

**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 January 31, 2024)**

January 30, 2024

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PART I: OVERVIEW

1. On January 23, 2024, 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**”) sought and obtained an order (the “**Initial Order**”) under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “**CCAA**”).

2. The Initial Order was tailored to provide the Applicants with the relief reasonably necessary to maintain the *status quo* and continue the Business’ (as defined below) ordinary course operations during an initial 10-day period (the “**Initial Stay Period**”).

3. Upon the expiration of the Initial Stay Period, the Applicants will require an extension and expansion of the relief provided under the Initial Order to facilitate and advance these CCAA proceedings. To that end, the Applicants now seek an amended and restated Initial Order (the “**ARIO**”), among other things:

- (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 relief proposed under the ARIO is necessary to allow the Applicants to continue the Business' ordinary course operations and pursue their refinancing and restructuring objectives for the benefit of their stakeholders. The requested relief is, in each case, supported by KSV Restructuring Inc., in its capacity as the Court-appointed monitor in these CCAA proceedings (the "**Monitor**").

PART II: FACTS

5. The facts underlying this motion are more fully set out in the affidavits of Robert Clark, sworn January 23, 2024 and January 28, 2024 (together, the “**Clark Affidavits**”).¹ All capitalized terms used but not defined herein have the meanings ascribed to them in the Clark Affidavits.

A. The Need for these CCAA Proceedings and the Initial Order

6. Together with SID Developments, SID Management, SID Renos, and certain non-Applicant affiliates, the Applicants are part of a group of companies (collectively, the “**Company**”) specializing 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

7. 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 424 are tenanted, as well as a single non-operating 200-acre golf course, 40 acres of which are zoned for development.⁵

8. 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 “**Second Mortgage Loans**”) provided predominantly by numerous individual real estate investors,

¹ Affidavit of Robert Clark sworn on January 23, 2024, Applicant’s Motion Record dated January 28, 2024 at Tab 2A [Motion Record]; Affidavit of Robert Clark sworn on January 28, 2024 [Second Clark Affidavit], Motion Record at Tab 2.

² Second Clark Affidavit, *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.

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

and (ii) unsecured promissory notes (the “**Promissory Notes**”) issued in favour of The Lion’s Share Group Inc. and various individual real estate investors.⁶

9. The Applicants’ application for CCAA protection was driven by a severe liquidity crisis. Despite months of 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

10. 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

11. 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**”), including, without limitation, all of the Lenders that have RRSPs or other registered accounts administered by Olympia Trust Company, in these or any other insolvency proceeding in respect of the Applicants that may be brought before the Court; 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

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

12. The relief sought pursuant to the Initial Order was limited to that reasonably necessary to preserve the *status quo* and provide the stability and breathing room required to prevent the immediate cessation of the Business and value-destructive liquidation of the Properties.¹⁰

B. The Stay of Proceedings

13. The Stay of Proceedings under the Initial Order will expire on February 2, 2024. Pursuant to the ARIO, the Applicants seek to extend the Initial Stay Period to and including March 28, 2024 (the “**Stay Period**”).

14. The extension of the Stay of Proceedings will preserve the *status quo* and allow the Applicants to, among other things:

- (a) operate the Business in the ordinary course;
- (b) avoid uncoordinated and distressed sales or forced liquidations of the Properties;
- (c) preserve existing tenant relationships;
- (d) continue to liaise with Lender Representative Counsel;
- (e) complete value accretive renovations;
- (f) continue to pursue a comprehensive refinancing or restructuring; and
- (g) develop and seek approval of a process to solicit, determine, and resolve claims against the Applicants and their present and former directors and officers.¹¹

15. The Applicants, with the assistance of the Monitor and the Financial Advisor, have prepared a revised cash flow forecast (the “**Cash Flow Forecast**”), which demonstrates that the

¹⁰ *Ibid* at para 15, Motion Record at Tab 2.

¹¹ *Ibid* at para 15, Motion Record at Tab 2.

Applicants will have sufficient cash to support the Business' ordinary course operations and the costs of these CCAA proceedings throughout the Stay Period, provided the ARIO is granted and the DIP Agreement is approved.¹²

C. Extending the Stay of Proceedings to the Additional Stay Parties and the Additional Stay Parties' Property

16. The ARIO extends the temporary stay of the Related Claims to prevent enforcement action from being commenced or continued against the Additional Stay Parties and the Additional Stay Parties' Property during the Stay Period. The ARIO does not release or in any way compromise the Related Claims, and tolls prescription, time or limitation periods relating to any proceeding in respect of the Additional Stay Parties or the Additional Stay Parties' Property in respect of the Related Claims during the Stay Period.¹³

17. As noted in the Clark Affidavits, the obligations of the Applicants under all or substantially all of the First Mortgage Loans, Second Mortgage Loans, and Promissory Notes are or are purportedly personally guaranteed by the Additional Stay Parties.¹⁴ As such, the Applicants and the Additional Stay Parties could be forced to respond to hundreds of claims, which would severely strain their limited resources and prejudice the Applicants' ability to successfully effect a comprehensive refinancing or restructuring in these CCAA proceedings absent an extension of this temporary stay of proceedings.¹⁵

18. The majority of the Additional Stay Parties' net worth is invested in the Applicants and the Properties, and the remainder is not expected to be sufficient to satisfy the significant obligations they have purportedly guaranteed. Given the Applicants' intention to consummate a

¹² *Ibid* at para 19, Motion Record at Tab 2.

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

¹⁴ *Ibid* at para 23, Motion Record at Tab 2.

¹⁵ *Ibid* at para 24, Motion Record at Tab 2.

comprehensive refinancing or restructuring transaction that will underpin a plan of compromise or arrangement in these CCAA proceedings, the quantum of the Related Claims, which are derivative of the Applicants' primary liabilities, may be reduced materially or eliminated.¹⁶

D. Essential Payments

19. The ARIO authorizes, but does not require, the Applicants to pay, with the consent of the Monitor, amounts owing for goods and services actually supplied to the Applicants prior to the date of the Initial Order, with the Monitor's consent to be informed by specific factors enumerated therein. The authorization to make such pre-filing payments will allow the Applicants, with the Monitor's oversight, to maintain relationships with the contractors, service providers and trades (many of whom are owed significant arrears) that provide critical services for the benefit of the Applicants, the Business, and the Applicants' stakeholders.¹⁷

20. Given that the Properties are located in secondary and tertiary markets, there are a limited number of contractors, service providers and trades that can support the ongoing operation of the Business.¹⁸ The business of these parties may be significantly impaired if certain pre-filing obligations are not promptly paid by the Applicants.¹⁹ It is important for the Applicants to maintain relationships with these contractors, service providers and trades as it would be difficult to find replacement services due to the small size of the markets in which the Properties are located.

¹⁶ *Ibid* at para 24, Motion Record at Tab 2.

¹⁷ *Ibid* at para 27, Motion Record at Tab 2.

¹⁸ First Report of the KSV Restructuring Inc. in its capacity as the Monitor dated January 29, 2024, section 9.2, para 1 [First Report of the Monitor].

¹⁹ *Ibid*.

E. The Financial Advisor’s Engagement and the Financial Advisor Charge

21. In connection with the commencement of these CCAA proceedings, the Applicants and HCC negotiated and entered into the Financial Advisor Engagement Agreement, the effectiveness of which is subject to the granting of the proposed ARIO.

22. HCC was previously retained by the Company pursuant to a letter agreement dated August 5, 2023 (as amended and restated on September 27, 2023, the “**Letter Agreement**”) to assist in obtaining a comprehensive refinancing solution and addressing the Company’s significant losses.²⁰ HCC was selected by the Company due, in part, to its financial advisory, turnaround and management expertise, and the significant experience of its principal, Howard Steinberg, in the real estate industry.²¹

23. The Letter Agreement contemplated that HCC would be appointed as financial advisor or chief restructuring officer on substantially similar terms in the event debtor-in-possession insolvency proceedings were commenced. As such, the Applicants negotiated the Financial Advisor Engagement Agreement pursuant to which the Financial Advisor, Mr. Steinberg, and any consultants, agents and/or advisors will provide certain advisory services to the Applicants (the “**Services**”). The Services include, among other things: acting as financial advisor; assisting in the development of the Applicants’ long term business plan; reviewing and assessing the financial situation and liquidity of the Applicants; and providing strategic advice and developing strategic alternatives.²²

²⁰ Second Clark Affidavit, *supra* note 1 at para 29, Motion Record at Tab 2.

²¹ *Ibid* at para 30, Motion Record at Tab 2.

²² *Ibid* at para 34, Motion Record at Tab 2.

24. In consideration for providing the Services to the Applicants, the Financial Advisor is entitled to: (i) a fixed fee of \$75,000 per month; (ii) the reimbursement of certain expenses and the fees of consultants retained with the prior consent of the Applicants and the Monitor; and (iii) a completion fee calculated as a percentage based on the various transactions that could result in the Applicants' exit from these proceeding, in any case up to a maximum amount of \$1,500,000 (the "**Completion Fee**").²³

25. Pursuant to the ARIO, the Completion Fee and the Applicants' indemnification obligations under the Financial Advisor Engagement Agreement will be secured by a charge on the Applicants' Property in favour of the Financial Advisor up to the maximum amount of \$1,500,000 (the "**Financial Advisor Charge**"). The Financial Advisor Charge is to be subordinate to each of the Administration Charge and the DIP Lender's Charge (collectively with the Financial Advisor Charge, the "**Charges**") but will rank in priority to all other Encumbrances (as defined in the ARIO).

F. The DIP Facility and the DIP Lender's Charge

26. To address the Applicants' urgent need for interim financing, the Applicants and KSV solicited interest in providing debtor-in-possession financing from multiple third-party lenders with expertise in real estate investment.²⁴ These efforts culminated in the execution of the DIP Agreement on January 26, 2024.

27. Pursuant to the DIP Agreement and in accordance with its terms, the DIP Lender has agreed to provide the Applicants with the DIP Facility. The DIP Facility is a non-revolving, super-priority, credit facility in the aggregate amount of up to \$12,000,000, inclusive of principal and an interest

²³ *Ibid* at paras 35-36, Motion Record at Tab 2.

²⁴ *Ibid* at para 42, Motion Record at Tab 2.

reserve in the amount of \$1,000,000 (the “**Interest Reserve**”), but exclusive of unpaid fees.²⁵ Absent access to the DIP Facility, the Applicants will not have the liquidity necessary to fund their obligations or the costs of these CCAA proceedings.²⁶

28. The interest rate applicable to all advances under the DIP Facility is the greater of (i) the Royal Bank of Canada’s prime rate, plus 4.80% or (ii) 12% per annum, in either case, compounded monthly on the last day of each month and payable from the Interest Reserve on the first day of each month.²⁷ In consideration for making the DIP Facility available to the Applicants, the DIP Agreement also entitles the DIP Lender to, among other things, a non-refundable commitment fee of \$240,000.²⁸ The term of the DIP Facility is the earlier of (i) October 31, 2024, as such date may be extended by the Borrowers (with the consent of the Monitor) and the DIP Lender; (ii) the occurrence of an Event of Default (as defined in the DIP Agreement); and (iii) the effective date of any plan of compromise and arrangement.²⁹

29. The DIP Facility is conditional upon, among other things, the issuance of the proposed ARIO, including the granting of the DIP Lender’s Charge, approving the DIP Facility and granting a charge over the Applicants’ Property in favour of the DIP Lender to secure all amounts advanced by the DIP Lender under the DIP Facility, together with all obligations, fees, expenses and other amounts payable by the Applicants under the DIP Agreement and the DIP Facility (the “**DIP Lender’s Charge**”). The DIP Lender’s Charge is to rank subordinate to the Administration Charge but in priority to the Financial Advisor Charge and all other Encumbrances.³⁰

²⁵ *Ibid* at para 43, Motion Record at Tab 2.

²⁶ *Ibid* at para 47, Motion Record at Tab 2.

²⁷ *Ibid* at para 44, Motion Record at Tab 2.

²⁸ *Ibid* at para 44, Motion Record at Tab 2.

²⁹ *Ibid* at para 45, Motion Record at Tab 2.

³⁰ *Ibid* at para 46, Motion Record at Tab 2.

G. Expanding and Increasing the Administration Charge

30. The Applicants are seeking (i) an increase to the Administration Charge up to the maximum amount of \$1,500,000, and (ii) in accordance with the Financial Advisor Engagement Agreement, to afford the Financial Advisor the benefit of the Administration Charge up to the maximum amount of \$150,000 in respect of its monthly fees and certain expenses only.³¹

31. The increased quantum of the Administration Charge was determined by the Applicants, with the assistance of the Monitor, and is commensurate with the fees and disbursements expected to be incurred by the beneficiaries of the Administration Charge during the Stay Period. The ARIO contemplates that the Administration Charge will have priority over all of the other Charges and all other Encumbrances.³²

PART III: ISSUES

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

- (a) the Initial Stay Period should be extended and the tolling relief should be granted;
- (b) the Applicants should be authorized to make certain pre-filing payments with the consent of the Monitor;
- (c) HCC should be appointed as Financial Advisor;
- (d) the Administration Charge should be increased, and the Financial Advisor Charge should be granted; and

³¹ *Ibid* at para 49, Motion Record at Tab 2.

³² *Ibid* at para 55, Motion Record at Tab 2.

- (e) the DIP Facility should be approved and the DIP Lender's Charge should be granted.

PART IV: LAW AND ANALYSIS

A. The Initial Stay Period Should be Extended and the Tolling Relief Should be Granted

1. The Initial Stay Period Should be Extended for the Applicants

33. 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”.³³ 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.³⁴

34. The jurisdiction vested in Courts to stay proceedings under section 11.02 “should be construed broadly to accomplish the legislative purposes of the CCAA”.³⁵ 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.³⁶ 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.³⁷

35. Here, the proposed extension of the Stay of Proceedings is appropriate in the circumstances given that:

³³ *Companies’ Creditors Arrangement Act*, [RSC 1985, c C-36, s 11.02\(2\)](#) [CCAA]; *Nordstrom Canada Retail, Inc.*, [2023 ONSC 1631](#) at [para 7](#) [Nordstrom].

³⁴ [CCAA](#), *ibid*; [Nordstrom](#), *ibid*.

³⁵ *Canwest Global Communications Corp.*, [2011 ONSC 2215](#) at [para 24](#) [Canwest].

³⁶ *ibid*; *Century Services Inc v Attorney General (Canada)*, [2010 SCC 60](#) at [para 15](#) [Century Services]; *Target Canada Co.*, [2015 ONSC 303](#) at [para 8](#) [Target]; *Re Timminco Limited*, [2012 ONSC 2515](#) at [para 15](#) [Timminco].

³⁷ *Century Services*, *ibid* at [para 14](#); *Target*, *ibid*; *Timminco*, *ibid*.

- (a) since the granting of the Initial Order, the Applicants have acted in good faith and with due diligence to stabilize and continue the Business' ordinary course operations, and advance their restructuring objectives, including by, among other things, liaising with their stakeholders and negotiating and executing the DIP Agreement and the Financial Advisor Engagement Agreement;
- (b) the Stay of Proceedings is necessary to prevent uncoordinated and value destructive enforcement efforts by the Lenders;
- (c) the proposed 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 and complete value accretive renovations;
- (d) the proposed extension of the Stay of Proceedings will enable the Applicants to develop and seek this Court's approval of a Claims Process while continuing to work towards a refinancing and/or restructuring solution;
- (e) provided that the proposed ARIO is granted and the DIP Facility is approved, 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
- (f) the Monitor is supportive of the proposed extension of the Stay of Proceedings.³⁸

³⁸ Second Clark Affidavit, *supra* note 1 at paras 18-19, 21, Motion Record at Tab 2; First Report of the Monitor, *supra* note 18 at section 7.0, para 2.

36. Taken together, the Applicants submit that the proposed extension of the Stay of Proceedings is in the best interests of the Applicants and their stakeholders, is consistent with the purposes of the CCAA, and is appropriate in the circumstances.

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

37. The ARIO 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.³⁹ Pursuant to the Initial Order, the Applicants sought to stay proceedings against or in respect 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 this relief 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.

38. In granting the Initial Order, this Court considered its jurisdiction to grant the Non-Applicant Stay in light of subsections 11.04 and 11.03(2) of the CCAA, both of which restrict the Court from granting a stay in respect of certain third-party guarantee claims under section 11.02. Noting that the Court previously declined to grant such a stay in *Cannapiece Group Inc. v. Marzili*,⁴⁰ this Court found that the circumstances in this case were more akin to those in *Nordstrom*

³⁹ *Ibid* at para 22, Motion Record at Tab 2.

⁴⁰ [2022 ONSC 6379](#).

Canada Retail, Inc.,⁴¹ *BBB Canada Ltd.*,⁴² and *McEwan Enterprises Inc.*,⁴³ in each of which the Court granted a stay of claims against third party guarantors.⁴⁴ This Court determined that it had jurisdiction under section 11 to grant the Non-Applicant Stay and that it was just and convenient in the circumstances.⁴⁵ 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.⁴⁶

39. These circumstances 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 resources and jeopardize the Applicants’ ability to successfully effect a restructuring in these CCAA proceedings.⁴⁷

40. In granting the Initial Order, the Court emphasized that the plaintiffs and potential plaintiffs should only be minimally prejudiced by the temporary Non-Applicant Stay, which does not settle their actions or release any claims.⁴⁸ To further limit any potential prejudice to the Lenders, the Applicants, following discussions with Lender Representative Counsel, are also seeking to toll 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. This Court has jurisdiction to grant such a tolling provision under subsection 11.02(2) of the

⁴¹ [2023 ONSC 1422](#) [*Nordstrom Canada*].

⁴² [2023 ONSC 1014](#).

⁴³ [2021 ONSC 6453](#).

⁴⁴ [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) at paras 30-32 [*Initial Order Endorsement*].

⁴⁵ [Ibid](#) at para 35.

⁴⁶ [Ibid](#) at para 34.

⁴⁷ Second Clark Affidavit, *supra* note 1 at para 24, Motion Record at Tab 2.

⁴⁸ [Initial Order Endorsement](#), *supra* note 44 at para 36.

CCAA, which allows the Court to grant stays “on any terms that it may impose”, and under section 11, which allows the Court to make any order it considers appropriate in the circumstances.⁴⁹ Tolling of certain stayed claims is not uncommon in CCAA proceedings, including in respect of stayed claims against third-party guarantors.⁵⁰

41. The extension of the Non-Applicant Stay on the terms provided in the ARIO is supported by the Monitor.⁵¹ The Applicants submit that this relief remains just and convenient in the circumstances and should be granted by this Court.

B. The Applicants Should be Authorized to Make Certain Pre-Filing Payments

42. The ARIO authorizes (but does not require) the Applicants to pay amounts owing for goods and services supplied to the Applicants prior to, on, or after the date of the ARIO. Such payments may only be made with the consent of the Monitor.⁵²

43. This Court’s jurisdiction under section 11 of the CCAA to permit payment of pre-filing obligations where such payment is essential to the ongoing business operations of the applicants is well-established.⁵³

44. In authorizing such payments, Courts have considered, among other factors:

- (a) whether the applicants have sufficient inventory on hand to meet their needs;
- (b) whether the goods and services were integral to the business of the applicants;

⁴⁹ [CCAA](#), *supra* note 33 at [s 11](#), [s 11.02\(2\)](#).

⁵⁰ [In the Matter of a Plan of Compromise or Arrangement of Nordstrom Canada Retail Inc, Nordstrom Canada Holdings Inc, LLC and Nordstrom Canada Holdings II, LLC](#), (March 10, 2023), Toronto, CV-23-00695619-00CL (Order) (ONSC); [In the Matter of a Plan of Compromise or Arrangement of BBB Canada Ltd](#), (February 21, 2023), Toronto, CV-23-00695619-00CL (Order) (ONSC); [In the Matter of a Plan of Compromise or Arrangement of Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited](#), (March 12, 2019), Toronto, CV-19-616077-00CL (Order) (ONSC).

⁵¹ First Report of the Monitor, *supra* note 18 at section 7.0, para 2.

⁵² Second Clark Affidavit, *supra* note 1 at para 26, Motion Record at Tab 2.

⁵³ [Nordstrom Canada](#), *supra* note 41 at [para 52](#); [Boreal Capital Partners Ltd et al \(Re\)](#), [2021 ONSC 7802](#) at [paras 20-21](#) [*Boreal*]; [MPX International Corporation](#), [2022 ONSC 4348](#) at [paras 69-70](#) [*MPX*].

- (c) the applicants' need for the uninterrupted supply of the goods and services;
- (d) the effect on the applicants' operations and ability to restructure if they could not make pre-filing payments;
- (e) the fact that no payments would be made without the consent of the Court-appointed monitor; and
- (f) the Court-appointed monitor's willingness to work with the applicants to ensure that payments to suppliers in respect of pre-filing liabilities are minimized.⁵⁴

45. Applying these factors, the Applicants submit that the requested relief to pay pre-filing amounts in the manner prescribed by the ARIO is appropriate, given that:

- (a) the Business requires the Applicants to maintain relationships with third-party contractors and trades that provide critical maintenance, renovation and construction services;
- (b) absent authorization to make pre-filing payments, the Applicants are concerned that their third-party contractors and trades may cease providing essential services;
- (c) the inability to pay relevant contractors and trades has already resulted in a significant loss of rental revenue, and further missed payments could imperil the continued operations of the Business to the detriment of the Applicants' refinancing and/or restructuring efforts and their stakeholders; and
- (d) pre-filing payments can only be made with the consent of the Monitor, who will consider various factors enumerated in the ARIO when deciding whether to consent

⁵⁴[Nordstrom Canada](#), *ibid* at [para 52](#); [MPX](#), *ibid* at paras [69-70](#); *Re Cinram International Inc.*, [2012 ONSC 3767](#) at [para 37](#) and [Schedule "C"](#) at [para 68](#).

to such payments and is supportive of the authorization sought to make such payments.⁵⁵

C. HCC Should be Appointed as Financial Advisor

46. This Court may exercise its broad discretion under section 11 to approve the engagement of a financial advisor and a corresponding charge in a complex CCAA proceeding, and has done so where such advisors' knowledge and experience is critical to assisting the debtor with a successful restructuring.⁵⁶ The Applicants are of the view that the retention of the Financial Advisor and the granting of the Financial Advisor Charge are necessary and in the best interests of the Applicants and their stakeholders in the circumstances.

47. The Additional Stay Parties, being the principals of the Applicants, are experienced in the real estate industry, but have no prior restructuring experience. These proceedings have the potential to be highly complicated, particularly considering that there are 406 owned Properties; at least 300 individual Lenders in respect of the First Mortgage Loans, Second Mortgage Loans, and Promissory Notes; and approximately 1,000 tenants. HCC has significant restructuring experience and has been appointed as chief restructuring officer in several complex CCAA proceedings, and Mr. Steinberg separately has significant experience in the financing and sale of residential properties.⁵⁷ That expertise will be critical to the success of these CCAA proceedings.

48. The approval of the Financial Advisor's retention and the Financial Advisor Engagement Agreement will benefit the Applicants. The Applicants believe that given the benefits expected to

⁵⁵ Second Clark Affidavit, *supra* note 1 at paras 26-28, Motion Record at Tab 2; First Report of the Monitor, *supra* note 18 at section 9.2, para 3.

⁵⁶ *Tacora Resources Inc (Re)*, [2023 ONSC 6126](#) at [para 158](#); *BioSteel Sports Nutrition Inc.*, (September 21, 2023), Toronto, CV-23-00706033-00CL (Endorsement) (ONSC) at paras 12-13; *Target*, *supra* note 36 at [para 72](#).

⁵⁷ Second Clark Affidavit, *supra* note 1 at paras 26-28, Motion Record at Tab 2.

result from the Financial Advisor's retention, the fees payable under the Financial Advisor Engagement Agreement are reasonable in the circumstances.

49. Pursuant to the Financial Advisor Engagement Agreement, the Applicants also seek to stay proceedings against the Financial Advisor and to limit the Financial Advisor's liability for any losses in connection with the Financial Advisor's engagement (except for gross negligence or wilful misconduct), as has been granted by Courts in other cases.⁵⁸ The protections in favour of the Financial Advisor in the ARIO will ensure that the Financial Advisor can focus on the Applicants' restructuring for the benefit of the Applicants and their stakeholders. The Monitor has advised that it is supportive of the relief sought.⁵⁹

D. The Administration Charge Should be Increased and the Financial Advisor Charge Should be Granted

50. Having regard to section 11.001 of the CCAA, the Applicants limited the quantum of the Administration Charge sought pursuant to the Initial Order to that which was reasonably necessary during the Initial Stay Period.⁶⁰

51. The Applicants now seek to increase the Administration Charge from a maximum of \$750,000 to a maximum of \$1,500,000, and, in accordance with the Financial Advisor Engagement Agreement, to afford the Financial Advisor the benefit of the Administration Charge up to the maximum amount of \$150,000 as security for the Applicants' obligation to pay the Financial Advisor's monthly fee and certain expenses. In accordance with the Financial Advisor

⁵⁸ [In the Matter of a Plan of Compromise or Arrangement of CannTrust Holdings Inc., CannTrust Inc., CTI Holdings \(Osoyoos\) Inc., and Elmcliffe Investments Inc.](#) (April 9, 2020), Toronto, CV-20-00638930-00CL (Order) (ONSC); [In the Matter of a Plan of Compromise or Arrangement of Tacora Resources Inc.](#) (October 30, 2023), Toronto, CV-23-00707394-00CL (Order) (ONSC) [Tacora Order]; [In the Matter of a Plan of Compromise or Arrangement of BioSteel Sports Nutrition Inc.](#) (September 21, 2023), Toronto, CV-23-00706033-00CL (Order) (ONSC) [BioSteel Order]; [In the Matter of a Plan of Compromise or Arrangement of Aralez Pharmaceuticals Inc. and Aralez Pharmaceuticals Canada Inc.](#) (August 10, 2018), Toronto, CV-18-603054-00CL (Order) (ONSC).

⁵⁹ Second Clark Affidavit, *supra* note 1 at para 41, Motion Record at Tab 2; First Report of the Monitor, *supra* note 18 at section 3.2, para 3.

⁶⁰ CCAA, *supra* note 33, s 11.001.

Engagement Agreement, the Applicants also seek the approval of the Financial Advisor Charge up to the maximum amount of \$1,500,000.

52. Subsection 11.52 of the CCAA provides this Court with jurisdiction to grant and increase an administrative charge in favour of professionals engaged in the restructuring of a debtor company on notice to secured creditors likely to be affected thereby.⁶¹ The non-exhaustive factors that may inform a Court's decision to grant an administration charge include:

- (a) the size and complexity of the business being restructured;
- (b) the proposed role of the beneficiaries of the charge;
- (c) whether there is unwarranted duplication of roles;
- (d) whether the quantum of the proposed charge appears to be fair and reasonable;
- (e) the position of the secured creditors likely to be affected by the charge; and
- (f) the position of the monitor.⁶²

53. Courts have considered similar factors when determining whether to grant a financial advisor charge, and have also considered the incentives created by the charge.⁶³

54. In approving the Administration Charge originally requested in the Initial Order, this Court found that:

⁶¹ [CCAA](#), *ibid*, s.11.52(1)-(2); *US Steel Canada Inc (Re)*, 2014 ONSC 6145 at para 20; *Canwest Global Communications Corp (Re)*, 2009 CanLII 55114, at paras 37-38; *Nordstrom Canada*, *supra* note 41 at para 55; *Lydian International Limited (Re)*, 2019 ONSC 7473 at para 44 [Lydian].

⁶² *Lydian*, *ibid* at paras 46-48; *Nordstrom Canada*, *ibid* at para 55.

⁶³ *Canwest Publishing Inc*, 2010 ONSC 222 at paras 54-55.

- (a) the Administration Charge reflects an estimate of fees for professionals whose services will be essential to the Applicants' restructuring efforts, and who will continue to play a key role in these proceedings;
- (b) some of the beneficiaries of the Administration Charge had already engaged in a significant amount of work in connection with the CCAA application and are expected to continue to provide restructuring and insolvency advice;
- (c) certain beneficiaries of the Administration Charge had modest retainers and significant arrears; and
- (d) each beneficiary is performing distinct functions in these CCAA proceedings.⁶⁴

55. The Applicants submit that these factors all continue to be present and weigh in favour of increasing the quantum of the Administration Charge. The increased quantum was determined by the Applicants, with the assistance of the Monitor, and remains commensurate with the fees and disbursements expected to be incurred by the beneficiaries of the Administration Charge, including the Financial Advisor, during the Stay Period, the modest retainers held by certain of such beneficiaries, and such beneficiaries' significant arrears.⁶⁵

56. Moreover, the protections afforded to the Financial Advisor are consistent with recent cases in which a financial advisor has been retained – in such cases, Courts have granted orders securing the financial advisor's monthly fees pursuant to an administration charge and their incentive payment pursuant to a subordinate charge.⁶⁶ As set out above, the Financial Advisor is expected to play a critical role in these proceedings, and the Financial Advisor Charge is a condition to the

⁶⁴ [Initial Order Endorsement](#), *supra* note 44 at para 48.

⁶⁵ Second Clark Affidavit, *supra* note 1 at para 50, Motion Record at Tab 2.

⁶⁶ [Tacora Order](#), *supra* note 51; [BioSteel Order](#), *supra* note 51.

Financial Advisor's retention and sufficiently incentivizes the Financial Advisor to maximize value in these proceedings for the benefit of the Applicants and their stakeholders.⁶⁷ The Financial Advisor Charge has been reviewed and is supported by the Monitor.⁶⁸

57. In light of the foregoing, the Applicants submit that the Financial Advisor Charge is necessary and appropriate in the circumstances.

E. The DIP Facility Should be Approved and the DIP Lender's Charge Should be Granted

58. Subsection 11.2(1) of the CCAA authorizes this Court to approve DIP financing and grant a corresponding charge in an amount it considers appropriate – having regard to the debtor company's cash flow statement – where the secured creditors likely to be affected by the charge are given notice thereof.⁶⁹ A charge granted pursuant to subsection 11.2(1) of the CCAA may not secure an obligation that exists before the proposed order is made.⁷⁰ Each of the statutory prerequisites to approving the DIP Facility and granting the proposed DIP Lender's Charge are satisfied in this case.

59. When determining whether to grant a charge securing DIP financing, subsection 11.2(4) directs Courts to consider the following non-exhaustive factors:

- (a) the period during which the applicants are expected to be subject to the CCAA proceedings;
- (b) how the applicants' business and financial affairs are to be managed during the CCAA proceedings;

⁶⁷ Second Clark Affidavit, *supra* note 1 at para 38, Motion Record at Tab 2; First Report of the Monitor, *supra* note 18 at section 3.2, para 3.

⁶⁸ Second Clark Affidavit, *ibid* at para 41, Motion Record at Tab 2; First Report of the Monitor, *ibid*.

⁶⁹ CCAA, *supra* note 33, s 11.2(1); *Boreal*, *supra* note 53 at para 23; *Re Just Energy Corp*, 2021 ONSC 1793 at para 52 [*Just Energy*].

⁷⁰ CCAA, *ibid*; *Boreal*, *ibid*.

- (c) whether the applicants' management has the confidence of their major creditors;
- (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the applicants;
- (e) the nature and value of the applicants' property;
- (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
- (g) the monitor's report, if any.⁷¹

60. Having regard to the foregoing factors and the requirements of subsection 11.2(1) of the CCAA, the following supports the approval of the DIP Facility and the granting of the DIP Lender's Charge:

- (a) the Applicants are facing a severe liquidity crisis, are unable to meet their obligations as they come due, and are in default of many of their obligations;
- (b) the Cash Flow Forecast substantiates the urgent need for DIP financing to provide the Applicants with the liquidity necessary to continue the Business' ordinary course operations and complete their intended renovations;
- (c) the amount to be funded under the DIP Facility is appropriate having regard to the Cash Flow Forecast;
- (d) the DIP Facility will preserve the value and going concern operations of the Business and prevent the disorderly liquidation of the Properties at distressed prices, which is in the best interests of the Applicants and their stakeholders;

⁷¹ [CCAA](#), *ibid.*, [s.11.2\(4\)](#); [Just Energy](#), *supra* note 69 at [para 61](#).

- (e) the DIP Facility is conditional on the granting of the DIP Lender's Charge, which does not secure any obligations incurred prior to these CCAA proceedings;
- (f) the Monitor is supportive of the DIP Facility and the DIP Lender's Charge.⁷²

PART V: RELIEF REQUESTED

61. 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 form of ARIO.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 30TH DAY OF JANUARY 2024

Bennett Jones LLP

BENNETT JONES LLP

⁷² Second Clark Affidavit, *supra* note 1 at paras 8, 42, 46-48, Motion Record at Tab 2; First Report of the Monitor, *supra* note 18 at sections 5.4, 8.2.

SCHEDULE A

LIST OF AUTHORITIES

Cases Cited

1. *BBB Canada Ltd.*, [2023 ONSC 1014](#).
2. [BioSteel Sports Nutrition Inc.](#), (September 21, 2023), Toronto, CV-23-00706033-00CL (Endorsement) (ONSC).
3. *Boreal Capital Partners Ltd. et. al. (Re)*, [2021 ONSC 7802](#).
4. *Cannapiece Group Inc. v. Marzili*, [2022 ONSC 6379](#).
5. *Canwest Global Communications Corp. (Re)*, [2009 CanLII 55114](#).
6. *Canwest Global Communications Corp.*, [2011 ONSC 2215](#).
7. *Canwest Publishing Inc.*, [2010 ONSC 222](#).
8. *Century Services Inc v. Attorney General (Canada)*, [2010 SCC 60](#).
9. [In the Matter of a Plan of Compromise or Arrangement of Aralez Pharmaceuticals Inc. and Aralez Pharmaceuticals Canada Inc](#) (August 10, 2018), Toronto, CV-18-603054-00CL (Order) (ONSC)
10. [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).
11. [In the Matter of a Plan of Compromise or Arrangement of BBB Canada Ltd](#), (February 21, 2023), Toronto, CV-23-00695619-00CL (Order) (ONSC).
12. [In the Matter of a Plan of Compromise or Arrangement of BioSteel Sports Nutrition Inc](#) (September 21, 2023), Toronto, CV-23-00706033-00CL (Order) (ONSC).
13. [In the Matter of a Plan of Compromise or Arrangement of CannTrust Holdings Inc, CannTrust Inc, CTI Holdings \(Osoyoos\) Inc., and Elmcliffe Investments Inc](#), (April 9, 2020), Toronto, CV-20-00638930-00CL (Order) (ONSC)
14. [In the Matter of a Plan of Compromise or Arrangement of Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited](#), (March 12, 2019), Toronto, CV-19-616077-00CL (Order) (ONSC).
15. [In the Matter of a Plan of Compromise or Arrangement of Nordstrom Canada Retail Inc, Nordstrom Canada Holdings Inc, LLC and Nordstrom Canada Holdings II, LLC](#), (March 10, 2023), Toronto, CV-23-00695619-00CL (Order) (ONSC).

16. [*In the Matter of a Plan of Compromise or Arrangement of Tacora Resources Inc*](#) (October 30, 2023), Toronto, CV-23-00707394-00CL (Order) (ONSC).
17. *Lydian International Limited (Re)*, [2019 ONSC 7473](#).
18. *McEwan Enterprises Inc.*, [2021 ONSC 6453](#).
19. *MPX International Corporation*, [2022 ONSC 4348](#).
20. *Nordstrom Canada Retail, Inc.*, [2023 ONSC 1422](#).
21. *Nordstrom Canada Retail, Inc.*, [2023 ONSC 1631](#).
22. *Re Cinram International Inc.*, [2012 ONSC 3767](#).
23. *Re Just Energy Corp.*, [2021 ONSC 1793](#).
24. *Re Timminco Limited*, [2012 ONSC 2515](#).
25. *Tacora Resources Inc. (Re)*, [2023 ONSC 6126](#).
26. *Target Canada Co*, [2015 ONSC 303](#).
27. *US Steel Canada Inc. (Re)*, [2014 ONSC 6145](#).

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. 111992, c. 27, s. 901996, c. 6, s. 1671997, c. 12, s. 1242005, c. 47, s. 128.

Section 11.001

Relief reasonably necessary

An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

2019, c. 29, s. 136

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.

2005, c. 47, s. 128.

Section 11.2

Interim financing

(1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

Priority — secured creditors

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Priority — other orders

(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

Factors to be considered

(4) In deciding whether to make an order, the court is to consider, among other things,

- (a) the period during which the company is expected to be subject to proceedings under this Act;
- (b) how the company's business and financial affairs are to be managed during the proceedings;
- (c) whether the company's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the monitor's report referred to in paragraph 23(1)(b), if any.

Additional factor — initial application

(5) When an application is made under subsection (1) at the same time as an initial application referred to in subsection 11.02(1) or during the period referred to in an order made under that subsection, no order shall be made under subsection (1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

1997, c. 12, s. 1242005, c. 47, s. 1282007, c. 36, s. 652019, c. 29, s. 138.

Section 11.52

Court may order security or charge to cover certain costs

(1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

2005, c. 47, s. 1282007, c. 36, s. 66

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

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

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.

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

Proceeding commenced at Toronto

**Factum of the Applicants
(Amended and Restated Initial Order)**

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