

**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 March 28, 2024)**

March 27, 2024

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TO: THE SERVICE LIST

TABLE OF CONTENTS

PART I:	OVERVIEW	1
PART II:	FACTS	2
A.	Background on CCAA Proceedings	2
B.	The Stay of Proceedings	9
C.	Unsecured Lender Representative Counsel	9
D.	Responding Motion Record of Lender Representative Counsel.....	11
PART III:	ISSUES	12
PART IV:	LAW AND ANALYSIS	13
A.	The Stay of Proceedings Should be Extended	13
1.	The Stay of Proceedings Should be Extended to and including April 30, 2024 for the Applicants.....	13
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.....	15
B.	Unsecured Lender Representative Counsel	17
1.	Unsecured Lender Representative Counsel Should be Appointed	17
2.	The Related Relief in Favour of the Unsecured Lender Representative Counsel Should be Granted	20
PART V:	RELIEF REQUESTED	21

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 a second amended and restated initial order (the “**Second ARIO**”) under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “**CCAA**”), among other things:

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

Administration Charge (as defined below) to secure such professional fees and disbursements.

2. The Applicants have acted in good faith and with due diligence to stabilize their business, communicate with stakeholders, respond to the Monitor's ongoing Investigation (as defined below), and advance their refinancing and restructuring efforts since these proceedings were commenced on January 23, 2024. The Applicants now seek the Second ARIO to preserve the *status quo*, enable the continued operation of the Business and the completion of additional value accretive renovations, and provide the Unsecured Lenders with the benefit of estate-funded legal representation, all of which is in the best interests of the Applicants' stakeholders and will enhance the prospect of a successful restructuring.

PART II: FACTS

3. The facts underlying this motion are more fully set out in the affidavits of Robert Clark sworn March 24, 2024 (the "**Clark Affidavit**") and March 27, 2024, respectively.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 are part of a group of companies that operate in the real estate sector in secondary and tertiary markets in Ontario with lower average costs of living, including Timmins, Sault Ste. Marie, Sudbury, Kirkland Lake, Capreol, Temiskaming Shores and Val Caron.² SIDRWC Inc. o/a SID Developments ("**SID Developments**"), SID Management Inc. ("**SID**

¹ Affidavit of Robert Clark sworn on March 24, 2024 [Clark Affidavit], Applicant's Motion Record dated March 24, 2024 at Tab 2 [Motion Record]; Affidavit of Robert Clark sworn on March 27, 2024 [Clark Reply Affidavit].

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

Management”), and 2707793 Ontario Inc. o/a SID Renos (“**SID Renos**”) provide acquisition, distribution, renovation and management services to the Applicants.³

5. 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**”).⁴ 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.⁵

6. The Applicants currently own 406 properties (collectively, the “**Properties**”) across secondary and tertiary markets in Ontario.⁶ The Properties contain 631 rental units, of which approximately 433 are tenanted, as well as a single non-operating 200-acre golf course, 40 acres of which are zoned for development.⁷

7. 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, and (ii) unsecured promissory notes (the “**Promissory Notes**”) issued in favour of Lion’s Share and various individual real estate investors.⁸

8. 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

³ *Ibid* at para 7, Motion Record at Tab 2.

⁴ *Ibid* at para 5, Motion Record at Tab 2.

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

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

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

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

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.⁹

9. 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.¹⁰

10. 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**");
- (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,

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

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

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 proceedings 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**”).¹¹

11. Following the issuance of the Initial Order, the Applicants served materials seeking an amended and restated Initial Order. This motion was ultimately opposed by certain of the Applicants’ secured Lenders. Balancing the objections of certain of the Applicants’ secured Lenders with the Applicants’ critical need for an extension and expansion of the limited relief obtained under the Initial Order, the Court adjourned the Applicants’ comeback motion on January 31, 2024, in part, and granted a more limited amended Initial Order (the “**Amended IO**”), among other things:

- (a) extending the Stay of Proceedings to and including February 16, 2024;

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

- (b) authorizing the Applicants to pay, with the consent of the Monitor, certain amounts owing for goods and services actually supplied to the Applicants prior to the date of the Initial Order;
- (c) increasing the maximum amount of the Administration Charge from \$750,000 to \$1,000,000;
- (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. or its permitted assignee (the "**DIP Lender**"); and
- (e) granting a charge over the Applicants' Property up to the maximum amount of \$4,000,000 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**").¹²

12. Following consultation among the Applicants, the Monitor and the Lender Representative Counsel, the Applicants sought and, on February 15, 2024, obtained an amended and restated Initial Order (the "**ARIO**") on an unopposed basis, which, among other things:

- (a) extended the Stay of Proceedings to and including March 28, 2024;

¹² *Ibid* at para 10, Motion Record at Tab 2.

- (b) increased the maximum amount of the Administration Charge from \$1,000,000 to \$1,500,000;
- (c) 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
- (d) granted the Monitor certain enhanced powers and oversight, including:
 - (i) subjecting all payments to be made, and liabilities to be incurred, by the Applicants to the prior written consent of the Monitor (the "**Payment Consent Right**"); 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 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.¹³

¹³ *Ibid* at para 21, Motion Record at Tab 2.

13. Since the granting of the ARIO, the Applicants have acted, and continue to act, in good faith and with due diligence to, among other things:

- (a) stabilize and continue the Business' ordinary course operations;
- (b) respond to numerous information requests made by the Lender Representatives and the Lenders, through the Monitor;
- (c) review and consider a non-binding letter of intent submitted by the Lender Representatives, which contemplated, among other things:
 - (i) the Applicants' divestiture of all the Properties to a purchaser to be owned by certain of the Secured Lenders and the Applicants' unsecured Lenders (excluding the Applicants' largest unsecured Lender), for a purchase price intended to reflect (A) the principal amount advanced under the First Mortgage Loans and the Second Mortgage Loans, and (B) 5% of the principal advanced under the Promissory Notes; and
 - (ii) the replacement of SID Management as the Applicants' exclusive property manager and SID Renos by the Monitor;
- (d) with the assistance of their counsel, consult with the Monitor and the Lender Representative Counsel regarding the retention of the proposed Unsecured Representative Counsel to represent the interests of the Unsecured Lenders in the Insolvency Proceedings;
- (e) cooperate in, and respond to, extensive inquiries made by the Monitor and its counsel pursuant to, the Investigation;
- (f) advance the process to engage a financial advisor on behalf of the Applicants; and

- (g) prepare, provide and execute or begin to execute (as applicable) upon scopes of work to renovate approximately 85 units by May 27, 2024.¹⁴

14. The renovation of eight additional units is scheduled to be completed on March 28, 2024, and the Applicants are now actively renovating 24 Properties.¹⁵ If permitted to continue their planned renovations unimpeded, the Applicants anticipate completing approximately ten units/week.¹⁶

B. The Stay of Proceedings

15. The Stay of Proceedings under the ARIIO will expire on March 28, 2024. Pursuant to the proposed Second ARIIO, 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 April 30, 2024 (the "**Stay Period**").¹⁷

16. The Applicants, with the assistance of the Monitor, have prepared a revised cash flow forecast (the "**Revised Cash Flow Forecast**"), which 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.¹⁸ The Revised Cash Flow Forecast is attached to the Second Report of the Monitor.

C. Unsecured Lender Representative Counsel

17. Pursuant to the proposed Second ARIIO, the Applicants are seeking to have GSNH appointed as the Unsecured Lender Representative Counsel for all of the Unsecured Lenders in

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

¹⁵ Clark Reply Affidavit, *supra* note 1 at para 12.

¹⁶ *Ibid* at para 12.

¹⁷ Clark Affidavit, *supra* note 1 at para 36, Motion Record at Tab 2.

¹⁸ *Ibid* at para 38, Motion Record at Tab 2; Second Report of the Monitor dated March 26, 2024, section 5.0.

the Insolvency Proceedings for any issues affecting the Unsecured Lenders in such Insolvency Proceedings. Given that Claire Drage, Lion's Share and The Windrose Group Inc. have already retained counsel, and that their interests may not align with the remainder of the Unsecured Lenders, Lion's Share and 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, are not included among the Unsecured Lenders.¹⁹

18. The Applicants' proposed appointment of the Unsecured Lender Representative Counsel is informed, in part, by the numerosity of the Lenders, the revised scope of the Lender Representative Counsel's mandate and the Unsecured Lenders' expressed desire to be represented in the Insolvency Proceedings. The material terms of the Unsecured Lender Representative Counsel's proposed appointment mirror those of the Lender Representative Counsel that currently exist under the ARIO.²⁰

19. If appointed, the Unsecured Lender Representative Counsel may identify up to six Unsecured Lenders to be nominated as Court-appointed representatives (the "**Unsecured Lender Representatives**") to advise and, where appropriate, instruct the Unsecured Lender Representative Counsel. Lenders who do not opt-out of the Unsecured Lender Representative Counsel's representation pursuant to the Second ARIO would be bound by the actions of the Lender Representative Counsel and the Unsecured Lender Representatives, if any.

20. As with the Lender Representative Counsel, the Applicants seek to pay the reasonable fees and disbursements of the Unsecured Lender Representative Counsel and to afford the Unsecured

¹⁹ *Ibid* at para 50, Motion Record at Tab 2.

²⁰ *Ibid* at para 52, Motion Record at Tab 2.

Lender Representative Counsel the benefit of the Administration Charge, as security for such fees and disbursements.²¹

D. Responding Motion Record of Lender Representative Counsel

21. On March 26, 2024, Lender Representative Counsel served what it titled a “Responding Motion Record”, purportedly in response to the within motion. The Responding Motion Record is comprised solely of an affidavit (the “**Im Affidavit**”) sworn by an articling student at Chaitons LLP (and not a Secured Lender or Lender Representative) appending “sample email communications” and “media articles and social media posts regarding the Applicants, directors, officers and representatives” received by Lender Representative Counsel.²² The Applicants had not previously received such sample email communications and note that the identities of the drafters, the dates on which they were sent, any prior or responding correspondence and other details have been redacted or omitted.²³

22. Despite its title, the Responding Motion Record neither seeks relief on, nor responds to, the Applicants’ motion. Rather, it appears to have been filed for the purposes of besmirching the Applicants and the Additional Stay Parties, and airing the concerns and complaints of a limited number of potentially non representative and unidentified Secured Lenders, from whom the Applicants did not directly solicit an investment.²⁴ Having redacted or omitted all identifying and other contextual information, the Applicants have no means of substantively responding to the Im Affidavit.²⁵

²¹ *Ibid* at para 60, Motion Record at Tab 2.

²² Clark Reply Affidavit, *supra* note 1 at para 6.

²³ *Ibid* at para 6.

²⁴ *Ibid* at para 8. As indicated within the First Clark Affidavit, all or substantially all of the First Mortgage Loans were sourced by Windrose and not the Applicants, the Additional Stay Parties or Robert Clark. Subject to a few limited exceptions, all of the Applicants’ current Second Mortgage Loans were provided by Lift Capital Incorporated (“**Lift**”), and syndicated among other investors by Lift thereafter.

²⁵ *Ibid* at para 8.

23. The Im Affidavit ignores the significant delays and procedural quandaries contributed to by the Secured Lenders to date, including in delaying the granting of the ARIIO, opposing the earlier appointment of a financial advisor and insisting upon the Investigation, numerous consultation rights and the Payment Consent Right.²⁶

24. The Applicants sympathize with the authors of the “sample email communications” and their respective financial circumstances, as well as any other Lenders experiencing difficulty in connection with these CCAA proceedings.²⁷ To assist in ameliorating any real or perceived information gap, the Applicants intend to host virtual meetings with Secured Lenders and Unsecured Lenders going forward, to which the Monitor and the Lender Representative Counsel and the Unsecured Lender Representative Counsel, respectively, will be invited.²⁸

25. The Applicants remain committed to achieving a value-maximizing restructuring or refinancing solution for all of their stakeholders. The Applicants hope that the Lender Representatives will work collaboratively with the Applicants going forward.

PART III: ISSUES

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

- (a) the Stay of Proceedings should be extended to April 30, 2024; and
- (b) the Unsecured Lender Representative Counsel should be appointed pursuant to the terms of the Second ARIIO.

²⁶ *Ibid* at para 10.

²⁷ *Ibid* at para 9.

²⁸ *Ibid* at para 16.

PART IV: LAW AND ANALYSIS

A. The Stay of Proceedings Should be Extended

1. The Stay of Proceedings Should be Extended to and including April 30, 2024 for the Applicants

27. 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”.²⁹ 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.³⁰

28. The jurisdiction vested in Courts to stay proceedings under section 11.02 “should be construed broadly to accomplish the legislative purposes of the CCAA”.³¹ 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.³² 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.³³

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

²⁹ *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].

³⁰ [CCAA](#), *ibid*; *Nordstrom*, *ibid*.

³¹ *Canwest Global Communications Corp.*, [2011 ONSC 2215](#) at para 24.

³² *ibid*; *Century Services Inc v Canada (Attorney General)*, [2010 SCC 60](#) at [para 15](#) [Century Services]; *Target Canada Co. (Re)* [2015 ONSC 303](#) at [para 8](#) [Target]; *Timminco Limited (Re)*, [2012 ONSC 2515](#) at [para 15](#) [Timminco].

³³ *Century Services*, *ibid* at para 14; *Target*, *ibid*; *Timminco*, *ibid*.

- (a) since the granting of the ARIIO, the Applicants have acted in good faith and with due diligence to stabilize and continue the Business' ordinary course 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:
 - (i) continue the Business' ordinary course operations;
 - (ii) complete value accretive renovations;
 - (iii) seek approval of the retention of a financial advisor;
 - (iv) continue to pursue a comprehensive refinancing and/or restructuring transaction;
 - (v) develop and seek approval of a process for the determination and resolution of claims against the Applicants and their present and former directors and officers; and
 - (vi) with the input of the financial advisor to be retained by the Applicants, and to the extent a value-maximizing refinancing solution is not otherwise first found, develop a process for the solicitation of interest in a reorganization or recapitalization of the Business through a refinancing, or sale of the Applicants' Property to be conducted by the financial advisor under the oversight of the Monitor;

- (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.³⁴

30. 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.

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

31. The Second ARIO 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.³⁵

32. Pursuant to the Initial Order (as amended by the Amended IO and the 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 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.

³⁴ Clark Affidavit, *supra* note 1 at paras 37-40, Motion Record at Tab 2.

³⁵ *Ibid* at para 41; Motion Record at Tab 2.

33. 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. In considering the relevant case law, the Court held that the circumstances in this case were akin to those in *Nordstrom Canada Retail, Inc.*,³⁶ *BBB Canada Ltd.*,³⁷ and *McEwan Enterprises Inc.*,³⁸ and ultimately determined that it had jurisdiction under section 11 to grant the Non-Applicant Stay and that it was just and convenient in the circumstances.³⁹ 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.⁴⁰

34. 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.⁴¹

35. As previously found by this Court, 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.⁴² As with the Amended IO and the ARIO, the Applicants again seek to toll any prescription, time or limitation period relating to any

³⁶ [2023 ONSC 1422](#) [*Nordstrom Canada*].

³⁷ [2023 ONSC 1014](#).

³⁸ [2021 ONSC 6453](#).

³⁹ *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) (Kimmel J) at para 35 [*Initial Order Endorsement*].

⁴⁰ *Ibid* at para 34.

⁴¹ Clark Affidavit, *supra* note 1 at para 43, Motion Record at Tab 2.

⁴² [Initial Order Endorsement](#), *supra* note 39 at para 36.

proceeding against or in respect of the Additional Stay Parties of the Additional Stay Parties' Property in respect of the Related Claims so as to limit any potential prejudice to the Lenders.

36. This Court has jurisdiction to grant a tolling provision in the form proposed under the Second ARIO pursuant to subsection 11.02(2) of the 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.⁴³ Tolling of certain stayed claims is not uncommon in CCAA proceedings, including in respect of stayed claims against third-party guarantors.⁴⁴ Indeed, this Court has already found it appropriate to grant such relief under both the Amended IO and the ARIO.

37. The extension of the Non-Applicant Stay on the terms provided in the Second ARIO is supported by the Monitor.⁴⁵ The Applicants submit that this relief remains just and convenient in the circumstances and should be granted by this Court.

B. Unsecured Lender Representative Counsel

1. Unsecured Lender Representative Counsel Should be Appointed

38. The Applicants seek the appointment of GSNH as Unsecured Lender Representative Counsel in these and any other Insolvency Proceedings pursuant to the proposed Second ARIO.

39. This Court has already found that it was necessary and appropriate for Lender Representative Counsel to be appointed to represent all of the Lenders.⁴⁶ The Unsecured Lender

⁴³ [CCAA](#), *supra* note 29 at [s 11](#), [s 11.02\(2\)](#).

⁴⁴ *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) (McEwen J); *In the Matter of a Plan of Compromise or Arrangement of BBB Canada Ltd*, (February 21, 2023), Toronto, CV-23-00695619-00CL ([Order](#)) (ONSC) (Morawetz CJ); *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) (McEwen J).

⁴⁵ Clark Affidavit, *supra* note 1 at para 44, Motion Record at Tab 2.

⁴⁶ [Initial Order Endorsement](#), *supra* note 39 at para 44.

Representative Counsel is proposed to be appointed to represent the now unrepresented Unsecured Lenders on substantially the same terms as Lender Representative Counsel. The same circumstances that weighed in favour of the appointment of Lender Representative Counsel now weigh in favour of the appointment of the Unsecured Lender Representative Counsel.

40. Section 11 of the CCAA and the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 confer broad jurisdiction on the Court to appoint representative counsel for vulnerable stakeholder and creditor groups.⁴⁷ In doing so, the relevant factors to consider include:

- (a) the vulnerability and resources of the group sought to be represented;
- (b) any benefit to the companies under CCAA protection;
- (c) any social benefit to be derived from representation of the group;
- (d) the facilitation of the administration of the proceedings and efficiency;
- (e) the avoidance of a multiplicity of legal retainers;
- (f) the balance of convenience and whether it is fair and just including to the creditors of the estate;
- (g) whether representative counsel has already been appointed for those who have similar interests to the group seeking representation and who is also prepared to act for the group seeking the order; and
- (h) the position of other stakeholders and the Monitor.⁴⁸

⁴⁷ CCAA, *supra* note 29, s 11; *Rules of Civil Procedure*, RRO 1990, Reg 194, 10.01; *Nortel Networks Corporation (Re)*, 2009 CanLII 26603 at paras 10-12.

⁴⁸ *Canwest Publishing Inc.*, 2010 ONSC 1328 at para 21; *Mountain Equipment Co-Operative (Re)*, 2020 BCSC 2037 at para 23 [*Mountain Equipment*]; *Imperial Tobacco Canada Ltd., Re*, 2020 ONSC 61 at para 26.

41. The ability for representative counsel to provide for effective communication and efficiency within the proceedings have been highlighted as particularly important factors.⁴⁹

42. The factors above each weigh in favour of the appointment of Unsecured Lender Representative Counsel. Namely:

- (a) GSNH has extensive involvement in complex insolvency proceedings and is an appropriate firm to serve as the Unsecured Lender Representative Counsel;
- (b) the appointment of the Unsecured Lender Representative Counsel will facilitate the efficient administration of these CCAA proceedings by providing a single point of contact between the numerous Unsecured Lenders (who together hold approximately 200 Promissory Notes), the Applicants, the Monitor, and the Court;
- (c) without the appointment of the Unsecured Lender Representative Counsel, a material stakeholder group in these proceedings – that is part of a larger group that this Court already found would benefit from representative counsel – would be without a single representative, and the Applicants, the Monitor and other stakeholders would be forced to liaise and attempt to develop consensus among numerous counsel;
- (d) the increased professional costs and inefficiencies that will result from the absence of the Unsecured Lender Representative Counsel will jeopardize the Applicants’ restructuring efforts and the success of these CCAA proceedings;
- (e) the Unsecured Lenders, who are mostly individual real estate investors, have voiced that they have a strong preference for representation in these proceedings and

⁴⁹ *Quadriga Fintech Solutions Corp (Re)*, [2019 NSSC 65](#) at [para 9](#).

believe they would benefit from the assistance of experienced insolvency counsel in both communicating developments and legal issues to them and voicing their views to the Court;

- (f) the Applicants do not believe that the relief sought will prejudice any stakeholder, and note that any Unsecured Lenders that do not wish to be represented may opt-out in accordance with the Second ARIO; and
- (g) the Monitor supports the proposed appointment of the Unsecured Lender Representative Counsel.⁵⁰

43. Having regard to the foregoing, the Applicants submit that the appointment of the Unsecured Lender Representative Counsel is necessary and appropriate in the circumstances and will facilitate the administration of these CCAA proceedings.

2. The Related Relief in Favour of the Unsecured Lender Representative Counsel Should be Granted

44. The material terms of the proposed Unsecured Lender Representative Counsel's appointment mirror those of the Lender Representative Counsel that currently exist under the ARIO.⁵¹ In accordance therewith, the Second ARIO provides that the reasonable fees and disbursements of the Unsecured Lender Representative Counsel shall be paid from the estate, and that the Unsecured Lender Representative Counsel shall have the benefit of the Administration Charge (the quantum of which the Applicants are not seeking to increase).

45. Just as this Court found that this relief was appropriate in favour of the Lender Representative Counsel, the Applicants submit that the relief in favour of the Unsecured Lender

⁵⁰ Clark Affidavit, *supra* note 1 at para 56, Motion Record at Tab 2.

⁵¹ *Ibid* at para 52, Motion Record at Tab 2.

Representative Counsel is necessary and appropriate in the circumstances. Pursuant to subsection 11.52 of the CCAA, this Court has the jurisdiction to order that professionals involved in CCAA proceedings, including representative counsel, are entitled to the benefit of an administration charge.⁵²

46. The Unsecured Lender Representative Counsel are expected to make distinct and significant contributions to the Applicants' restructuring efforts.⁵³ Their involvement in these proceedings will allow the Unsecured Lenders to have effective representation, will improve the efficiency of these CCAA proceedings, and will reduce the professional costs incurred by the Applicants. As such, the Applicants believe that the payment of the Unsecured Lender Representative Counsel's fees, and its inclusion as a beneficiary of the Administration Charge, is fair and reasonable in the circumstances.

PART V: RELIEF REQUESTED

47. 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 Second ARIO.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 27TH DAY OF MARCH 2024

Bennett Jones LLP
BENNETT JONES LLP

⁵² CCAA, *supra* note 29 at ss 11.52; *Nordstrom Canada*, *supra* note 37 at paras 54-55.

⁵³ Clark Affidavit, *supra* note 1 at para 61, Motion Record at Tab 2.

SCHEDULE A

LIST OF AUTHORITIES

Cases Cited

1. *BBB Canada Ltd.*, [2023 ONSC 1014](#)
2. *Canwest Global Communications Corp.*, [2011 ONSC 2215](#)
3. *Canwest Publishing Inc.*, [2010 ONSC 1328](#)
4. *Century Services Inc v. Canada (Attorney General)*, [2010 SCC 60](#)
5. *Imperial Tobacco Canada Ltd., Re*, [2020 ONSC 61](#)
6. *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) (Kimmel J.)
7. *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) (McEwen J.)
8. *In the Matter of a Plan of Compromise or Arrangement of BBB Canada Ltd.*, (February 21, 2023), Toronto, CV-23-00694493-00CL ([Order](#)) (ONSC) (Morawetz C.J.)
9. *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) (McEwen J.)
10. *McEwan Enterprises Inc.*, [2021 ONSC 6453](#)
11. *Mountain Equipment Co-Operative (Re)*, [2020 BCSC 2037](#)
12. *Nordstrom Canada Retail, Inc.*, [2023 ONSC 1631](#)
13. *Nordstrom Canada Retail, Inc.*, [2023 ONSC 1422](#)
14. *Nortel Networks Corporation (Re)*, [2009 CanLII 26603](#)
15. *Quadriga Fintech Solutions Corp. (Re)*, [2019 NSSC 65](#)
16. *Timminco Limited (Re)*, [2012 ONSC 2515](#)
17. *Target Canada Co. (Re)*, [2015 ONSC 303](#)

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.

Section 11.03

Stays — directors

(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

Section 11.04

Persons obligated under letter of credit or guarantee

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 11.52

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

Rules of Civil Procedure, RRO 1990, Reg 194

Rule 10.01

Representation of an Interested Person Who Cannot Be Ascertained

Proceedings in which Order may be Made

(1) In a proceeding concerning,

(a) the interpretation of a deed, will, contract or other instrument, or the interpretation of a statute, order in council, regulation or municipal by-law or resolution;

(b) the determination of a question arising in the administration of an estate or trust;

- (c) the approval of a sale, purchase, settlement or other transaction;
- (d) the approval of an arrangement under the Variation of Trusts Act;
- (e) the administration of the estate of a deceased person; or
- (f) any other matter where it appears necessary or desirable to make an order under this subrule,

a judge may by order appoint one or more persons to represent any person or class of persons who are unborn or unascertained or who have a present, future, contingent or unascertained interest in or may be affected by the proceeding and who cannot be readily ascertained, found or served.

R.R.O. 1990, Reg. 194, r. 10.01 (1)

Order Binds Represented Persons

(2) Where an appointment is made under subrule (1), an order in the proceeding is binding on a person or class so represented, subject to rule 10.03.

R.R.O. 1990, Reg. 194, r. 10.01 (2)

Settlement Affecting Persons who are not Parties

(3) Where in a proceeding referred to in subrule (1) a settlement is proposed and some of the persons interested in the settlement are not parties to the proceeding, but,

- (a) those persons are represented by a person appointed under subrule (1) who assents to the settlement; or
- (b) there are other persons having the same interest who are parties to the proceeding and assent to the settlement,

the judge, if satisfied that the settlement will be for the benefit of the interested persons who are not parties and that to require service on them would cause undue expense or delay, may approve the settlement on behalf of those persons.

R.R.O. 1990, Reg. 194, r. 10.01 (3)

(4) A settlement approved under subrule (3) binds the interested persons who are not parties, subject to rule 10.03.

R.R.O. 1990, Reg. 194, r. 10.01 (4)

**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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(Returnable March 28, 2024)

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