

Court File No.: _____

**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 FORME DEVELOPMENT GROUP INC.
AND THE OTHER COMPANIES LISTED ON SCHEDULE "A"
HERETO (the "Applicants")

APPLICATION UNDER THE *COMPANIES' CREDITORS
ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

FACTUM OF THE APPLICANTS

November 6, 2018

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PART I – NATURE OF THIS APPLICATION

1. This factum is filed in support of an application made by Forme Development Group Inc. ("**Forme Development**") and those other entities listed on Schedule "A" hereto (collectively and together with Forme Development, the "**Forme Group**" or the "**Applicants**") for relief under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, as amended (the "**CCAA**").

2. The Forme Group is experiencing a severe liquidity crisis and can no longer support development on most of its Properties (defined below)¹. Consolidated CCAA proceedings for the Forme Group in which the majority of the Properties will be sold in an orderly and efficient and expeditious manner will be more beneficial to the Applicants and their stakeholders than separate enforcement by powers of sale or receivers.² KSV Kofman Inc. ("**KSV**"), the proposed monitor

¹ Affidavit of Yuan Hua Wang, sworn November 5, 2018 (the "**Initial Affidavit**"), para 5, Application Record, Tab 2.

² Initial Affidavit, para 6, Application Record, Tab 2.

(“**Monitor**”) has extensive experience acting as monitor in CCAA filings and in real estate filings including Urbancorp.³

3. The Applicants have:

- (a) alongside KSV and TD Cornerstone Commercial Realty Inc. (“**TD**”); formulated a listing strategy and contemplate seeking approval of a sales process for the majority of the Properties (defined below) as quickly as possible, and consequently will be in a position to implement a sales process for such Properties on a timely and efficient basis;⁴
- (b) finalized arrangements (subject to Court approval) for a debtor in possession financing facility to (i) enable the implementation of the sales process, (ii) to the extent required, fund development costs where necessary to preserve and protect value to stakeholders, (iii) fund professional fees, costs and expenses of these proceedings in a cost-effective manner, and (iv) minimize the expense burden on Properties where the anticipated equity is less or not available;⁵
- (c) intend to account and reconcile the allocation of the costs of this process in a fair manner with no single Project bearing the entirety of the costs;⁶ and
- (d) with the implementation of the above, enabled certain of the Applicants to be in the best position in the circumstances maximize return to creditors of the Applicants and mortgage guarantors.

4. Creditors are not being unduly prejudiced by the proposed CCAA proceeding given the proactive retention of KSV and TD which will expedite the sale process and the proposed priority of the Charges (as defined and discussed below).

³ The report of KSV Kofman Inc. as Proposed CCAA Monitor of Forme Development Group Inc. and the Companies Listed on Appendix “A” dated November 5, 2018 (the “**Pre-Filing Report**”), section 2.4(1)(c).

⁴ Pre-Filing Report, section 3.0(3).

⁵ Pre-Filing Report, section 5.4 (1) (a) to (f).

⁶ Pre-Filing Report, section 5.3

PART II – FACTS

5. The facts supporting this application are set out in full detail in the affidavit Yuan Hua Wang sworn November 5, 2018 (the “**Wang Affidavit**”). Capitalized terms used herein and not otherwise defined have the meaning given to them in the Wang Affidavit.

6. The Forme Group is a commercial and residential real estate development group specializing in low-rise, high-rise, mixed-use and hospitality developments. The development projects are primarily located in the Greater Toronto Area with a few in Southwestern Ontario and one in Western Canada.⁷

A. The Projects

7. The Forme Group owns approximately 30 properties (the “**Properties**”) in respect of 18 projects (the “**Projects**”).⁸ One Project located at 1483 Birchmount Road (“**Birchmount Gardens**”) is completed but not closed. The remaining Projects are still in the development and planning phase⁹. Included in the Projects are:

- (a) The Pacific Projects - The Pacific Projects consist of a number of Properties¹⁰ owned by the Pacific Entities¹¹ located in different areas within a larger development known as the Milliken Centre Secondary Plan. The Pacific Entities are the second largest owner of property within that development. The Properties located at 186 Old Kennedy Road, 51 Victory Road and 31 Victory Road (the “**186 Kennedy/Victory Properties**”) is one of the areas owned by the Forme Group and are intended for the development of 222 townhomes into the Pacific Gardens. Cushman & Wakefield Inc. (“**C&W**”) appraisals obtained at the time of acquisition of the properties show potentially significant equity value in these Properties.

⁷ Initial Affidavit, para 3, Application Record, Tab 2.

⁸ Initial Affidavit, para 4, Application Record, Tab 2.

⁹ Initial Affidavit, para 4, Application Record, Tab 2.

¹⁰ The “**Pacific Gardens Properties**” are the Properties known as 186 Old Kennedy Road, 51 Victory Road, 31 Victory Road, 22 Old Kennedy Road, 16 Old Kennedy Road, 19 Turff Avenue, 35 Thelma Avenue, 20 Thelma Avenue, 58/76/82 Old Kennedy Road, 4550 Steeles Avenue and 31 Old Kennedy Road

¹¹ The “**Pacific Entities**” are 186 Old Kennedy Development Inc., 31 Victory Development Inc., 58 Old Kennedy Development Inc., 82 Old Kennedy Development Inc., 76 Old Kennedy Development Inc., 22 Old Kennedy Development Inc., 35 Thelma Development Inc., 19 Turff Development Inc. and 4550 Steeles Development Inc.

Additionally, TD has also performed initial valuation work on an “as is” basis to test the C&W appraisals. Based on initial estimates by TD, the Pacific Gardens Properties could have an equity value of between \$30 -\$70 million or higher¹².

- (b) The Niagara Falls Project - The Niagara Falls Properties¹³ are a number Properties acquired for the purpose of the construction of a number of condominium suites. The Niagara Falls Properties are situated in a prime Niagara Falls location, just blocks from the Fallsview casino and minutes to the Rainbow Bridge crossing to the United States. Significant time and resources has already been spent to obtain the development approvals but that is still in process.¹⁴

8. All of the Properties have been heavily financed with single or multiple mortgages. Yuan Hua Wang, the founder, sole shareholder and director of each of the Applicants, has also personally guaranteed most of the first and second mortgages on the Properties and certain of the further subordinated mortgages on the Properties.¹⁵

9. The Forme Group can no longer advance its Projects because it does not have the liquidity to pay development costs (such as consulting and legal fees) nor to service its debt obligations. In recent weeks, certain of the Applicants have received a number of demand letters and other legal documents as a result of outstanding defaults on various mortgage obligations. Additionally, on November 1, 2018, the Forme Group missed scheduled interest payments on all of the mortgages.¹⁶

10. Since October 26, 2018, NOI Proceedings (as defined and discussed below) for several of the Forme Group companies have been commenced.¹⁷

¹² Initial Affidavit, paras 19 and 20, Application Record, Tab 2.

¹³ The “**Niagara Falls Properties**” are the Properties known as 399 John Street, 4407 John Street, 4413 John Street, 4427 John Street, 5472 River Road, 5491 River Road, 5507 River Road and River Lane (all in Niagara Falls, Ontario)

¹⁴ Initial Affidavit, para 23, Application Record, Tab 2.

¹⁵ Initial Affidavit, paras 2 and 4, Application Record, Tab 2.

¹⁶ Initial Affidavit, para 5, Application Record, Tab 2.

¹⁷ Initial Affidavit, para 5, Application Record, Tab 2.

B. The Sale Process

11. The purpose of the CCAA proceeding is to maximize value for as many of the Forme Group's creditors and other stakeholders as possible. This will be accomplished through an orderly sale process conducted by the Monitor (defined below) with TD as the listing agent. TD has already begun performing initial work and, assuming its retention is approved, will work to list the Properties as quickly as possible with a view to no undue delay to creditors. Maximizing sale proceeds through this process, particularly where there may be significant equity in a number of the Properties will benefit Mr. Wang's creditors (namely those mortgagees that he has guaranteed).¹⁸

12. The Applicants and TD have entered into an engagement letter dated November 5, 2018 (the "**TD Engagement Letter**") appointing TD as the exclusive listing agent to sell the Applicants' Properties for a period of 6 months. The proposed fee is 1.1%.¹⁹

13. Schedule B to the TD Engagement Letter sets out the general anticipated terms of the sale process.²⁰ However, the final sale process will be subject to a further motion of the Court to be brought as quickly as possible after the initial hearing.

C. The Retained Properties

14. A small number of Properties are proposed to be retained by the Applicants, at least for the time being. Currently, the retained properties are the 186 Old Kennedy/Victory Properties and possibly the Niagara Falls Properties (the "**Retained Properties**"). Birchmount Gardens also will not be listed as construction is complete and the development is fully sold. It is anticipated closings for Birchmount Gardens will occur before the end of the year. If the DIP Facility (defined below) is approved in full at the come-back hearing, the Applicants intend to service the mortgage debt obligations on the Retained Properties unless they ultimately are listed.²¹

¹⁸ Initial Affidavit, para 6, Application Record, Tab 2.

¹⁹ Pre-Filing Report, section 7.0(1).

²⁰ Pre-Filing Report, Appendix "G", Schedule B.

²¹ Initial Affidavit, para 7, Application Record, Tab 2.

15. Currently, it is intended that the 186 Old Kennedy/Victory Properties will continue to be developed; however, if the sale process for the other properties is less successful than anticipated the 186 Old Kennedy/Victory Properties may also be listed for sale. Similarly, the decision to sell or develop the Niagara Falls Project will be made upon further discussion with the Monitor and TD after the filing. The Niagara Falls Project may have significant equity if development approval can be obtained.²²

D. The NOI Proceedings

16. Certain of the Applicants have already received demand or default notices as well as notices under Section 244 (“**244 Notices**”) of the *Bankruptcy and Insolvency Act*.²³

17. In response to the 244 Notices and judgement for possession: (a) 58 Old Kennedy Development Inc., 76 Old Kennedy Development Inc. and 82 Old Kennedy Development Inc. each filed a notice of intention (“**NOI**”) to make a proposal under the BIA on October 26, 2018; (b) 9500 Dufferin Development Inc. filed an NOI on November 1, 2018; (c) 250 Danforth Development Inc. (“**250 Danforth**”), 3310 Kingston Development Inc. (“**3310 Kingston**”) and 1296 Kennedy Development Inc. each filed an NOI on November 2, 2018; and (d) 159 Carville Development Inc. filed an NOI on November 5, 2018 (collectively, the “**NOI Proceedings**”). KSV was appointed the proposal trustee in each of the NOI Proceedings.²⁴ The Applicants that filed NOIs are referred to herein as the “**NOI Companies**”).

E. DIP Financing

18. The Applicants require immediate interim financing (“**DIP Financing**”) as there are currently next to no funds available in the Applicants’ bank accounts.²⁵ The Applicants require this interim financing to provide an immediate source of cash funding and to provide stability during the CCAA proceeding.²⁶

²² Initial Affidavit, paras 7 and 22, Application Record, Tab 2.

²³ Initial Affidavit, para 32, Application Record, Tab 2.

²⁴ Initial Affidavit, para 33, Application Record, Tab 2.

²⁵ Initial Affidavit, para 30, Application Record, Tab 2.

²⁶ Initial Affidavit, para 47, Application Record, Tab 2.

19. As a result, in the lead-up to the CCAA proceeding, KSV assisted the Applicants to negotiate the terms of DIP financing. KSV approached two potential DIP lenders, both of whom are real estate lenders to obtain proposals. As a result of this process, the DIP proposal submitted by Kingsett Mortgage Corporation (the “**DIP Lender**”) was accepted as the favourable proposal on November 5, 2018.²⁷

20. Pursuant to a DIP term sheet dated as of November 6, 2018 (the “**DIP Term Sheet**”)²⁸ entered into by the Pacific Entities, as borrowers, and the DIP Lender, the DIP Lender is prepared to advance interim financing (the “**DIP Facility**”) of up to \$5 million on the terms and conditions set out therein. As set out above and in the cash flow, the Applicants have immediate need for advances under the DIP Facility. However, as a matter of process, the Applicants are requesting approval to borrow only up to \$750,000 pending the come-back hearing. This borrowing accords with the cash flow.²⁹

21. Advances under the DIP Facility will bear interest of 9% per annum and the obligations will be fully payable on the maturity date which is the earliest of: (a) upon demand by the DIP Lender; (b) November 15, 2019, as may be extended in writing; and (c) consummation of a material Sale Transaction for the Pacific Properties or implementation of a plan of compromise or arrangement or other restructuring transaction involving any of the Pacific Entities.³⁰

PART III – ISSUES AND THE LAW

22. This issues are as follows:

- (a) Should the Initial Order under the CCAA be granted?
- (b) Should the following relief be granted in the Initial Order:
 - (i) Conversion of the NOI Proceedings to the CCAA Proceeding;

²⁷ Initial Affidavit, paras 27 and 48, Application Record, Tab 2.

²⁸ Pre-Filing Report, Appendix D

²⁹ Initial Affidavit, para 50, Application Record, Tab 2.

³⁰ Pre-Filing Report, section 5.1(2)(a) to (k)

- (ii) Extension of the stay to Yuan Hua Wang;
- (iii) Approval of the Administration Charge and Intercompany Charge;
- (iv) Approval of the DIP Facility and DIP Lender's Charge; and
- (v) Approval of the retention of TD as listing agent.

A. The CCAA Initial Order Should be Granted

i. The Legislation

23. Section 3(1) of the CCAA states that the CCAA applies “in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than \$5,000,000 or any other amount that is prescribed.”³¹

24. An application under the CCAA may be made to the court “that has jurisdiction in the province within which the head office or chief place of business of the company in Canada is situated, or, if the company has no place of business in Canada, in any province within which any assets of the company are situated.”³²

25. For the purposes of the CCAA, a “debtor company” includes a company that is “insolvent”.³³ The CCAA does not define “insolvent” but looks to the *Bankruptcy and Insolvency Act* which defines “insolvent person”.³⁴ The scope of the definition of “insolvent” was expanded by Justice Farley in *Stelco* who held that the definition should be expanded to give effect to the objectives of the CCAA of allowing the debtor company to obtain some breathing room in order to restructure.³⁵

³¹ CCAA, s. 3(1).

³² CCAA, s. 9(1).

³³ CCAA, s. 2.

³⁴ *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended, s. 2.

³⁵ *Re Stelco Inc.*, 2004 CarswellOnt 1211 (Sup Ct) [*Stelco*], leave to appeal to CA refused, 2004 CarswellOnt 2936, leave to appeal to SCC refused, 2004 CarswellOnt 5200, at para. 26, Brief of Authorities of the Applicants Tab 1.

ii. *The Applicants are Insolvent*

26. Each of the Applicants is a “debtor company” to which the CCAA applies and over which this Court has jurisdiction.

- (a) Each of the Applicants is a company existing under the *Business Corporations Act* (Ontario);³⁶
- (b) The head office of each Applicant is located in Markham, Ontario;³⁷
- (c) The Applicants have liabilities well in excess of \$5 million with mortgage debt alone exceeding \$220 million;³⁸
- (d) The Applicants are insolvent:
 - (i) The Applicants are in default of all of their mortgage obligations;³⁹
 - (ii) Several demand letters and notices of enforcement of security have been sent in respect or several of the Applicants and Properties;⁴⁰
 - (iii) NOI Proceedings have been commenced by eight (8) of the Applicants;⁴¹ and
 - (iv) The Applicants have no liquidity to service their debt obligations.⁴²

iii. *Considerations Specific to Real Estate Development Companies*

27. Because of the typical corporate structure of most real estate development companies as well as the nature of the assets involved, Courts have provided special consideration as to whether

³⁶ Initial Affidavit, para 13, Application Record, Tab 2.

³⁷ Initial Affidavit, para 13, Application Record, Tab 2.

³⁸ Initial Affidavit, para 27, Application Record, Tab 2.

³⁹ Initial Affidavit, para 35, Application Record, Tab 2.

⁴⁰ Initial Affidavit, para 32, Application Record, Tab 2.

⁴¹ Initial Affidavit, para 33, Application Record, Tab 2.

⁴² Initial Affidavit, para 35, Application Record, Tab 2.

a CCAA proceeding should be commenced for such companies. Courts have, at times, depending on the circumstances, exercised their discretion to not allow real estate development debtors to commence CCAA proceedings. Courts may be particularly hesitant to grant CCAA protection where:

- (a) There is material prejudice to the first mortgagee(s);
- (b) There is no indication a CCAA will result in a better outcome than the first mortgagee enforcing its own remedies (power of sale and/or receivership);
- (c) The equity in the properties cannot support the DIP financing;
- (d) There are a limited number of creditors outside the first mortgagee;
- (e) There are no employees or real operating business; and
- (f) The CCAA proceedings appear to be for the purpose of just buying more time for the debtor.⁴³

28. However, Courts have also found that CCAA proceedings can be beneficial to the stakeholders of real estate development companies and have granted CCAA protection accordingly and it is clear that there is no “generic prohibition” against a land development business being subject to a CCAA process.⁴⁴ More recently, the Courts have allowed CCAA proceedings to continue in a number of cases, most notably in *Urbancorp*⁴⁵, *Hush Homes Inc.*⁴⁶ and *League Assets Corp*⁴⁷. Notably in *Hush Homes Inc.*, the Court, in recognizing that both a CCAA application and receivership application are highly discretionary in nature, rejected the first mortgagee’s request

⁴³ *Re Textbook (525 Princess Street) Inc. et al.* Court File No. CV-16-1162-00CL – handwritten endorsement of Justice Penny dated December 15, 2016, Brief of Authorities of the Applicants, Tab 2; *Re Hush Homes Inc.* 2015 ONSC 370, paras 21 and 22, Brief of Authorities of the Applicants, Tab 3.

⁴⁴ *Re Hush Homes Inc. [Hush Homes]* 2015 ONSC 370, para 23, Brief of Authorities of the Applicants, Tab 3.

⁴⁵ *Re Urbancorp Inc.* 2016 ONSC 3288, Brief of Authorities of the Applicants, Tab 4.

⁴⁶ *Re Hush Homes Inc.* 2015 ONSC 370, Brief of Authorities of the Applicants, Tab 3.

⁴⁷ *League Assets Corp., et al.*, Order Made After Application dated October 18, 2013, Court File No.: S-137743, Brief of Authorities of the Applicants, Tab 5.

for exclusion of its property given that, on the facts of that case, its risks in CCAA were roughly the same as those in receivership.⁴⁸

29. This case is one in which CCAA relief is appropriate. In particular, there are several factors that mitigate in favour of allowing a CCAA to proceed, including:

- (a) There are several mortgages on most or all of the Properties as well as other unsecured creditors, mostly consultants and other advisors, who are creditors of the Applicants;⁴⁹
- (b) An orderly sale process is expected to yield better results than individual powers of sale processes and/or receivership sales and will, in some cases, yield equity for Mr. Wang which will benefit his personal creditors (particularly those who have guarantees for their mortgages);⁵⁰
- (c) The Applicants have been proactive in retaining KSV and TD both of whom have extensive real estate experience and who intend to commence a sale process imminently – in cases where the Court has frowned on a CCAA, there has often been no plan in place for sale resulting in lenders being asked to wait for unknown periods of time;⁵¹
- (d) The Applicants' belief there is equity in many of the Properties and most significantly, the Pacific Gardens Properties, is supported by the appraisals obtained from C&W – the TD valuation work which has been focused on the Pacific Gardens Properties also indicates there is significant value in the Pacific Gardens Properties even on an “as is” basis, potentially in the \$10s of millions;⁵²
- (e) There will be no significant prejudice to the first mortgagees. Other than on the Pacific Gardens Properties (where there appears to be significant equity value),

⁴⁸ *Hush Homes*, para 49, Brief of Authorities of the Applicants, Tab 3.

⁴⁹ Initial Affidavit, paras 27 and 28, Application Record, Tab 2.

⁵⁰ Initial Affidavit, paras 9 and 10, Application Record, Tab 2.

⁵¹ Initial Affidavit, para 6, Application Record, Tab 2.

⁵² Initial Affidavit, para 10, Application Record, Tab 2.

there is no request that the first mortgagees be primed on any other Properties and the DIP Lender's Charge is not proposed to even attach to any Properties other than the Pacific Gardens Properties;⁵³ and

- (f) The Applicants have already undertaken a number of development and planning steps for certain of the Projects and employ 12 individuals in their business.⁵⁴

B. The NOI Proceedings should be continued into the CCAA Proceeding

30. Each of the NOI Entities filed NOIs under the BIA. Section 11.6 of the CCAA provides that NOI proceedings may be taken up and continued under the CCAA provided that no proposal has been filed under Part III of the BIA. The application should also be consistent with the purposes of the CCAA.⁵⁵

31. None of the NOI Entities have filed a proposal under Part II of the BIA nor have there been any appearances in the NOI Proceedings.

32. As noted by the Supreme Court of Canada in *Century Services Inc. v. Canada (Attorney General)*, the purpose of the CCAA includes the following:

- (a) To permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets;
- (b) To provide a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made;
- (c) To avoid the social and economic losses resulting from liquidation of an insolvent company; and

⁵³ Initial Affidavit, para 53, Application Record, Tab 2.

⁵⁴ Initial Affidavit, paras 13(a) and 14, Application Record, Tab 2.

⁵⁵ *Clothing for Modern Times Ltd.*, 2011 ONSC 7522, para 8, Brief of Authorities of the Applicants, Tab 6.; *Re Urbancorp Inc.* 2016 ONSC 3288, paras 36-39, Brief of Authorities of the Applicants, Tab 4.

- (d) To create conditions for preserving the status quo while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all.⁵⁶

33. The conversion of the NOI Proceedings into a single CCAA proceeding with the other entities in the Forme Group will provide for administrative efficiencies within this process. There is no benefit to keeping the NOI Companies in NOI Proceedings with the balance of the Forme Group in CCAA. Additionally, the NOI Companies require funding that is contemplated to come from DIP financing and an administrative charge for the professionals in these proceedings. The continuation of the NOI Proceedings into the CCAA proceeding with the remaining Applicants will further the purposes of the CCAA for the reasons set out in paragraph 29 above.⁵⁷

C. The Applicants and their Directors and Officers should be granted a broad stay of proceedings; the limited third party stay in favour of Mr. Wang should be granted

34. One of the fundamental goals in seeking protection under the CCAA is obtaining a stay of proceedings to allow a debtor company to maintain the *status quo* while a debtor develops a plan.⁵⁸

35. Section 11.02(1) of the CCAA provides that the Court may grant a stay of proceedings:

- (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.⁵⁹

⁵⁶ *Century Services Inc. v. Canada (Attorney General)* 2010 SCC 60, paras 15, 17, 18, 59 and 77, Brief of Authorities of the Applicants, Tab 7.

⁵⁷ Initial Affidavit, para 38, Application Record, Tab 2.

⁵⁸ *Re Lehndorff General Partner Ltd.*, [1993] O.J. No. 14 [*Lehndorff*], para. 5, Brief of Authorities of the Applicants Tab 8.

⁵⁹ CCAA, s. 11.02(1)

36. Section 11.03(1) of the CCAA states:

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.⁶⁰

37. Section 11.03(2) indicates that (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.⁶¹

38. The Applicants seek a stay of proceedings for the benefit of Mr. Wang in two capacities. First, in his capacity as director and officer of each of the Applicants. Second, in his capacity as a personal guarantor of many of the mortgages.

39. Courts have granted an expanded stay of proceedings in favour of directors and officers of an Applicant generally where the debtor company would otherwise have to spend extensive time and effort defending litigation, causing distraction during the restructuring period.⁶² In *Lehndorff*, Justice Farley stated:

The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course or otherwise deal with their assets so as to enable plan of compromise or arrangement to be prepared, filed and considered by their creditors and the court. In the interim, a judge has great discretion under the CCAA to make order so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors

⁶⁰ CCAA, s. 11.03(1)

⁶¹ CCAA, s. 11.03(2)

⁶² *Re Nortel Networks Corp.*, 2009 CarswellOnt 4806 at paras. 20, 27 and 36 (Sup Ct) [*Nortel*], Brief of Authorities of the Applicants Tab 9.

for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors.⁶³

40. The Court has the inherent jurisdiction to grant a stay of proceedings for non-applicant third parties where it is just and reasonable to do so. Courts have often granted third party stays where the business operations are heavily intertwined with that of the Applicant but where the third party is not subject to the jurisdiction of the Court or other circumstances dictate that they not become applicants in the filing; or where such third party's exposure to claims could have a detrimental or distracting impact on the debtor company.⁶⁴

41. Section 11.04 of the CCAA qualifies the extension of the stay to a debtor under Section 11.02. Specifically, Section 11.04 provides:

No order made under section 11.02 has affect on any action, suit or proceeding against a person, other than a company in respect of whom the order is made, who is obligated under a letter of credit or guarantee in relation to the company.⁶⁵

42. Courts have, at times, been reluctant to grant a third party stay in favour of a guarantor of a debtor because the nature of a guarantee, in and of itself, is to ensure payment of an obligation. The main case that appears to have considered this issue in the context of Section 11.04 of the CCAA was *Re Northern Transportation Co.* ("*Northern Transportation*").⁶⁶ In that case, the Alberta Court gave specific consideration to the common law on this issue and considered the cases in *Re Keddy Motor Inns Ltd.*⁶⁷ and *Browne v. Southern Canada Power Co.*⁶⁸ In *Keddy Motors*, the Court held that a suit against a guarantor "ought not to have any adverse affect against

⁶³ *Lehndorff*, para. 5, Brief of Authorities of the Applicants Tab 8.

⁶⁴ *Re First Leaside Wealth Management Inc.*, 2012 ONSC 1299, at paras. 28-30 Brief of Authorities of the Applicants Tab 10.

⁶⁵ CCAA, s. 11.04

⁶⁶ *Re Northern Transportation Co. [Northern Transportation]* 2016 ABQB 522, paras 75-100, Brief of Authorities of the Applicants Tab 11.

⁶⁷ *Keddy Motor Inns Ltd., Re [Keddy Motor]* (1991), 107 N.S.R. (2d) 419, Brief of Authorities of the Applicants Tab 12.

⁶⁸ *Browne v. Southern Canada Power Co.* 1941 CarswellQue 14, Brief of Authorities of the Applicants Tab 13.

the company; indeed, satisfaction of debts by realization of guarantee should enhance the financial position of the company. The principles – not the company- will suffer the effect”.⁶⁹

43. Courts in Ontario have been willing to grant third party stays in respect of guarantors where such stays are consistent with the purpose of the CCAA including in *Target*.⁷⁰ Although the Alberta Court in *Northern Transportation* did not follow those decisions, it ultimately found that the stay could not be justified on the facts of the case, but did acknowledge that the court has inherent jurisdiction to extend such a stay in appropriate circumstances.⁷¹ Similarly, Section 11.03(2) should not be read to say that the Court does not have the jurisdiction to stay guarantee actions by a director but instead should be read in a similar manner as the interpretation of Section 11.04 of the CCAA.

44. Mr. Wang is the director of the Applicants but he wears many hats as he is also the founder and sole shareholder of the Forme Group. His guarantees were likely as a result of those roles as opposed to his acting as director of the Applicants. As noted herein, the entire purpose of the CCAA proceeding is to maximize value in the sale of the majority of the Properties and potential refinancing of the Retained Properties to generate equity for the benefit of Mr. Wang’s creditors and specifically his personal guarantee obligations.⁷² Actions calling on the extensive guarantees granted by Mr. Wang clearly will not be resolved until proceeds of sale from the Properties are generated. Mr. Wang’s net worth is tied with the Applicants. Litigation against Mr. Wang personally while the CCAA sale process is pending would be, in fact, contrary to the purposes of the Applicants’ proposed restructuring and only result in distraction and delay by Mr. Wang while he dealt with personal actions. Especially, given that Mr. Wang’s personal wealth is tied to the Property values, he is unable to independently satisfy those obligations unless and until equity is generated in the Properties. Consequently, there is no detriment to creditors with respect to the stay.⁷³

⁶⁹ *Keddy Motor*, para 13, Brief of Authorities of the Applicants Tab 12.

⁷⁰ *Re Target Canada Co.*, 2015 ONSC 303 [*Target*], Brief of Authorities of the Applicants, Tab 14.

⁷¹ *Northern Transportation*, para 76, Brief of Authorities of the Applicants Tab 11.

⁷² Initial Affidavit, para 10, Application Record, Tab 2.

⁷³ Pre-Filing Report, section 8(1).

D. The Administration Charge and Intercompany Charge Should be Granted

Administration Charge

45. Pursuant to Section 11.52 of the CCAA:

Court may order security or charge to cover certain costs

- **11.52 (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.⁷⁴

46. In considering whether to grant such charges, the Court may consider:

- (a) The size and complexity of the business being restructured;
- (b) The proposed role of the beneficiaries of the charge;
- (c) Whether there is an unwarranted duplication of roles;
- (d) Whether the quantum of the proposed charge appears to be fair and reasonable;
- (e) The position of the secured creditors likely to be affected by the charge; and
- (f) The position of the Monitor.⁷⁵

⁷⁴ CCAA, s. 11.52(1).

⁷⁵ *Re Canwest Publishing*, 2010 ONSC 222 [*Canwest Publishing*] at para. 54, Brief of Authorities of the Applicants Tab 15. These criteria have also been followed in other cases, including *Target* at para. 74, Brief of Authorities of the Applicants Tab 14.

47. The proposed administration charge in the interim amount of \$300,000 (the “Administration Charge”) is intended to cover: (a) the Monitor; (b) the Monitor’s counsel; and (c) counsel to the Applicants. Super priority Administration Charges are routinely granted in CCAA proceedings. The proposed Administration Charge is appropriate in the circumstances for the following reasons:

- (a) The Applicants worked with the proposed Monitor to estimate the proposed quantum of the Administration Charge - given the complexity of the creditor structure in this process, the proposed quantum of the Administration Charge has been limited to \$300,000 for the interim period pending the comeback hearing – none of the beneficiaries of the Administration Charge have received any payment for fees or disbursements to date nor have they received any retainers;⁷⁶
- (b) The anticipated process will require extensive involvement from the Monitor including the execution and supervision of the anticipated sale process – the involvement of the Monitor in the sale process is intended to ensure a fair and impartial process;⁷⁷
- (c) It is unlikely that the proposed beneficiaries would participate in the CCAA proceedings absent an Administration Charge; and
- (d) There is no unwarranted duplication of roles between the proposed beneficiaries.

48. The proposed priority for the Administration Charge is as follows:

- (a) First priority over all other encumbrances granted by the Pacific Entities to any person; and
- (b) With respect to the non-Pacific Entities, second priority after the first mortgagee on the Properties owned by those entities.⁷⁸

⁷⁶ Initial Affidavit, para 40, Application Record, Tab 2.

⁷⁷ Initial Affidavit, para 42, Application Record, Tab 2.

⁷⁸ Initial Affidavit, para 53, Application Record, Tab 2.

49. In all cases, it is not proposed that the Administration Charge would prime persons with properly perfected purchase money security interests (of which there do not appear to be any) or super priority statutory deemed trusts for unremitted source deductions.

50. The priority proposed in respect of the Administration Charge is appropriate given:

- (a) It is not proposed that the Administration Charge will prime the first mortgagees other than with respect to the Pacific Gardens Properties where there is projected to be significant equity;
- (b) Priority for charges of this nature is routinely provided for in CCAA proceedings; and
- (c) No priority is being sought over properly perfected purchase money security interests or super priority statutory deemed trusts for unremitted source deductions.

E. The DIP Facility and DIP Lender's Charge should be Approved

51. The Applicants are seeking a super priority charge on the assets, property, undertaking and business of the Pacific Entities only to secure the DIP Facility (the "**DIP Lender's Charge**") which charge will be subordinate only to the Administration Charge. The DIP Lender's Charge will not extend to any of the other Applicants but instead will be accounted for through the Intercompany Charge.⁷⁹

52. It is a condition of the DIP Term Sheet that the Applicants obtain approval of the DIP Term Sheet and the DIP Lender's Charge before advances may be made.⁸⁰

53. Without the funds under the DIP Facility, the Applicants have no liquidity to fund these proceedings including any professional costs, costs of sale or costs of further development (if any). KSV has been closely involved in the negotiation of the DIP Facility and has considered the Applicants' immediate cash needs.⁸¹

⁷⁹ Initial Affidavit, para 50, Application Record, Tab 2.

⁸⁰ Pre-Filing Report, section 5.1(f)

⁸¹ Initial Affidavit, paras 49 and 50, Application Record, Tab 2.

54. Section 11.2 of the CCAA provides for the following:

Interim Financing 11.2(1) – On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company’s property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made

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

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

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

- (a) the period during which the company is expected to be subject to proceedings under this Act;
- (b) how the company’s business and financial affairs are to be managed during the proceedings;
- (c) whether the company’s management has the confidence of its major creditors;
- (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
- (e) the nature and value of the company’s property;
- (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
- (g) the monitor’s report referred to in paragraph 23(1)(b), if any.⁸²

55. In this case:

⁸² CCAA, s. 11.2(1).

- (a) The DIP Lender is not willing to provide the required interim financing other than on the terms and conditions set out in the DIP Term Sheet;⁸³
- (b) Without the DIP Facility, the Applicants will be unable to fund these proceedings and conduct an orderly sale process. In that scenario, there could be a disorganized realization process whereby the Applicants' mortgagees conduct multiple and separate power of sale or other enforcement proceedings;⁸⁴
- (c) The DIP Facility will provide the Applicants, and this process, with the liquidity required to orderly and expediently conduct a sale process for substantially all of the Properties, and to continue development activity for the Retained Properties and potentially the River Road Project. The contemplated process is intended to provide the opportunity to generate better recoveries than if the projects were sold under power of sale proceedings, while still providing mortgagees with a sale process that will be carried out in the near term under the supervision of the Court;⁸⁵
- (d) KSV has compared the terms of the DIP Facility to other DIP facilities approved by Canadian courts in CCAA proceedings commenced in 2017 and 2018 which is attached to the pre-filing report. Based on the comparison, the costs of the proposed DIP Facility are superior to other DIP financings approved by this and other Canadian courts;⁸⁶
- (e) It is intended that DIP funds will be advanced through KSV (as Monitor) and that KSV will provide oversight as to the business and financial affairs of the Applicants during the CCAA proceedings;⁸⁷
- (f) Approval of the DIP Facility is in the best interests of the Applicants' stakeholders and will enhance the prospects of maximizing value in the circumstances. The DIP

⁸³ Pre-Filing Report, section 5.4(1)(a).

⁸⁴ Pre-Filing Report, section 5.4(1)(b).

⁸⁵ Pre-Filing Report, section 5.4(1)(c).

⁸⁶ Pre-Filing Report, section 5.4(1)(d).

⁸⁷ Pre-Filing Report, section 5.4(1)(e).

Facility is projected to be sufficient to fund the costs of these proceedings, including the sale process;⁸⁸

- (g) Creditors will not be unduly prejudiced from approval of the DIP Facility particularly given the estimated value of the Pacific Properties – to the contrary, they should benefit from it as it will allow the Applicants to work with the Monitor to maximize value for as many mortgagees and other creditors as possible and will be more efficient than allowing for individual enforcement processes to be carried out on each of the Applicants' properties.⁸⁹

56. Courts have approved DIP financing and DIP Charges on an initial filing where it is clear that funds are needed immediately.⁹⁰ As set out above, the Applicants are in need of immediate funds and cannot wait until the comeback hearing to draw on the DIP. Absent the approval of immediate DIP funding the Applicants will not be able to continue their restructuring. It is intended that shortened notice will be provided to the mortgagees of the Pacific Entities prior to the initial hearing to the extent possible.

Intercompany Advances

57. The Applicants will require funds throughout the CCAA proceedings to fund the administration and sale process costs and, where applicable, to fund additional debt or development costs. It is anticipated that most of these funds will be advanced by the Pacific Entities to the other Applicants with funds from the DIP Facility. There is a chance that funds from other Applicants may be available also. The Applicants are proposing an Intercompany Charge to account for such advances.⁹¹

58. The Court has previously granted relief allowing existing intercompany arrangements to continue post filing and grant necessary protections accordingly.⁹² Intercompany charges have

⁸⁸ Pre-Filing Report, section 5.4(1)(f).

⁸⁹ Pre-Filing Report, section 5.4(1)(g).

⁹⁰ *Re US Steel Canada Inc.*, 2014 ONSC 6145 paras. 9, 10 and 11, Brief of Authorities of the Applicants Tab 16.

⁹¹ Initial Affidavit, para 52, Application Record, Tab 2.

⁹² *Re Performance Sports Group Ltd.*, 2016 ONSC 6800 [*Performance Sports*], at paras 34 and 35, Brief of Authorities of the Applicants Tab 17; see also *Walter Energy Holdings Inc.*, [*Walter Energy*] 2016 BCSC 107, paras. 3, 62 and

been granted in other proceedings where it is necessary to maintain the integrity of the debt and security structure for post-filing advances such that the ultimate beneficiary of funding has a secured obligation to repay those amounts and it is not to the detriment of the stakeholders of the “lending” entity.⁹³

59. The granting of the Intercompany Charge to secure advances by any Applicant to another Applicant will facilitate the pursuit and completion of the proposed sale process and is consistent with the proposed structure of the filing and purpose of the proceeding.

60. Costs incurred by the Applicants throughout the CCAA proceedings (including professional fees) will be allocated across the various Properties with no single Property bearing all of the costs. It is intended that the Monitor will assist the Applicants with maintaining Property specific reconciliations. Where costs can be allocated specifically to one or more Properties, those costs will be allocated accordingly. If costs cannot be attributed specifically to one or more Properties they will be allocated on a pro rata or other basis across the Properties based on a methodology to be addressed at a future motion in these proceedings.

F. TD’s retention should be Approved

61. The approval of the retention of TD will assist in the Applicants’ goal of moving forward with the sale of the Properties (other than the Retained Properties and Birchmount Gardens) as quickly as possible. TD requires the assurance that its retention has been approved by the Court before it moves forward with the preparatory work that needs to be done in order to list the Properties which it intends to do immediately after its retention is approved (prior to the sale process hearing). If the approval of TD’s retention is delayed, it will inevitably cause delay in the listing of the Properties.⁹⁴

62. TD and, specifically Jamie Ziegel and Ashley Martis, have been retained by KSV previously and have achieved successful outcomes. Messrs. Ziegel and Martis are experienced

67, Brief of Authorities of the Applicants Tab 18; *Carillion Canada Holdings Inc.*, et al., Initial Order, January 25, 2018, CV-18-590812-00CL, at paras. 13, 37 and 38, Brief of Authorities of the Applicants Tab 19.

⁹³ *Performance Sports*, at paras 34 and 35, Brief of Authorities of the Applicants Tab 17; see also *Walter Energy* at paras. 3, 62 and 67, Brief of Authorities of the Applicants Tab 18.

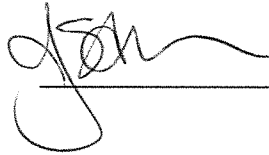
⁹⁴ Initial Affidavit, para 55, Application Record, Tab 2.

real estate professionals. The 1.1% fee being charged by TD is reasonable in the circumstances and is at or below market in other similar circumstances. There is little chance that another listing agent with the same reputation would propose significantly more favourable terms and TD has already spent considerable time and effort familiarizing itself with the Forme Group and the Properties.⁹⁵

PART IV – NATURE OF THE ORDER SOUGHT

63. The Applicants therefore requests an Order substantially in the form of the Proposed Initial Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6th day of November, 2018.

A handwritten signature in black ink, appearing to be 'J. Smith', is written above a horizontal line that extends across the page.

⁹⁵ Pre-Filing Report, section 7.0(1) and (2).

SCHEDULE "A" – LIST OF COMPANIES

2358825 Ontario Ltd.
27 Anglin Development Inc.
29 Anglin Development Inc.
4 Don Hillock Development Inc.
250 Danforth Development Inc.
3310 Kingston Development Inc.
1296 Kennedy Development Inc.
7397 Islington Development Inc.
1326 Wilson Development Inc.
101 Columbia Development Inc.
4208 Kingston Development Inc.
376 Derry Development Inc.
390 Derry Development Inc.
189 Carrville Development Inc.
169 Carrville Development Inc.
159 Carrville Development Inc.
5507 River Development Inc.
4439 John Development Inc.
186 Old Kennedy Development Inc.
31 Victory Development Inc.
58 Old Kennedy Development Inc.
76 Old Kennedy Development Inc.
82 Old Kennedy Development Inc.
22 Old Kennedy Development Inc.
35 Thelma Development Inc.
19 Turff Development Inc.
4550 Steeles Development Inc.
9500 Dufferin Development Inc.

SCHEDULE B – LIST OF AUTHORITIES

1. *Re Stelco Inc.*, 2004 CarswellOnt 1211 (Sup Ct) [*Stelco*], leave to appeal to CA refused, 2004 CarswellOnt 2936, leave to appeal to SCC refused, 2004 CarswellOnt 5200
2. *Re Textbook (525 Princess Street) Inc. et. al.* Court File No. CV-16-1162-00CL
3. *Re Hush Homes Inc.* 2015 ONSC 370
4. *Re Urbancorp Inc.* 2016 ONSC 3288
5. *League Assets Corp., et al.*, Order Made After Application dated October 18, 2013, Court File No.: S-137743
6. *Clothing for Modern Times Ltd.*, 2011 ONSC 7522
7. *Century Services Inc. v. Canada (Attorney General)* 2010 SCC 60
8. *Re Lehndorff General Partner Ltd.*, [1993] O.J. No. 14
9. *Re Nortel Networks Corp.*, 2009 CarswellOnt 4806
10. *Re First Leaside Wealth Management Inc.*, 2012 ONSC 1299
11. *Re Northern Transportation Co.* 2016 ABQB 522
12. *Keddy Motor Inns Ltd., Re* (1991), 107 N.S.R. (2d) 419
13. *Browne v. Southern Canada Power Co.* 1941 CarswellQue 14
14. *Re Target Canada Co.*, 2015 ONSC 303
15. *Re Canwest Publishing*, 2010 ONSC 222
16. *Re US Steel Canada Inc.*, 2014 ONSC 6145
17. *Re Performance Sports Group Ltd.*, 2016 ONSC 6800
18. *Walter Energy Holdings Inc.*, 2016 BCSC 107

19. *Carillion Canada Holdings Inc.*, et al., Initial Order, January 25, 2018, CV-18-590812-00CL

SCHEDULE C – RELEVANT STATUTES

Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3

2 In this Act,

insolvent person means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

- (a) who is for any reason unable to meet his obligations as they generally become due,
- (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
- (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due; (*personne insolvable*)

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

2 (1) In this Act,

debtor company means any company that

- (a) is bankrupt or insolvent,
- (b) has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act* or is deemed insolvent within the meaning of the *Winding-up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts,
- (c) has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act*, or
- (d) is in the course of being wound up under the *Winding-up and Restructuring Act* because the company is insolvent; (*compagnie débitrice*)

Application

3 (1) This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than \$5,000,000 or any other amount that is prescribed.

Jurisdiction of court to receive applications

9 (1) Any application under this Act may be made to the court that has jurisdiction in the province within which the head office or chief place of business of the company in Canada is

situated, or, if the company has no place of business in Canada, in any province within which any assets of the company are situated.

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.

11.01 No order made under section 11 or 11.02 has the effect of

- (a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or
- (b) requiring the further advance of money or credit.

11.02 (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 30 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.

(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.

(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.

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

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

(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.

(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.

Interim financing

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

Priority — secured creditors

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

Priority — other orders

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

Factors to be considered

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

- (a) the period during which the company is expected to be subject to proceedings under this Act;
- (b) how the company's business and financial affairs are to be managed during the proceedings;
- (c) whether the company's management has the confidence of its major creditors;
- (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
- (e) the nature and value of the company's property;
- (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
- (g) the monitor's report referred to in paragraph 23(1)(b), if any.

Security or charge relating to director's indemnification

- **11.51 (1)** On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of 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.
- Restriction — indemnification insurance
 - (3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

Court may order security or charge to cover certain costs

- **11.52 (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.

Court File No:

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 FORME DEVELOPMENT GROUP INC. AND
THE OTHER COMPANIES LISTED ON SCHEDULE "A" HERETO (the
"Applicants")

ONTARIO

**SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced TORONTO

**FACTUM OF THE APPLICANTS
(returnable November 6, 2018)**

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