

**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. (collectively the "Applicants", and each an "Applicant")**

**FACTUM OF THE MONITOR
(MOTION RETURNABLE APRIL 14, 2025)**

April 10, 2025

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PART I - NATURE OF THIS MOTION

1. This Factum is filed in support of a motion by KSV Restructuring Inc., in its capacity as court-appointed monitor (in such capacity, the “**Monitor**”) of the Applicants pursuant to the Initial Order of the Ontario Superior Court of Justice (Commercial List) (the “**Court**”) dated January 23, 2024 as subsequently amended and restated by Orders dated February 15, 2024 and March 28, 2024 (as further amended from time to time, including by Order dated December 6, 2024, the “**SARIO**”) and pursuant to the Order (Expansion of Monitor’s Powers) of the Court dated June 25, 2024 (the “**Expanded Powers Order**”), seeking two orders from the Court.

2. The first is a second omnibus credit bid vesting order which will allow for the closing of 12 property sales pursuant to the Secondary Credit Bid APAs (as defined and discussed below).

3. The second is an order which, among other things, approves the Second DIP Allocation (as defined below) and certain proposed mechanics and procedures to permit the Monitor to accept and complete sales of the Liquidation Portfolio Properties (as defined below) without the need for further Court approval for efficiency purposes.

4. More specifically, the Monitor seeks the following:

(a) an order substantially in the form attached at Tab 3 of the Motion Record (the “**Second Omnibus Credit Bid Vesting Order**”), among other things:

(i) abridging the manner and time for, and validating service of, this Notice of Motion and supporting materials such that the motion is properly returnable on April 14, 2025 and dispensing with further service thereof;

- (ii) approving twelve individual real property sale transactions (collectively, the “**Transactions**” and each a “**Transaction**”) contemplated by agreements of purchase and sale (collectively, the “**Sale Agreements**” and each a “**Sale Agreement**”) between, in each case, an Applicant, as seller, and a Purchaser (as hereinafter defined), as buyer, dated as of various dates and in each case substantially in the form of Sale Agreement attached at Appendix “G” to the Twelfth Report of the Monitor dated April 7, 2025 (the “**Twelfth Report**”);
 - (iii) vesting in the applicable person(s) or entity(ies) listed on Schedule “A” to the Second Omnibus Credit Bid Vesting Order (each, a “**Purchaser**”), the applicable Applicants’ right, title and interest in and to the applicable lands and premises legally described in Schedule “A” to the Second Omnibus Credit Bid Vesting Order (collectively, the “**Purchased Properties**” and each a “**Purchased Property**”); and
 - (iv) assigning to the applicable Purchaser, the applicable Applicants’ rights and obligations in and to the applicable tenant leases in respect of the applicable Purchased Property (collectively, the “**Assigned Leases**” and each an “**Assigned Lease**”); and
- (b) an order substantially in the form attached at Tab 4 of the Motion Record (the “**Second DIP Allocation and Orderly Liquidation Mechanics Order**”, together with the Second Omnibus Credit Bid Vesting Order, the “**Proposed Orders**”), among other things:

- (i) abridging the manner and time for, and validating service of, this Notice of Motion and supporting materials such that the motion is properly returnable on April 14, 2025 and dispensing with further service thereof;
- (ii) extending the Stay Period (as defined in the SARIO) to and including August 31, 2025;
- (iii) approving the Second DIP Allocation as defined in the Twelfth Report and substantially in the form attached at Appendix “J” to the Twelfth Report;
- (iv) authorizing the Monitor to accept and complete sales of any Liquidation Portfolio Property in accordance with the proposed Orderly Liquidation Mechanics (as defined in the Twelfth Report); and
- (v) approving (i) the Twelfth Report and the activities of the Monitor referred to therein and (ii) the fees and disbursements of the Monitor and its counsel, Cassels Brock & Blackwell LLP (“**Cassels**”), from February 1, 2025 to and including March 31, 2025, as set out in the Twelfth Report, the Affidavit of Noah Goldstein sworn April 7, 2025 (the “**Goldstein Affidavit**”) and the Affidavit of Ryan Jacobs sworn April 7, 2025 (the “**Jacobs Affidavit**”).

5. Capitalized terms not defined herein have their meaning as set out in the Twelfth Report.

PART II - SUMMARY OF FACTS

A. Background

6. On January 23, 2024, the Applicants obtained an initial order (the "**Initial Order**") under the CCAA, which among other things, appointed KSV Restructuring Inc. as the Monitor in these CCAA proceedings.¹ The Initial Order was subsequently amended and restated and thereafter further amended ultimately resulting in the SARIO.²

7. On June 25, 2024, the Court granted the Expanded Powers Order, which, among other things:

- (a) authorized and empowered the Monitor to exercise any powers which may be properly exercised by a board of directors or any officers of the Applicants to cause the Applicants to take various actions or steps as set out in paragraph 3 of the Expanded Powers Order;
- (b) provided for a process for the Monitor to transition the Applicants' property and other management service providers from the SID Companies (as defined in the Expanded Powers Order) as determined necessary by the Monitor; and
- (c) granted various additional and ancillary relief to facilitate the foregoing.³

8. On August 30, 2024, the Court granted an Order, which, among other things, approved the restructuring term sheet (the "**Restructuring Term Sheet**"), and authorized and directed the Monitor to carry out its obligations under the Restructuring Term Sheet, including, without

¹ The Twelfth Report of the Monitor dated April 7, 2025 at section 1.0(1) [Twelfth Report].

² Twelfth Report at section 1.0(7).

³ Twelfth Report at section 1.0(9).

limitation, facilitating the negotiation and settlement of the transactions contemplated therein and finalizing all documentation reasonably necessary to carry out such transactions, but provided that nothing in such order approved any specific transaction or agreement contemplated by the Restructuring Term Sheet, all of which remained subject to further approval by the Court.⁴

9. On December 6, 2024, the Court granted an order, which, among other things (the **“Omnibus Credit Bid Vesting Order”**):

- (a) approved credit bid transactions in respect of 323 of the Applicants’ 407 properties, including assigning tenant leases for the properties subject to the Omnibus Credit Bid Vesting Order to the respective purchasers, and separate from the Omnibus Credit Bid Vesting Order, assigned all tenant leases applicable to the Remaining Portfolio from the SID Companies to the applicable Applicant;
- (b) approved the DIP Allocation;
- (c) approved a replacement DIP Term Sheet with Viscount (the **“Viscount DIP Term Sheet”**) and authorized the Monitor to execute the Viscount DIP Term Sheet on behalf of the Applicants in its capacity as “super” monitor of the Applicants pursuant to the Expanded Powers Order;
- (d) authorized the Monitor, on behalf of the Applicants in its capacity as “super” monitor of the Applicants pursuant to the Expanded Powers Order, to repay the Harbour DIP Facility from: (i) cash on hand in the Applicants’ bank accounts and/or the Monitor’s trust account in respect of the Applicants; (ii) the DIP

⁴ Twelfth Report at section 1.0(11)(b).

Allocations paid on closing of each Credit Bid APA; and (iii) the proceeds of the Viscount DIP Term Sheet.⁵

10. On February 27, 2025, the Court granted an order, which, among other things, (the “**Credit Bid/Liquidation Process Order**”):

- (a) extended the Stay Period to May 31, 2025; and
- (b) approved a Secondary Credit Bid Process and an Orderly Liquidation Plan (each as defined in the Monitor’s Eleventh Report to Court dated February 20, 2025 (the “**Eleventh Report**”)), including the listing agreements with five listing agents in their respective local markets, and authorized the Monitor to carry out those processes on the basis detailed in the Eleventh Report.⁶

B. Secondary Credit Bid Process and Proposed Second Omnibus Credit Bid Vesting Order

11. The Secondary Credit Bid mechanics were substantially the same as those used in the initial credit bid process set out in the Restructuring Term Sheet and approved by this Court on August 30, 2024, subject to one substantive change to consider the requirements under the Viscount DIP Term Sheet (as described in the Twelfth Report). In this regard, the forms of the purchase agreements documenting the credit bid transactions (the “**Secondary Credit Bid APAs**”) were substantially the same as the forms of Credit Bid APAs approved by this Court under the Omnibus Credit Bid Vesting Order.⁷

⁵ Twelfth Report at section 1.0(15).

⁶ Twelfth Report at section 1.0(17).

⁷ Twelfth Report at section 4.1(2).

12. The Monitor has received Secondary Credit Bid APAs from 12 mortgagees.⁸

13. Since the deadlines for submitting credit bids (being March 14 and 21, 2025 for first and second mortgagees, respectively), the Monitor has communicated with mortgagees who submitted credit bids to seek clarification or supporting documentation on their submission, including in respect of their Mortgage Indebtedness Amount, before accepting the Secondary Credit Bid APAs. The Monitor also cross-referenced the name of the mortgagee and amount listed on the Secondary Credit Bid APA to the registered mortgagee of the applicable Property and ensured that such mortgagee and mortgage were registered on the applicable Property. Given the funding constraints, consistent with the approval in the first credit bid process, the Monitor did not obtain an independent legal opinion on the validity of the 12 mortgages subject to the Secondary Credit Bid APAs. The Secondary Credit Bid APAs submitted are in the form required and are acceptable to the Monitor.⁹

14. The Secondary Credit Bid APAs require that each Purchaser assume any tenant leases on closing. Based on the information available to the Monitor from the Applicants' records, of the 12 properties subject to the Second Omnibus Credit Bid Vesting Order, 7 have tenants (the "**Leases**").¹⁰

⁸ Twelfth Report at section 1.2(1)(a).

⁹ Twelfth Report at section 4.1(4).

¹⁰ Twelfth Report at section 4.2(1).

C. The Proposed Second DIP Allocation and Orderly Liquidation Mechanics Order

Second DIP Allocation

15. Earlier in these proceedings, the Monitor sought and obtained approval of the DIP Allocation so the proceeds of the initial 321 credit bid transactions could be used to repay, in part, the Harbour DIP Facility. The same methodology was used for the purposes of the amount owing under the Viscount DIP Term Sheet, which has been allocated by the Monitor on the following basis:

- (a) property specific costs, such as renovations and property taxes, to the applicable Property; and
- (b) general costs, such as professional fees associated with these CCAA proceedings, over the Portfolio in proportion to the acquisition cost of each Property.¹¹

16. The proposed Second DIP Allocation, which totals \$5 million, follows a customary and equitable manner in which DIP funding is typically allocated in similar circumstances by allocating general costs across all properties and property specific costs to the applicable property, and uses acquisition cost as the basis to allocate general costs across the entire Portfolio.¹² This methodology is consistent with the DIP Allocation methodology approved by the Omnibus Credit Bid Vesting Order.¹³

17. Subject to Court approval of the Second DIP Allocation and the Second Omnibus Credit Bid Vesting Order, the Monitor expects the total of the Second DIP Allocation proceeds from the 12 credit bid transactions to be approximately \$733,000 (excluding the additional 25% Escrow

¹¹ Twelfth Report at section 5.0(1).

¹² Twelfth Report at section 5.0(4)(a).

¹³ Twelfth Report at section 5.0(4)(c).

funds required under the Viscount DIP Term Sheet).¹⁴ These funds will be used to reduce the principal outstanding under the Viscount DIP Term Sheet to approximately \$3.7 million, which will also reduce the monthly interest payments payable under the Viscount DIP Term Sheet.¹⁵

Liquidation Portfolio Properties

18. Subject to Court approval and completion of the 12 secondary credit bid transactions, the remaining Liquidation Portfolio Properties will consist of 74 properties.¹⁶

19. Following the credit bid deadlines established under the Court-approved Secondary Credit Bid Process, the Monitor commenced its implementation of the Orderly Liquidation Plan previously approved by the Court on February 27, 2025 by taking the steps as further described in the Twelfth Report to list several Liquidation Portfolio Properties.¹⁷

20. There have been four offers received by the Listing Agents on the Liquidation Portfolio Properties. No offers have been accepted to-date. However, the Monitor anticipates being in a position to sell certain of the Liquidation Portfolio Properties in the near term. Accordingly, the Monitor worked with stakeholders and/or their counsel to develop a streamlined process to accept and close offers for the Liquidation Portfolio Properties to avoid the costs of ongoing and recurring Court appearances to sell each property.¹⁸

¹⁴ Twelfth Report at section 5.0(6).

¹⁵ Twelfth Report at section 5.0(7).

¹⁶ Twelfth Report at section 6.0(1).

¹⁷ Twelfth Report at section 6.0(2).

¹⁸ Twelfth Report at section 6.0(4).

21. The Orderly Liquidation Mechanics are described in Section 6.1 of the Twelfth Report and are set forth in the proposed Second DIP Allocation and Orderly Liquidation Mechanics Order included at Tab 4 of the Monitor's Motion Record.

Approval of the Monitor's Reports, Activities, and Fees and Disbursements

22. The Monitor is seeking approval of the Twelfth Report, and the activities of the Monitor described therein, as well as the fees and disbursements of the Monitor and its counsel, Cassels.

23. In support of this motion, the Twelfth Report attaches the Goldstein Affidavit and the Jacobs Affidavit, which provides a comprehensive listing of accounts sought to be passed, including each account (redacted for matters of privilege or confidentiality) and summary tables identifying the individual professionals who have worked on this matter, their hourly billing rates and total number of hours worked, among other information.¹⁹

24. The fees (excluding disbursements and HST) of the Monitor and Cassels from February 1, 2025 to March 31, 2025 total \$133,039 and \$106,056, respectively.²⁰

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

25. The issues to be determined on this Motion are whether this Court should approve the Second Omnibus Credit Bid Vesting Order and the Second DIP Allocation and Orderly Liquidation Mechanics Order.

¹⁹ Twelfth Report at Appendix "O" and Appendix "P".

²⁰ Twelfth Report at section 10.0(2).

A. THE PROPOSED SECOND OMIBUS CREDIT BID VESTING ORDER

The Transactions contemplated by the Secondary Credit Bid APAs should be Approved

26. Under s. 36 of the CCAA, this Court may authorize the Applicant to sell or otherwise dispose of its assets outside of the ordinary course of business free and clear of any security, charge or other restriction. A sale to preserve the business as a going-concern is consistent with the objectives of the CCAA.²¹

27. In deciding whether to exercise its discretion to approve a transaction, this Court must review a transaction as a whole and decide whether it is appropriate, fair, and reasonable. This determination is made in the context of the primary objectives of the CCAA, which include avoiding the devastating social and economic costs of liquidation of a debtor company's assets.²² Section 36(3) of the CCAA provides a non-exhaustive list of factors to be considered:²³

- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances.²⁴ The SISF was developed by the Monitor in consultation with the Applicants, the Secured Lender Representative Counsel, the Unsecured Lender Representative Counsel and the Lion's Share Representative, each of whom supported or did not oppose its approval by the Court.²⁵ The rights of the Secured Lenders to credit bid were specifically preserved under the SISF, and 452 Secured

²¹ *Consumers Packaging Inc., Re* (2001), 27 C.B.R. (4th) 197, [2001 CanLII 6708](#) at paras [5](#), [9](#) (CA); *Nortel Networks Corporation (Re)*, [2009 CanLII 39492](#) at para [35 – 40](#), [48](#) (ON SC) [*Nortel 2009*]; *PCAS Patient Care Automation Services Inc. (Re)*, [2012 ONSC 3367](#) at [para 35](#) [*PCAS*].

²² *PCAS* at [para 54](#); *Veris Gold Corp. (Re)*, [2015 BCSC 1204](#) at [para 23](#) [*Veris Gold*], citing *White Birch Paper Holding Co., Re*, [2010 QCCS 4915](#) at [para 49](#) [*White Birch*]; *Mountain Equipment Co-Operative (Re)*, [2020 BCSC 1586](#) at paras [156](#), [157](#).

²³ *Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36*, ss. [36\(3\)](#) [CCAA]; and see *White Birch* at [para 48](#).

²⁴ CCAA, s. [36\(3\)\(a\)](#).

²⁵ Twelfth Report at section 4.6(1)(a).

Lenders submitted credit bid LOIs in the SISP.²⁶ All of the acquisition or refinancing LOIs submitted under the SISP for all or a portion of the Portfolio would have resulted in a substantial shortfall to the Applicants' first ranking Secured Lenders, and each of Secured Lender Representative Counsel, the Unsecured Lender Representative Counsel and the Lion's Share Representative agreed that the Monitor should not pursue any such offers.²⁷

Further, the Secondary Credit Bid APAs before the Court on this motion were all submitted in accordance with the Secondary Credit Bid Process which was approved by the Court on February 27, 2025 and was substantively the same as the first credit bid process conducted and completed pursuant to the Restructuring Term Sheet.

- (b) whether the Monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy.²⁸ The Twelfth Report states that the Monitor believes that the proposed sales are more beneficial to creditors than a sale or disposition under a bankruptcy.²⁹
- (c) the extent to which the creditors were consulted.³⁰ The Secondary Credit Bid Process, pursuant to which the Secondary Credit Bid APAs were submitted, was developed in consultation with each of Secured Lender Representative Counsel, the

²⁶ Twelfth Report at section 4.6(1)(b).

²⁷ Twelfth Report at section 4.6(1)(c).

²⁸ CCAA, s. [36\(3\)\(c\)](#).

²⁹ Twelfth Report at section 4.6(1)(i).

³⁰ CCAA, s. [36\(3\)\(d\)](#).

Replacement DIP Lender, the Unsecured Lender Representative Counsel and the Lion's Share Representative.

- (d) the effects of the proposed sale or disposition on the creditors and other interested parties.³¹ The Secured Lenders have not been paid interest on their mortgage debt for 18 months (or longer) and have incurred further costs and taken steps (including funding their Deposits) to prepare to complete the transactions contemplated by the Secondary Credit Bid APAs, presumably including securing the necessary funds to pay the Priority Payables and the Additional Priority Payables Payment in connection with their transactions, should the Court approve them.³²
- (e) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.³³ The Monitor believes that the consideration to be received under the Secondary Credit Bid APAs is fair and reasonable in the circumstances.³⁴

28. The s. 36(3) factors are not intended to be exhaustive and the principles established in *Royal Bank v. Soundair Corp.* for approval of a sale in an insolvency proceeding remain relevant.³⁵ Applying these principles, courts examine: (i) whether the party conducting the sale made sufficient efforts to obtain the best price and did not act improvidently; (ii) the interests of all

³¹ CCAA, s. [36\(3\)\(e\)](#).

³² Twelfth Report at section 4.6(1)(g).

³³ CCAA, s. [36\(3\)\(f\)](#).

³⁴ Twelfth Report at section 4.6(1)(i).

³⁵ *Veris Gold* at [paras 22 – 25](#); *Arrangement relative à Black Rock Metals Inc.*, [2022 QCCS 2828](#) at [para 95](#), citing *Harte Gold (Re)*, [2022 ONSC 653](#); see also *CCAA Plan of Arrangement – Clearbeach and Forbes (Re)*, [2021 ONSC 5564](#) at [para 24, 25](#).

parties; (iii) the efficacy and integrity of the process by which offers were obtained; and (iv) whether there has been unfairness in the working out of the process.³⁶

29. The Secondary Credit Bid APAs are substantially the same as the forms of Credit Bid APAs, which, in the interest of keeping the interests of all parties in mind, was developed by the Secured Lender Representative Counsel, in consultation with the Monitor and its counsel, and approved by this Court under the Omnibus Credit Bid Vesting Order.³⁷ Further, to maintain efficacy and integrity in the process, the Secondary Credit Bid mechanics were substantially the same as those used in the first credit bid process set out in the Restructuring Term Sheet and approved by this Court on August 30, 2024.³⁸ Accordingly, the process and transactions contemplated by the Secondary Credit Bid APAs viewed as a whole, are appropriate, fair, and reasonable in the circumstances and should be approved by this Court.

30. The Monitor is also not aware of any of the Credit Bid Purchasers being “related” to the Applicants and accordingly subsection 36(5) of the CCAA is not applicable here.³⁹

31. The Monitor served its Motion Record on each secured creditor or other party whose interest in the Properties is proposed to be discharged by the Second Omnibus Credit Bid Vesting Order, which the Monitor delivered by email and, where an email address was not available, by courier to any known address of such lender.⁴⁰

³⁶ *Royal Bank of Canada v. Soundair Corp.*, [1991 CanLII 2727](#) (ON CA) at [para 16](#).

³⁷ Twelfth Report at sections 4.1(1) and 4.1(2).

³⁸ Twelfth Report at sections 4.1(2).

³⁹ Twelfth Report at section 4.6(1)(j).

⁴⁰ Affidavits of Service of Stephanie Savannah Fernandes, each sworn April 8, 2025.

Assignment and Assumption of Leases should be Approved

32. Section 11.3 of the CCAA provides that this Court may grant an order assigning the rights and obligations of the Applicant to “any person who is specified by the court and agrees to the assignment”, with certain limited exceptions.⁴¹ In deciding whether to exercise its discretion under s. 11.3, this Court must consider, among other things, three statutory factors:

- (a) whether the Monitor approved the proposed assignment;
 - (b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and
 - (c) whether it would be appropriate to assign the rights and obligations to that person.⁴²
- Appropriateness under the CCAA is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA, which are “avoiding the social and economic losses resulting from liquidation of an insolvent company”. Thus, where an assignment is necessary for the business to continue as a going-concern, Courts have found the assignment to be appropriate.⁴³

33. Finally, this Court may not make an order under s. 11.3 of the CCAA unless it is satisfied that all monetary defaults in relation to the assigned contracts, with certain exceptions, will be remedied on or before the day fixed by this Court.⁴⁴

34. The Monitor served a short-form notice to each known tenant under a Lease proposed to be assigned pursuant to the Second Omnibus Credit Bid Vesting Order advising of the proposed

⁴¹ CCAA, s. [11.3](#).

⁴² CCAA, s. [11.3\(3\)](#).

⁴³ CCAA, s. [11.3](#)

⁴⁴ CCAA, s. [11.3\(4\)](#).

assignment.⁴⁵ As of the date of this Factum, no objections to the proposed assignments have been received.

35. While the Monitor believes it is important to provide both purchasers and tenants with certainty as to the state of the leases, it would be impractical to obtain executed consents or acknowledgments from several tenants under the Leases and that doing so will create a risk to completing the simultaneous closing of all credit bid transactions on an expedited timeframe as contemplated by the Secondary Credit Bid APAs.⁴⁶

36. The Monitor believes it is appropriate, and in the best interests of the affected tenants, for the Leases to be assigned to the applicable Purchaser, and the Monitor is not aware of any reason why the applicable Purchasers would not be able to satisfy their obligations under the Leases once assigned and assumed. Given the nature of the Leases, the Monitor is also not aware of any potential monetary obligations in favour of the tenants that would be outstanding.⁴⁷ The Monitor believes that the proposed assignment of the Leases is warranted under and satisfies Section 11.3(3) of the CCAA.

37. The proposed assignment is also consistent with the Omnibus Credit Bid Vesting Order and the Credit Bid Vesting Order granted by the Court in connection with the first credit bid process for the reasons set out in the Court's Endorsement.⁴⁸

⁴⁵ Affidavit of Service of Nathalie El-Zakhem sworn April 8, 2025.

⁴⁶ Twelfth Report at [section 4.2\(2\)](#).

⁴⁷ Twelfth Report at [section 4.2\(3\)](#).

⁴⁸ Twelfth Report at [section 4.2\(4\)](#); See [Endorsement of Justice Osborne](#) dated December 6, 2024.

B. THE PROPOSED SECOND DIP ALLOCATION AND ORDERLY LIQUIDATION MECHANICS ORDER

The Second DIP Allocation should be Approved

38. Section 11 of the CCAA empowers courts to make any order that it considers appropriate in the circumstances.⁴⁹ As the Supreme Court of Canada has recognized, the power granted to courts by section 11 of the CCAA is “vast” and, considering the importance of judicial discretion in the CCAA, a supervising judge must be satisfied that the order is appropriate, advances the remedial objectives of the CCAA, and that the Applicant has acted in good faith and with due diligence.⁵⁰

39. In *Royal Bank of Canada v Atlas Block Co. Limited*⁵¹, this Court established the following principles to be considered in allocating costs (in that case in a receivership proceeding):

- (a) the allocation of costs must be done on a case-by-case basis and involves an exercise of discretion by a receiver or trustee;
- (b) costs should be allocated in a fair and equitable manner, one which does not readjust the priorities between creditors, and one which does not ignore the benefit or detriment to any creditor;
- (c) a strict accounting to allocate such costs is neither necessary nor desirable in all cases. To require a receiver to calculate and determine an absolutely fair value for its services for one group of assets vis-à-vis another likely would not be cost-effective and would drive up the overall cost of the receivership;

⁴⁹ CCAA, s. [11](#).

⁵⁰ *Canada v. Canada North Group Inc.*, [2021 SCC 30](#) at [para 21](#).

⁵¹ *Royal Bank of Canada v. Atlas Block Co. Limited*, [2014 ONSC 153](#) [Atlas Block].

- (d) a creditor need not benefit “directly” before the costs of an insolvency proceeding can be allocated against that creditor’s recovery;
- (e) an allocation does not require a strict cost/benefit analysis or that the costs be borne equally or on a *pro rata* basis; and
- (f) where an allocation appears *prima facie* as fair, the onus falls on an opposing creditor to satisfy the court that the proposed allocation is unfair or prejudicial.⁵²

40. The Monitor requests that the Court approve the proposed Second DIP Allocation for the following reasons:

- (a) in the Monitor’s view, the proposed allocation methodology follows a customary and equitable manner in which DIP funding is typically allocated in similar circumstances by allocating general costs across all properties and property specific costs to the applicable property;
- (b) using acquisition cost as the basis to allocate general costs across the entire Portfolio is reasonable in the circumstances and, in the Monitor’s view, is more appropriate than allocating those costs based on mortgage debt, as the Applicants did not incur or repay mortgage debt in any systematic manner;
- (c) the Second DIP Allocation methodology is consistent with the first DIP Allocation methodology approved by this Court on December 6, 2024 and applied to the first credit bid transactions;
- (d) the Second DIP Allocation was communicated to stakeholders in February 2025, allowing mortgagees sufficient time to review their allocations before the

⁵² *Atlas Block* at [para 43](#).

secondary credit bid submission deadlines of March 14 and 21, 2025 for first and second mortgagees, respectively.⁵³

41. For the foregoing reasons, the proposed Second DIP Allocation meets the principles set forth in *Royal Bank of Canada v Atlas Block Co. Limited*, and the Monitor considers it fair and reasonable in the circumstances.⁵⁴

The Orderly Liquidation Mechanics Should Be Approved

42. The Monitor further recommends that the proposed Orderly Liquidation Mechanics (as set out in the Twelfth Report), should be approved to permit the Monitor to accept and complete sales of Liquidation Portfolio Properties without the need for further approval of the Court.⁵⁵

43. It is designed to permit the Monitor to accept and complete specific sales of the Liquidation Portfolio Properties (pursuant to the already court-approved Orderly Liquidation Plan) without further approval of the Court provided that the Monitor has the consent of those stakeholders or stakeholder representatives who have the economic interest in the proceeds of each particular sale transaction.⁵⁶

44. It is well established that a CCAA court has the jurisdiction to approve a sale process in relation to a CCAA debtor's business and assets, prior to the development (or even in the absence) of a plan of compromise and arrangement. The Court in *Nortel* identified a number of factors that should be considered in determining whether to authorize a sale process, including:

⁵³ Twelfth Report at section 5.0(4).

⁵⁴ Twelfth Report at section 5.0(5).

⁵⁵ Twelfth Report at section 6.1(1).

⁵⁶ Twelfth Report at section 6.1(5)(b).

- (a) Is a sale transaction warranted at this time?
- (b) Will the sale benefit the whole economic community?
- (c) Do any of the debtors' creditors have a *bona fide* reason to object to a sale of the business?
- (d) Is there a better viable alternative?⁵⁷

45. Although the *Nortel* criteria were articulated prior to the 2009 amendments to the CCAA, the Court in *Brainhunter* confirmed that the same criteria apply under the post-2009 CCAA in determining whether a sale process should be approved.⁵⁸

46. Although section 36(3) of the CCAA does not directly apply at this stage, the *Nortel* criteria are often evaluated in light of the additional criteria set out in section 36(3)⁵⁹, namely:

- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (b) whether the monitor approved the process leading to the proposed sale or disposition;
- (c) whether the monitor filed with the court a report stating that in its opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
- (d) the extent to which the creditors were consulted;
- (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
- (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.⁶⁰

⁵⁷ *Nortel 2009* at [para 48](#).

⁵⁸ *Brainhunter Inc. (Re)*, [2009 CanLII 72333 \(ON SC\)](#) at [paras 15-17](#) [*Brainhunter*].

⁵⁹ *Brainhunter* at [para 17](#).

⁶⁰ *U.S. Steel Canada Inc. (Re)*, [2015 ONSC 2523](#) at para 8.

47. In consideration of the above criteria and factors, the Orderly Liquidation Mechanics should be approved because:

- (a) in the Monitor's view, it would be impractical and inefficient to seek Court approval prior to completing sale transactions for 74 individual or a subset of properties comprising the Liquidation Portfolio Properties;
- (b) the proposed Orderly Liquidation Mechanics would require consents from the economic stakeholders in the various scenarios having regard to the sale price, Mortgage Debt and the Second DIP Allocation for each Liquidation Portfolio Property and therefore sales would only be completed if the applicable economic stakeholder(s) are in agreement (or the Court otherwise approves the sale if such consent is not granted);
- (c) the key stakeholders and/or their representative counsel were consulted in the development of the proposed Orderly Liquidation Mechanics;
- (d) the rationale for the Orderly Liquidation Mechanics is to minimize the cost of selling the Liquidation Portfolio Properties, which is in the best interest of all stakeholders;
- (e) the Orderly Liquidation Mechanics provide that Court approval is required in the event that any of the applicable economic stakeholders do not consent to the proposed sale; and
- (g) the Applicants' creditors have no *bona fide* reason to object to the Orderly Liquidation Mechanics and there is no better viable alternative available.⁶¹

48. In the Monitor's view, the proposed Orderly Liquidation Mechanics are reasonable and appropriate in the circumstances, as the Monitor worked with stakeholders and/or their counsel to

⁶¹ Twelfth Report at section 6.1(5).

develop a streamlined process to accept and close offers for the Liquidation Portfolio Properties in an effort to avoid the costs of ongoing and recurring Court appearances to sell each property.⁶²

The Stay Period should be Extended

49. Section 11.02(2) of the CCAA empowers courts to grant a stay extension, for any period that the court considers necessary, where a court is satisfied that: (a) circumstances exist which make such an order appropriate; and (b) the applicants have acted and are continuing to act in good faith and with due diligence.⁶³

50. As endorsed by the Court in this proceeding and other CCAA proceedings, in the context of a “super monitor”, the monitor is held to the good faith standard.⁶⁴

51. Extending the Stay Period is necessary and appropriate in the circumstances, and the following factors support the extension of the Stay Period to August 31, 2025:

- (a) the Monitor is discharging its duties and obligations under the CCAA, the Expanded Powers Order and other orders made in these CCAA proceedings in good faith and with due diligence;
- (b) it will provide additional time to, if approved by the Court: (i) close the Secondary Credit Bid transactions; and (ii) implement the Court-approved Orderly Liquidation Plan;
- (c) the Monitor believes that no creditor will be materially prejudiced as a result of the extension of the Stay Period; and

⁶² Twelfth Report at section 6.0(4).

⁶³ CCAA, ss. [11.02\(2\)-\(3\)](#).

⁶⁴ *Forme Development Group Inc. (Re)*, Court File No.: CV-18-608313-00CL ([Endorsement of Mr. Justice Hainey](#)) February 20, 2020; *In the Matter of a Compromise or Arrangement of Balboa Inc. et. al*, Court File No.: CV-24-00713245-00CL ([Endorsement of Madame Justice Steele](#)) July 31, 2024.

- (d) the Cash Flow Forecast projects that there will be sufficient funding available to fund operations and the costs of these proceedings during the extension period.⁶⁵

The Twelfth Report, the Monitor's Activities, and Fees and Disbursements of the Monitor and Cassels should be Approved

52. As has been noted by this Court, requests to approve a monitor's report are not unusual, and there are good policy and practical reasons for the court to do so, including:

- (a) allowing the Monitor to move forward with the next steps in these CCAA proceedings;
- (b) allowing the Monitor to bring its activities before the court;
- (c) allows an opportunity for the concerns of the stakeholders to be addressed, and any problems to be rectified;
- (d) enabling the court to satisfy itself that a monitor's activities have been conducted in prudent and diligent manners;
- (e) providing protection for a monitor not otherwise provided by the CCAA; and
- (f) protecting creditors from delay that may be caused by re-litigation of steps and potential indemnity claims by the Monitor.⁶⁶

53. This Court has approved prior Monitor's reports in these CCAA proceedings.⁶⁷ The Reports and the actions, conduct and activities of the Monitor described therein should be

⁶⁵ Twelfth Report at section 9.0(2).

⁶⁶ *Target Canada Co. (Re)*, 2015 ONSC 7574 at para 23.

⁶⁷ See [SISP Approval Order dated April 12, 2024](#), the [Order dated June 24, 2024](#), the [Ancillary Order dated June 25, 2024](#), the [Order Dated July 31, 2024](#), the [Restructuring Term Sheet and DIP Amendment Order](#) dated August 30, 2024, the [Approval of Replacement DIP Facility and Ancillary Matters](#) dated December 6, 2024, and the [Credit Bid/Liquidation Process Order](#) dated February 27, 2025.

approved, as the Monitor has acted reasonably and in good faith throughout these CCAA proceedings.

54. The Second DIP Allocation and Orderly Liquidation Mechanics Order also seeks to approve the fees and disbursements of the Monitor and its counsel, Cassels, incurred between February 1, 2025 to March 31, 2025.

55. In considering whether to approve fees and disbursements, the Court has regard to the “overriding principle of reasonableness,” and does not engage in a docket-by-docket or line-by-line assessment of the accounts.⁶⁸ The following factors assist a court in assessing the reasonableness of the Monitor’s fees:

- (a) the nature, extent and value of the assets being handled;
- (b) the complications and difficulties encountered;
- (c) the degree of assistance provided by the company, its officers or its employees;
- (d) the time spent;
- (e) the Monitor’s knowledge, experience and skill;
- (f) the diligence and thoroughness displayed;
- (g) the responsibilities assumed;
- (h) the results achieved; and
- (i) the cost of comparable services when performed in a prudent and economical manner.⁶⁹

56. Additionally, Courts will often consider whether fees and disbursements are “fair and reasonable in all circumstances. The concerns are ensuring that the monitor is fairly compensated while safeguarding the efficiency and integrity of the CCAA process.”⁷⁰

⁶⁸ *Nortel Networks Inc.*, [2022 ONSC 6680](#) at [para 10](#) [*Nortel 2022*].

⁶⁹ *Bank of Nova Scotia v. Diemer*, [2014 ONCA 851](#) at [para 33](#); *Nortel 2022* at [para 11](#).

⁷⁰ *Re Nortel Networks Corporation et al.*, [2017 ONSC 673](#) at [para 13](#).

57. The fee affidavits attached as Appendices “O” and “P” to the Twelfth Report, provide detailed information on the fees and disbursements of the Monitor and of Cassels, in each case from February 1, 2025 to March 31, 2025.⁷¹

58. The Monitor is of the view that the hourly rates charged by Cassels are consistent with the rates charged by large corporate law firms practicing in the area of corporate insolvency and restructuring in the Toronto market, that Cassels’ billings reflect work performed consistent with the Monitor’s instructions and that the overall fees charged by Cassels and the Monitor are reasonable and appropriate in the circumstances.⁷²

PART IV - ORDER REQUESTED

59. For the reasons set out above, the Monitor respectfully requests that this Court grant the Proposed Orders.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of April, 2025.

Cassels Brock & Blackwell LLP

Cassels Brock & Blackwell LLP
Lawyers for the Monitor, KSV Restructuring
Inc.

⁷¹ Twelfth Report at Appendix “O” and Appendix “P”.

⁷² Twelfth Report at section 10.0(6).

SCHEDULE “A”

LIST OF AUTHORITIES

1. *Arrangement relative à Black Rock Metals Inc.*, [2022 QCCS 2828](#)
2. *Bank of Nova Scotia v. Diemer*, [2014 ONCA 851](#)
3. *Brainhunter Inc. (Re)*, [2009 CanLII 72333 \(ON SC\)](#)
4. *Canada v. Canada North Group Inc.*, [2021 SCC 30](#)
5. *CCAA Plan of Arrangement – Clearbeach and Forbes (Re)*, [2021 ONSC 5564](#)
6. *Consumers Packaging Inc., Re* (2001), 27 C.B.R. (4th) 197, [2001 CanLII 6708](#)
7. *Forme Development Group Inc. (Re)*, Court File No.: CV-18-608313-00CL ([Endorsement of Mr. Justice Hainey](#)) February 20, 2020
8. *In the Matter of a Compromise or Arrangement of Balboa Inc. et. al*, Court File No.: CV-24-00713245-00CL ([SISP Approval Order](#)) dated April 12, 2024
9. *In the Matter of a Compromise or Arrangement of Balboa Inc. et. al*, Court File No.: CV-24-00713245-00CL ([Order](#)) dated June 24, 2024
10. *In the Matter of a Compromise or Arrangement of Balboa Inc. et. al*, Court File No.: CV-24-00713245-00CL ([Ancillary Order](#)) dated June 25, 2024
11. *In the Matter of a Compromise or Arrangement of Balboa Inc. et. al*, Court File No.: CV-24-00713245-00CL ([Endorsement of Madame Justice Steele](#)) dated July 31, 2024
12. *In the Matter of a Compromise or Arrangement of Balboa Inc. et. al*, Court File No.: CV-24-00713245-00CL ([Restructuring Term Sheet and DIP Amendment Order](#)) dated August 30, 2024

13. *In the Matter of a Compromise or Arrangement of Balboa Inc. et. al*, Court File No.: CV-24-00713245-00CL ([Approval of Replacement DIP Facility and Ancillary Matters](#)) dated December 6, 2024
14. 15. *In the Matter of a Compromise or Arrangement of Balboa Inc. et. al*, Court File No.: CV-24-00713245-00CL ([Credit Bid/Liquidation Process Order](#)) dated February 27, 2025
15. *Mountain Equipment Co-Operative (Re)*, [2020 BCSC 1586](#)
16. *Nortel Networks Corp. (Re)* (2009), [2009 CanLII 39492 \(ON SC\)](#)
17. *Nortel Networks Inc.*, [2022 ONSC 6680](#)
18. *Re Nortel Networks Corporation et al*, [2017 ONSC 673](#)
19. *PCAS Patient Care Automation Services Inc. (Re)*, [2012 ONSC 3367](#)
20. *Royal Bank of Canada v. Atlas Block Co. Limited*, [2014 ONSC 153](#)
21. *Royal Bank of Canada v. Soundair Corp.*, [1991 CanLII 2727](#) (ON CA)
22. *Target Canada Co. (Re)*, [2015 ONSC 7574](#)
23. *Veris Gold Corp. (Re)*, [2015 BCSC 1204](#)
24. *White Birch Paper Holding Co., Re*, [2010 QCCS 4915](#)
25. *U.S. Steel Canada Inc. (Re)*, [2015 ONSC 2523](#)

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY - LAWS

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

General power of court

11 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.

...

Stays, etc. — other than initial application

11.02 (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.

Factors to be considered

36(3) In deciding whether to grant the authorization, the court is to consider, among other things,

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

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

FACTUM OF THE MONITOR
(RETURNABLE ON APRIL 14, 2025)

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