to the best interests of the Applicants and their stakeholders, including their over 300 Lenders (as defined below) and approximately 1,000 tenants, and after extensive review and careful consideration of the strategic options and alternatives available, the Applicants determined that it was necessary to seek urgent relief under the CCAA. Accordingly, the Applicants sought, and on January 23, 2024, obtained the Initial Order.⁸

9. Among other things, the Initial Order:

- (a) appointed KSV Restructuring Inc. as the Monitor;
- (b) stayed, for the Initial Stay Period, all proceedings and remedies taken or that might be taken in respect of the Applicants, the Monitor or the Applicants’ directors and officers, or affecting the Business or the Applicants’ Property (as defined below), except with the prior written consent of the Applicants and the Monitor, or with leave of the Court (the “**Stay of Proceedings**”);

⁶ *Ibid* at para 7, Motion Record at Tab 2.

⁷ *Ibid* at para 8, Motion Record at Tab 2.

⁸ *Ibid* at para 9, Motion Record at Tab 2.

- (c) stayed, for the Initial Stay Period, all proceedings against or in respect of Aruba Butt (“**Ms. Butt**”), Dylan Suitor (“**Mr. Suitor**”) and/or Ryan Molony (collectively with Ms. Butt and Mr. Suitor, the “**Additional Stay Parties**”), or against or in respect of any of the Additional Stay Parties’ current or future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate, and including all proceeds thereof (collectively, the “**Additional Stay Parties’ Property**”) 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 (collectively, the “**Related Claims**”), except with the prior written consent of the Applicants and the Monitor, or with leave of the Court;
- (d) appointed Chaitons LLP as representative counsel (in such capacity, the “**Lender Representative Counsel**”) for all of the secured and unsecured lenders of the Applicants (collectively, the “**Lenders**” and each, a “**Lender**”), in these or any other insolvency proceedings in respect of the Applicants that may be brought before the Court (collectively, the “**Insolvency Proceedings**”); and
- (e) granted the Administration Charge over the Applicants’ current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate, including all proceeds thereof (the “**Applicants’ Property**”).⁹

10. On January 31, 2024, the Court adjourned the Applicants’ comeback motion, in part, and granted an amended Initial Order (the “**Amended IO**”). Among other things, the Amended IO

⁹ *Ibid* at para 10, Motion Record at Tab 2.

extended the Stay of Proceedings to and including February 16, 2024, and approved the Applicants' ability to borrow under a debtor-in-possession credit facility (the "**DIP Facility**") pursuant to a DIP Agreement dated January 26, 2024, between the Applicants and Harbour Mortgage Corp. or its permitted assignee and granted certain related relief.¹⁰

11. On February 15, 2024, the Applicants sought and obtained an amended and restated Initial Order (the "**ARIO**"), which, among other things:

- (a) extended the Stay of Proceedings to and including March 28, 2024;
- (b) increased the Applicants' maximum borrowings under the DIP Facility from \$4,000,000 to \$12,000,000, and granted a corresponding increase to the DIP Lender's Charge; and
- (c) granted the Monitor certain enhanced powers and oversight, including:
 - (i) requiring the prior written consent of the Monitor for all payments to be made, and liabilities to be incurred, by the Applicants; and
 - (ii) directing and empowering the Monitor to (A) conduct an investigation into the use of funds borrowed by the Applicants, pre-filing transactions conducted by the Applicants and/or their principals and affiliates, and such other matters as may be requested by the Lender Representatives (as defined in the ARIO) and agreed to by the Monitor, in each case, to the extent such investigation relates to the Applicants' property, the Business or such other matters as may be relevant to these CCAA proceedings as determined by

¹⁰ *Ibid* at para 13, Motion Record at Tab 2.

the Monitor (the “**Investigation**”), and (B) report to the Lender Representatives and the Court on the findings of the Investigation as the Monitor deems necessary and appropriate.¹¹

12. Most recently, the Applicants sought, and on March 28, 2024, obtained a second ARIO (the “**Second ARIO**”), which, among other things:

- (a) extended the Stay of Proceedings to and including April 30, 2024; and
- (b) appointed Goldman Sloan Nash & Harber LLP 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) 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**”), in the Insolvency Proceedings.¹²

B. The SISP Advisors’ Retention

13. In contemplation of a potential SISP and to address the Applicants’ need for the assistance of an independent financial and/or sale advisor, the Applicants, with the assistance of the Monitor, solicited proposals from various prospective advisors. The Applicants and the Monitor received proposals from four advisors, including HCC and CBRE, and the Applicants separately received a proposal from an additional advisor (collectively, the “**Prospective Advisors**”).¹³

14. The Monitor, following consultation with the Applicants, the Lender Representative Counsel, the Unsecured Lender Representative Counsel and the Court-appointed receiver of

¹¹ *Ibid* at para 14, Motion Record at Tab 2.

¹² *Ibid* at para 16, Motion Record at Tab 2.

¹³ *Ibid* at para 24, Motion Record at Tab 2.

Lion's Share (the "**Lion's Share Receiver**"), recommended that HCC and CBRE be jointly retained as the SISP Advisors as follows:

- (a) HCC would be engaged solely in respect of any refinancing of, or other strategic investment in, the Applicants' Property (each, a "**Strategic Transaction**"); and
- (b) CBRE would be engaged solely in respect of any sale transactions involving the Applicants' Property (each, a "**Sale Transaction**").¹⁴

15. After careful review and consideration of each of the Prospective Advisors and their respective proposals, the Applicants similarly concluded that it was in the best interests of the Applicants and their stakeholders to retain both HCC and CBRE.¹⁵

16. The terms of the SISP Advisors' engagements are set out in the substantially final, unexecuted copies of the HCC Engagement Agreement and the CBRE Engagement Agreement (together, the "**Engagement Agreements**") to be entered into between HCC and the Applicants and CBRE and the Applicants, respectively.¹⁶ Both Engagement Agreements contemplate that the SISP Advisors will:

- (a) assist the Monitor in implementing and conducting the SISP in connection with their respective mandates;
- (b) consult with key stakeholders;
- (c) assist with the due diligence process for interested parties;

¹⁴ Affidavit of Joshua Foster sworn April 11, 2024 at Exhibit "A", HCC Engagement Agreement and Exhibit "B", CBRE Engagement Agreement, respectively [Foster Affidavit].

¹⁵ Clark Affidavit, *supra* note 1 at para 26, Motion Record at Tab 2.

¹⁶ *Ibid* at para 21, Motion Record at Tab 2; Foster Affidavit, *supra* note 14 at Exhibits "A" and "B".

- (d) provide advice with respect to Strategic Transactions or Sale Transactions, as applicable; and
- (e) engage local agents (with the consent of the Monitor) if and when appropriate.¹⁷

17. As noted above, the Engagement Agreements clearly delineate that HCC shall be solely responsible for aspects of the SISP related to Strategic Transactions, and that CBRE shall solely be responsible for aspects of the SISP related to Sale Transactions. As such, there is no overlap with respect to the services to be provided by the SISP Advisors.¹⁸

18. Pursuant to the HCC Engagement Agreement and in consideration for providing the services set out therein, HCC is entitled to a fixed fee in an amount equal to \$30,000 per month, plus applicable taxes (the “**Monthly Fee**”). The Monthly Fee is (i) payable from the date on which the proposed SISP Approval Order is granted until the termination of HCC’s engagement and (ii) pro-rated for the number of days for which HCC is a SISP Advisor in respect of the first and last months of its retention.¹⁹ HCC is also entitled to a completion fee equal to 1% of the indebtedness involved in any Strategic Transaction(s), subject to certain exceptions, up to a maximum of \$1,500,000 (the “**Completion Fee**”), as well as reimbursement of expenses incurred by it and any of its consultants (subject to certain consent rights in favour of the Applicants and the Monitor).²⁰

19. Pursuant to the CBRE Engagement Agreement, CBRE is entitled to a work fee in the amount of \$100,000, plus applicable taxes. CBRE is also entitled to the following fees, to be paid upon the closing of any applicable Sale Transaction (the “**Sales Fees**”):

¹⁷ *Ibid* at paras 35, 41, Motion Record at Tab 2.

¹⁸ Foster Affidavit, *supra* note 14 at Exhibits “A” and “B”.

¹⁹ Clark Affidavit, *supra* note 1 at para 36, Motion Record at Tab 2.

²⁰ *Ibid* at para 37, Motion Record at Tab 2.

- (a) 5% (or the equivalent standard MLS fee per market) of the gross sale price of one of the Properties;
- (b) 0.75% of the gross sale price for the sale of the entirety of the Portfolio; and
- (c) a variable percentage of the gross sale price for the sale of a portion of the Portfolio, which ranges between 4% to 0.75% and decreases as the gross sale proceeds increase.²¹

20. HCC shall not be entitled to the Completion Fee if it terminates the HCC Engagement Agreement.²² Similarly, CBRE shall not be entitled to Sales Fees if it terminates the CBRE Engagement Agreement.²³

C. The SISP

21. The SISP was developed by the Monitor in consultation with the Applicants, the SISP Advisors, the Lender Representative Counsel, the Unsecured Lender Representative Counsel and the Lion's Share Receiver.²⁴ As set out below, it provides for an extremely flexible process that is intended to maximize value for the benefit of the Applicants and their stakeholders.

22. The SISP prescribes the manner in which the Monitor, with the assistance of the SISP Advisors, and in consultation with the Applicants, the Lender Representative Counsel, the Unsecured Lender Representative Counsel and the Lion's Share Receiver, shall solicit interest in one or more refinancing, sale and/or other strategic Transactions involving the business, assets and/or equity of the Applicants or any part thereof from interested parties (the "**Opportunity**").²⁵

²¹ *Ibid* at para 42, Motion Record at Tab 2.

²² *Ibid* at para 38, Motion Record at Tab 2.

²³ *Ibid* at para 43, Motion Record at Tab 2.

²⁴ *Ibid* at para 46, Motion Record at Tab 2.

²⁵ *Ibid* at para 46, Motion Record at Tab 2.

23. The SISP contemplates a two-stage process. The first phase (“**Phase 1**”) requires the submission of non-binding letters of intent (“**LOIs**” and each, an “**LOI**”) by Potential Bidders (as defined in the SISP) while the second phase (“**Phase 2**”) will require the submission of binding offers.²⁶

24. In Phase 1 of the SISP, the Monitor, supported by and with the assistance of the SISP Advisors, will solicit non-binding LOIs in respect of the Opportunity. A Potential Bidder that wishes to make a bid in the SISP must deliver a written copy of its non-binding LOI to the Monitor by no later than 5:00 p.m. (Toronto time) on June 10, 2024.²⁷ Such LOI must comply with the criteria prescribed in the SISP to constitute a Qualified LOI (as defined in the SISP).²⁸

25. Subject to certain safeguards intended to protect the integrity of the SISP, the SISP Advisors, the Monitor, the Applicants, the Lion’s Share Receiver, the Lender Representative Counsel and the Unsecured Lender Representative Counsel (collectively, the “**Reviewing Parties**”) shall review the LOIs received.²⁹ The Monitor, in consultation with the other Reviewing Parties, shall determine which of the LOIs, if any, constitute Qualified LOIs.³⁰

26. To maximize the flexibility of the SISP and reduce the unnecessary expenditure of time and resources, the SISP does not enumerate the parameters that will govern the submission of binding bids in Phase 2.³¹ Rather, it provides for an informed, cooperative, and consultative process pursuant to which such parameters, if necessary, will be determined by the Reviewing Parties.

²⁶ *Ibid* at para 48, Motion Record at Tab 2.

²⁷ *Ibid* at para 50, Motion Record at Tab 2.

²⁸ *Ibid* at para 52, Motion Record at Tab 2.

²⁹ *Ibid* at para 54, Motion Record at Tab 2. While not a “Reviewing Party” as defined in the SISP, the DIP Lender shall also have the right to review the LOIs received, subject to the same safeguards as the Reviewing Parties.

³⁰ *Ibid* at para 54, Motion Record at Tab 2.

³¹ *Ibid* at para 56, Motion Record at Tab 2.

D. The Stay of Proceedings

27. The Stay of Proceedings under the ARIO will expire on April 30, 2024. Pursuant to the proposed SISP Approval Order, the Applicants are seeking to extend the Stay of Proceedings, including in respect of the Additional Stay Parties and the Additional Stay Parties' Property, to and including June 24, 2024 (the "**Stay Period**").³²

28. The Applicants revised cash flow forecast demonstrates that the Applicants will have sufficient cash to support the Business' ordinary course operations and the costs of these CCAA proceedings throughout the Stay Period.³³

E. Sealing

29. To protect the integrity of the SISP and ensure that one or more value-maximizing Transactions materialize therein, the Applicants are seeking a temporary sealing order in respect of the unredacted copy of the CBRE Engagement Agreement, which contains commercially sensitive information.³⁴ The Applicants have filed a redacted copy of the CBRE Engagement Agreement in respect of the within motion. The proposed sealing order is limited to the variable component of the Sales Fees applicable in the event of a partial sale of the Portfolio.³⁵

PART III: ISSUES

30. The issues to be considered on this motion are whether:

- (a) the Applicants should be authorized to retain the SISP Advisors and the Engagement Agreements should be approved;

³² *Ibid* at para 59, Motion Record at Tab 2.

³³ *Ibid* at para 59, Motion Record at Tab 2; Third Report of the Monitor dated April 9, 2024 at section 6.0 [Third Report].

³⁴ *Ibid* at para 44, Motion Record at Tab 2.

³⁵ *Ibid*, Motion Record at Tab 2.

- (b) the SISP should be approved;
- (c) the Stay of Proceedings should be extended to June 24, 2024; and
- (d) the unredacted copy of the CBRE Engagement Agreement should be sealed.

PART IV: LAW AND ANALYSIS

A. The Applicants Should be Authorized to Retain the SISP Advisors and the Engagement Agreements Should be Approved

31. This Court has the authority under section 11 of the CCAA to make any order it considers appropriate in the circumstances.³⁶ The Applicants are of the view that it is necessary and in the best interests of the Applicants and their stakeholders to retain the SISP Advisors in connection with the SISP.

32. The exercise of this Court’s discretion under section 11 of the CCAA must “further the remedial objectives of the CCAA and be guided by the baseline considerations of appropriateness, good faith, and due diligence”.³⁷ The CCAA’s objectives include “providing for timely, efficient and impartial resolution of a debtor’s insolvency” and “preserving and maximizing the value of a debtor’s assets”.³⁸

33. Relying on section 11 of the CCAA, Courts have previously approved the engagement of financial advisors where such engagements facilitated the debtors’ restructuring,³⁹ including in the context of assisting with Court-approved sale processes.⁴⁰

³⁶ *Companies’ Creditors Arrangement Act*, RSC 1985, c C-36, s 11. [CCAA].

³⁷ 9354-9186 *Québec inc v Callidus Capital Corp*, 2020 SCC 10 at para 70.

³⁸ *Ibid* at para 40.

³⁹ *Tacora Resources Inc (Re)*, 2023 ONSC 6126 at para 158; *BioSteel Sports Nutrition Inc.*, (September 21, 2023), Toronto, CV-23-00706033-00CL ([Endorsement](#)) (ONSC) (Commercial List) at paras 12-13 (Cavanagh, J); *Target Canada Co. (Re)*, 2015 ONSC 303 at para 72.

⁴⁰ *Re Tamerlane Ventures Inc*, 2013 ONSC 5461 at para 22; *Re Walter Energy Canada Holdings, Inc*, 2016 BCSC 107 at paras 19, 27, 31-32 [Walter Energy]; *In the Matter of a Plan of Compromise or Arrangement of Trichome Financial Corp. et al* (January 9, 2023), Toronto, CV-22-00689857-00CL ([Stalking Horse and SISP Approval Order](#)) (ONSC) (Commercial List) (Conway, J); 2039882 *Ontario Limited O/A Shelter Cove (Re)* (February 6, 2024), Toronto, CV-24-00713069-00CL ([Endorsement](#)) at para 12 (Conway, J).

34. When determining whether to approve the engagement of an advisor in an insolvency proceeding, Courts have considered the following factors, among others:

- (a) whether the debtors and the Court-officer overseeing the proceedings believe that the quantum and nature of the remuneration are fair and reasonable;
- (b) whether the financial advisor has industry experience and/or familiarity with the business of the debtor; and
- (c) whether a success fee is necessary to incentivize the financial advisor.⁴¹

35. In the circumstances, the Applicants submit that it is appropriate for this Court to authorize the retention of the SISP Advisors and to approve the Engagement Agreements as:

- (a) the Applicants and the Monitor are of the view that the engagement of the SISP Advisors will enhance the prospect of achieving one or more value maximizing Transactions for the benefit of the Applicants and their stakeholders;
- (b) the SISP Advisors each have relevant and unique experience and will bring significant knowledge and expertise to the SISP. HCC has extensive financial advisory, turnaround and management experience, including in the real estate industry. CBRE is a global leader in commercial real estate services and investments and is regularly engaged in Canadian insolvency proceedings;
- (c) the roles and success fee-based remuneration of the SISP Advisors are not duplicative, and each of the SISP Advisors will carry out distinct functions in separately working towards achieving one or more value-maximizing Strategic

⁴¹ *Danier Leather Inc. (Re)*, [2016 ONSC 1044](#) at para 47 [*Danier*]; *Colossus Minerals Inc. (Re)*, [2014 ONSC 514](#) at paras 30, 31-36; *Sino-Forest Corporation (Re)*, [2012 ONSC 2063](#) at para 47; *Walter Energy*, *ibid* at paras 31-32, 35; *Target*, *ibid* at para 72.

Transactions and Sale Transactions, as applicable. The Properties, which as noted above, are located in secondary and tertiary markets, form one of Canada's largest residential real estate portfolios. Given the unique nature of the Properties and this asset class in Canada, the retention of both SISP Advisors to perform their respective services, each based on their expertise, is necessary and appropriate;

- (d) the Applicants and the Monitor are of the view that the SISP Advisors' remuneration is appropriate given the SISP Advisors' experience, the breadth of the services to be provided and the benefit expected to accrue to the Applicants and their stakeholders by virtue of the SISP Advisors' involvement in the SISP;
- (e) the Monitor is supportive of the SISP Advisors' engagement and the approval of the Engagement Agreements; and
- (f) as of the date hereof, the Applicants are not aware of any opposition to the engagement of the SISP Advisors.⁴²

B. The SISP Should be Approved

36. The remedial nature of the CCAA confers broad powers to facilitate restructurings, including the power to approve a sale process in relation to a CCAA debtor's business and assets, prior to or in the absence of a plan of compromise and arrangement.⁴³

37. In *Nortel Networks Corporation (Re)*, the Court identified several factors to be considered in determining whether to approve a sale process:

⁴² Clark Affidavit, *supra* note 1 at paras 22, 26, and Exhibit "A", Affidavit of Robert Clark sworn January 23, 2024 at para 43; Motion Record at Tab 2; Third Report, *supra* note 33 at section 5.0, para 8.

⁴³ *Nortel Networks Corporation (Re)*, 2009 CanLII 39492 (ON SC) [Commercial List] at para 48 [*Nortel*]; *In the Matter of the Companies' Creditors Arrangement Act and In the Matter of a Plan of Compromise or Arrangement of BZAM Ltd* (March 8, 2024), Toronto, CV-24-00715773-00CL ([Endorsement](#)) (ONSC) (Commercial List), (Osborne, J) at para 15; [CCAA](#), *supra* note 36 at [s 11](#), [s 36](#).

- (a) Is a sale warranted at this time?
- (b) Will the sale be of benefit to the whole “economic community”?
- (c) Do any of the debtors’ creditors have a *bona fide* reason to object to a sale of the business?
- (d) Is there a better viable alternative?⁴⁴

38. While not technically applicable at the sale process stage, the factors set out in subsection 36(3) of the CCAA have also been considered when deciding whether to approve a sale process:

- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (b) whether the monitor approved the process leading to the proposed sale or disposition;
- (c) whether the monitor filed with the court a report stating that in its opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
- (d) the extent to which the creditors were consulted;
- (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

⁴⁴ [Nortel](#), *ibid* at para 49; [Brainhunter Inc \(Re\)](#), 2009 CanLII 72333 (ON SC) [Commercial List] at para 13; [Danier](#), *supra* note 41 at para 23.

- (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.⁴⁵
39. In consideration of the above criteria and factors, the SISP should be approved, as:
- (a) the SISP was developed by the Monitor and the terms were negotiated between the Monitor, the Applicants, the Lender Representative Counsel, the Unsecured Lender Representative Counsel and the Lion's Share Receiver;
 - (b) the SISP will provide a flexible, efficient, fair and equitable process for canvassing the market for potential buyers of, or investors in, some or all of the Applicants' Property, and maximizing recovery for the Applicants' stakeholders;
 - (c) the SISP's unique structure will afford the Applicants and their stakeholders the optionality to pursue one or more refinancing, sale and/or other strategic Transactions or, if appropriate, other restructuring options, and navigate the complexities attending marketing an incomplete Portfolio;
 - (d) the timelines provided in Phase 1 are reasonable, and the flexible nature of the SISP provides that the Phase 2 timelines will be determined once a review of LOIs received pursuant to Phase 1 is complete;
 - (e) the Applicants are not aware of any opposition to the SISP; and
 - (f) the Monitor is supportive of the approval of the SISP.⁴⁶

⁴⁵ See for example *U.S. Steel Canada Inc. (Re)*, [2015 ONSC 2523](#) at para 8.

⁴⁶ Clark Affidavit, *supra* note 1 at paras 46-48; Third Report, *supra* note 33 at section 4.4.

40. For the reasons set out above, the Applicants submit that the SISP should be approved.

C. The Stay of Proceedings Should be Extended

1. The Stay of Proceedings Should be Extended to and including June 24, 2024 for the Applicants

41. 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”.⁴⁷ 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.⁴⁸

42. The jurisdiction vested in Courts to stay proceedings under section 11.02 “should be construed broadly to accomplish the legislative purposes of the CCAA”.⁴⁹ These purposes include, among others, enabling the continuation of the applicants’ business, avoiding the social and economic costs of a liquidation and facilitating a value-maximizing restructuring.⁵⁰ Accordingly, 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 attempt to arrange an acceptable restructuring plan in order to maximize recoveries for stakeholders.⁵¹

43. In this case, the proposed extension of the Stay of Proceedings is appropriate in the circumstances given that:

- (a) since the granting of the Second ARIO, the Applicants have acted in good faith and with due diligence to stabilize and continue the Business’ ordinary course

⁴⁷ CCAA, *supra* note 36 at s 11.02(2); *Nordstrom Canada Retail, Inc.*, 2023 ONSC 1631 at para 7 [*Nordstrom*].

⁴⁸ CCAA, *ibid*; *Nordstrom*, *ibid*.

⁴⁹ *Canwest Global Communications Corp.*, 2011 ONSC 2215 at para 24.

⁵⁰ *Ibid*; *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60 at para 15 [*Century Services*]; *Target*, *supra* note 39 at para 8; *Timminco Limited (Re)*, 2012 ONSC 2515 at para 15 [*Timminco*].

⁵¹ *Century Services*, *ibid* at para 14; *Target*, *ibid*; *Timminco*, *ibid*.

operations, cooperate with the Investigation, and advance their restructuring objectives;

- (b) the Stay of Proceedings remains necessary to avoid uncoordinated and distressed sales or forced liquidations of the Properties to the detriment of the Applicants' stakeholders;
- (c) the extension of the Stay of Proceedings will preserve the *status quo* and afford the Applicants the breathing space and stability required to continue the Business' ordinary course operations, complete value accretive renovations and allow the Monitor, with the assistance of the SISP Advisors, to implement and conduct the SISP;
- (d) the Applicants are forecast to have sufficient liquidity to support the Business' ordinary course operations and the costs of these CCAA proceedings throughout the Stay Period; and
- (e) the Monitor is supportive of the proposed extension of the Stay of Proceedings.⁵²

44. The Applicants therefore submit that the proposed extension of the Stay of Proceedings for the Applicants' benefit is in their best interests and in the best interests of their stakeholders, is consistent with the purposes of the CCAA, and is appropriate in the circumstances.

⁵² Clark Affidavit, *supra* note 1 at paras 60-63, Motion Record at Tab 2; Third Report, *supra* note 33 at section 7.0.

2. The Stay of Proceedings Should be Extended for the Additional Stay Parties and the Additional Stay Parties' Property, and the Tolling Relief Should be Granted

45. The SISP Approval Order also extends the Stay of Proceedings in favour of the Additional Stay Parties and the Additional Stay Parties' Property for the Stay Period. The Additional Stay Parties are indirect shareholders of the Applicants and are the Applicants' only directors.⁵³

46. Pursuant to the Initial Order (as amended and restated most recently by the Second ARIO), this Court granted a limited stay of proceedings in favour of the Additional Stay Parties and the Additional Stay Parties' Property with respect to the Related Claims for the Initial Stay Period (the “**Non-Applicant Stay**”). Among other things, the purpose of seeking the Non-Applicant Stay was to allow the Additional Stay Parties to focus on achieving a restructuring solution in these CCAA proceedings and to prevent them from being dragged into the myriad of claims that have been or could soon be issued as a result of their purported guarantee of all or substantially all of the Applicants' funded indebtedness.

47. This Court has previously found that it has jurisdiction to grant the Non-Applicant Stay in light of subsections 11.04 and 11.03(2) of the CCAA and that such a stay is just and convenient in the circumstances.⁵⁴ In its endorsement accompanying the Initial Order, it found that the Non-Applicant Stay was consistent with the “single-proceeding model” and that uncoordinated enforcement by hundreds of Lenders against the Additional Stay Parties would not be in the best interests of the Applicants or the administration of justice.⁵⁵

⁵³ *Ibid* at para 64, Motion Record at Tab 2.

⁵⁴ *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* (January 23, 2024), Toronto, CV-24-00713254-00CL ([Endorsement](#)) (ONSC) (Commercial List), (Kimmel J) at para 35 [*Initial Order Endorsement*].

⁵⁵ *Ibid* at para 34.

48. The circumstances of this case continue to favour the extension of the Non-Applicant Stay for the Stay Period. Absent the stay extension, the Applicants and the Additional Stay Parties could be forced to respond to hundreds of claims, which would severely strain the Applicants' and the Additional Stay Parties' limited and already stretched resources and jeopardize the Applicants' ability to successfully effect a restructuring in these CCAA proceedings.⁵⁶

49. Given that the Second ARIO tolls any prescription, time or limitation period relating to any proceeding against or in respect of the Additional Stay Parties of the Additional Stay Parties' Property in respect of the Related Claims, the plaintiffs and potential plaintiffs will only be minimally prejudiced by the temporary Non-Applicant Stay, which does not settle their actions or release, compromise or permanently enjoin any claims.⁵⁷

D. Sealing

50. The SISP Approval Order would seal the unredacted copy of the CBRE Engagement Agreement. As noted above, the Applicants only seek to keep the variable component of the Sales Fees applicable in the context of a partial sale of the Portfolio confidential in the circumstances. The Applicants have otherwise filed a redacted copy of the CBRE Engagement Agreement with their motion materials.

51. Subsection 137(2) of the *Courts of Justice Act* provides that a court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.⁵⁸

⁵⁶ Clark Affidavit, *supra* note 1 at para 67, Motion Record at Tab 2.

⁵⁷ *Initial Order Endorsement*, *supra* note 54 at para 36.

⁵⁸ *Courts of Justice Act*, [RSO 1990, c C 43, s 137\(2\)](#).

52. In *Sherman Estate v. Donovan*, the Supreme Court of Canada recast the test to be used by a Court in considering whether a sealing order should be granted.⁵⁹ The Supreme Court held that the party asking a Court to exercise its discretion to grant a sealing order must establish that: (i) court openness poses a serious risk to an important public interest; (ii) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and (iii) as a matter of proportionality, the benefits of the order outweigh its negative effects.⁶⁰

53. All factors favour the sealing request in this case.

54. The sealing of the CBRE Engagement Agreement is in the public interest. Courts have recognized the important public interests that CCAA proceedings serve,⁶¹ and that the maximization of recoveries in an insolvency proceeding is an important public interest.⁶² Moreover, there is no reasonable alternative to granting the sealing relief requested in the SISP Approval Order. Courts have found that no reasonable alternative to a sealing order exists where declining to grant the proposed order would materially impair the maximization of asset value for the benefit of stakeholders.⁶³

55. In this case, it is in the public interest to seal the unredacted CBRE Engagement Agreement, and failing to do so could materially impair the maximization of asset value. The disclosure of the variable component of the Sales Fees could undermine the Monitor's ability, with the assistance of the SISP Advisor, to consummate one or more value-maximizing Sale Transactions in respect of a portion of the Portfolio to the detriment of the Applicants and their stakeholders. Indeed, such

⁵⁹ *Sherman Estate v Donovan*, [2021 SCC 25](#).

⁶⁰ *Ibid* at para [38](#).

⁶¹ *Nortel*, *supra* note 43 at para [29](#).

⁶² *Danier*, *supra* note 41 at para [84](#).

⁶³ *In the Matter of a Plan of Compromise or Arrangement of Original Traders Energy Ltd. and 2496750 Ontario Inc.*, (January 30, 2023), Toronto, CV-23-00693758-00CL ([Endorsement](#)) (ONSC) (Commercial List), (Osborne, J) at para 62.

disclosure may lead to Potential Bidders surmising what CBRE views as the most likely achievable values for the Properties and submitting bids strategically to come within the ambit of a particular range of CBRE's variable Sales Fees. By keeping these details confidential, the Applicants will ensure that there is appropriate competitive tension in the SISP.

56. Finally, the benefits of the sealing request outlined above outweigh any deleterious effects. The sealing request is appropriately limited in the circumstances. Only limited information has been redacted from the public record, and the sealing order will be subject to further order of the Court.

57. The Applicants therefore submit that the sealing request is necessary and appropriate in the circumstances, and does not prejudice any of their stakeholders.

PART V: RELIEF REQUESTED

58. The Applicants submit that the relief sought on the within motion is reasonable and appropriate in the circumstances and respectfully request that this Court grant the proposed SISP Approval Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 11TH DAY OF APRIL 2024

Bennett Jones LLP

BENNETT JONES LLP

SCHEDULE A

LIST OF AUTHORITIES

Cases Cited

1. 2039882 *Ontario Limited O/A Shelter Cove (Re)* (February 6, 2024), Toronto, CV-24-00713069-00CL ([Endorsement](#)) (ONSC) (Commercial List) (Conway, J).
2. 9354-9186 *Québec inc v Callidus Capital Corp*, [2020 SCC 10](#).
3. *BioSteel Sports Nutrition Inc.*, (September 21, 2023), Toronto, CV-23-00706033-00CL ([Endorsement](#)) (ONSC) (Commercial List) (Cavanagh, J).
4. *Brainhunter Inc (Re)*, [2009 CanLII 72333 \(ON SC\) \[Commercial List\]](#).
5. *Canwest Global Communications Corp*, [2011 ONSC 2215](#).
6. *Century Services Inc v Canada (Attorney General)*, [2010 SCC 60](#).
7. *Colossus Minerals Inc. (Re)*, [2014 ONSC 514](#).
8. *Danier Leather Inc. (Re)*, [2016 ONSC 1044](#).
9. *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* (January 23, 2024), Toronto, CV-24-00713254-00CL ([Endorsement](#)) (ONSC) (Commercial List), (Kimmel J).
10. *In the Matter of a Plan of Compromise or Arrangement of Original Traders Energy Ltd. and 2496750 Ontario Inc*, (January 30, 2023), Toronto, CV-23-00693758-00CL ([Endorsement](#)) (ONSC) (Commercial List), (Osborne, J).
11. *In the Matter of a Plan of Compromise or Arrangement of Trichome Financial Corp. et al* (January 9, 2023), Toronto, CV-22-00689857-00CL ([Stalking Horse and SISP Approval Order](#)) (ONSC) (Commercial List), (Conway, J).
12. *In the Matter of the Companies' Creditors Arrangement Act and In the Matter of a Plan of Compromise or Arrangement of BZAM Ltd* (March 8, 2024), Toronto, CV-24-00715773-00CL ([Endorsement](#)) (ONSC) (Commercial List), (Osborne, J).
13. *Nordstrom Canada Retail, Inc*, [2023 ONSC 1631](#).
14. *Nortel Networks Corporation (Re)*, [2009 CanLII 39492 \(ON SC\) \[Commercial List\]](#).
15. *Re Tamerlane Ventures Inc*, [2013 ONSC 5461](#).
16. *Re Walter Energy Canada Holdings, Inc*, [2016 BCSC 107](#).

17. *Sherman Estate v. Donovan*, [2021 SCC 25](#).
18. *Sino-Forest Corporation (Re)*, [2012 ONSC 2063](#).
19. *Tacora Resources Inc (Re)*, [2023 ONSC 6126](#).
20. *Target Canada Co. (Re)*, [2015 ONSC 303](#).
21. *Timminco Limited (Re)*, [2012 ONSC 2515](#).
22. *U.S. Steel Canada Inc, (Re)*, [2015 ONSC 2523](#).

SCHEDULE B

STATUTES AND REGULATIONS RELIED ON

Companies' Creditors Arrangement Act, R.S.C. 1985, c C-36

Section 11

General Power of Court

Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

R.S., 1985, c. C-36, s. 11; 1992, c. 27, s. 90; 1996, c. 6, s. 167; 1997, c. 12, s. 124; 2005, c. 47, s. 128.

Section 11.02

Stays, etc. – initial application

(1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Stays, etc. — other than initial application

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Burden of proof on application

(3) The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Restriction

(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

2005, c. 47, s. 128, 2007, c. 36, s. 62(F)2019, c. 29, s. 137.

Stays — directors

11.03 (1) An order made under section 11.02 may provide that no person may commence or continue any action against a director of the company on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the company if directors are under any law liable in their capacity as directors for the payment of those obligations, until a compromise or an arrangement in respect of the company, if one is filed, is sanctioned by the court or is refused by the creditors or the court.

Exception

(2) Subsection (1) does not apply in respect of 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.

Persons deemed to be directors

(3) If all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the company is deemed to be a director for the purposes of this section.

2005, c. 47, s. 128

Persons obligated under letter of credit or guarantee

11.04 No order made under section 11.02 has affect on any action, suit or proceeding against a person, other than the company in respect of whom the order is made, who is obligated under a letter of credit or guarantee in relation to the company.

Section 36

Restriction on disposition of business assets

(1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Notice to creditors

(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Factors to be considered

(3) In deciding whether to grant the authorization, the court is to consider, among other things,

- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (b) whether the monitor approved the process leading to the proposed sale or disposition;
- (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
- (d) the extent to which the creditors were consulted;
- (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
- (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

Additional factors — related persons

(4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

- (a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and
- (b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

Related persons

(5) For the purpose of subsection (4), a person who is related to the company includes

- (a) a director or officer of the company;
- (b) a person who has or has had, directly or indirectly, control in fact of the company; and
- (c) a person who is related to a person described in paragraph (a) or (b).

Assets may be disposed of free and clear

(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

Restriction — employers

(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(5)(a) and (6)(a) if the court had sanctioned the compromise or arrangement.

Restriction — intellectual property

(8) If, on the day on which an order is made under this Act in respect of the company, the company is a party to an agreement that grants to another party a right to use intellectual property that is included in a sale or disposition authorized under subsection (6), that sale or disposition does not affect that other party's right to use the intellectual property — including the other party's right to enforce an exclusive use — during the term of the agreement, including any period for which the other party extends the agreement as of right, as long as the other party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

2005, c. 47, s. 1312007, c. 36, s. 782017, c. 26, s. 142018, c. 27, s. 26

Courts of Justice Act, RSO 1990, c C 43

Section 137

Documents public

(1) On payment of the prescribed fee, a person is entitled to see any document filed in a civil proceeding in a court, unless an Act or an order of the court provides otherwise.

Sealing documents

(2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

Court lists public

(3) On payment of the prescribed fee, a person is entitled to see any list maintained by a court of civil proceedings commenced or judgments entered.

Copies

(4) On payment of the prescribed fee, a person is entitled to a copy of any document the person is entitled to see.

R.S.O. 1990, c. C.43, s. 137.

**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
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.**

Court File No.: CV-24-00713245-00CL

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

Proceeding commenced at Toronto

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