

**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 MONITOR
(Motion returnable June 23, 2022)

June 17, 2022

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PART I: OVERVIEW

1. On November 30, 2018, Forme Development Group Inc. and certain of its affiliated entities (the "**Applicants**") obtained an order of this Honourable Court, as amended and restated on December 6, 2018 (the "**Initial Order**"), granting relief pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**", with these proceedings being referred to herein as the "**CCAA Proceedings**").
2. The Applicants and certain of their affiliated companies (collectively, the "**Forme Group**") intended to develop low-rise, high-rise and mixed-use projects primarily in the Greater Toronto Area.
3. Pursuant to the Initial Order, KSV Restructuring Inc.¹ ("**KSV**") was appointed as the monitor (in such capacity, the "**Monitor**") with enhanced powers, including powers to market for sale and to complete real property sale transactions on behalf of the Applicants in the CCAA Proceedings.
4. The primary purpose of the CCAA Proceedings was to create a stabilized environment to conduct a Court-approved sale process for the Applicants' real property (the "**Sale Process**"). The Sale Process included all of the Applicants' real estate development projects and 59 and 63 Elm Avenue, being two (2) residential properties owned by Yuan Hua Wang ("**Mr. Wang**"), the principal of the Applicants, and his wife.
5. KSV was also appointed Proposal Trustee of three (3) of the Applicants' affiliated entities (the "**NOI Entities**") in proposal proceedings commenced on October 26, 2018 by the NOI Entities under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "**BIA**") (the "**BIA Proceedings**", and together with the CCAA Proceedings, the "**Proceedings**").

¹ Effective August 31, 2020, KSV Kofman Inc. changed its name to KSV Restructuring Inc.

6. Mr. Wang is the sole shareholder of the Applicants, the NOI Entities and fourteen (14) affiliated real estate development companies which are not debtor companies in the Proceedings (each a "**Non-Applicant**" and collectively, the "**Non-Applicants**").

7. The Monitor has now completed its administration of the Claims Procedure (as defined below) and is proposing to make distributions to creditors and complete the CCAA Proceedings.

8. Accordingly, the Monitor is seeking:

- (a) an order (the "**CCAA Termination and Distribution Order**"), among other things:
 - (i) extending the Stay Period (as defined in paragraph 15 of the Initial Order) from September 30, 2022 to and including the earlier of: (i) December 31, 2022; or (ii) the CCAA Termination Date (as defined below) (the "**Stay Extension**");
 - (ii) authorizing and directing the Monitor, on behalf of the Forme Group (as defined below), to make distributions totaling approximately \$5.9 million to unsecured creditors with proven claims against certain Forme Group entities, including approximately \$2.2 million to Pollard & Associates Inc. ("**Pollard**"), in its capacity as Licensed Insolvency Trustee of two (2) Non-Applicants, being 186 Old Kennedy Development Inc. ("**186 Old Kennedy**") and 31 Victory Development Inc. ("**31 Victory**") and together with 186 Old Kennedy, the "**Pollard Estates**") from the funds in its trust accounts and the trust accounts of its legal counsel, Bennett Jones LLP ("**Bennett Jones**") (collectively, the "**Proposed Distributions**");
 - (iii) authorizing the Monitor to make the Proposed First Source Distribution to First Source in respect of the 1296 Wang Secured Claim (each as defined below);

- (iv) authorizing the Monitor to establish, hold and maintain an administrative reserve of \$300,000 (the "**Fee Accrual**") to cover the fees and disbursements incurred or to be incurred by the Monitor and Bennett Jones from May 1, 2022 to the CCAA Termination Date, and to pay such fees and disbursements without further Order of the Court;
- (v) terminating the CCAA Proceedings, the Stay Period and the Charges (as defined in the Initial Order) upon the Monitor's filing of the certificate appended to the CCAA Termination and Distribution Order as Schedule "B" (the "**Discharge Certificate**");
- (vi) discharging KSV as the Monitor of the Applicants upon the filing of the Discharge Certificate;
- (vii) releasing the Monitor from any and all liability that KSV now has or may hereafter have by reason of, or in any way arising out of, the acts or omissions of KSV while acting as Monitor, save and except for its gross negligence or wilful misconduct on the Monitor's part; and
- (viii) approving the Twenty-First Report of the Monitor and the Seventeenth Report of the Proposal Trustee dated June 14, 2022 (the "**Report**")² and the activities of the Monitor and the Proposal Trustee described therein.

PART II: FACTS

9. The facts with respect to this motion are more fully set out in the Report. Capitalized terms not otherwise defined herein have the meaning ascribed to them in the Report or the Initial Order, as

² Twenty-First Report of the Monitor and the Seventeenth Report of the Proposal Trustee dated June 14, 2022 [Twenty-First Report].

applicable. Details on the Forme Group and the commencement of the CCAA Proceedings are set out in KSV's Report as the Proposed Monitor and its supplements. These details, unless relevant to the present motion, are not repeated herein.

10. All dollar amounts referred to herein are in CAD unless otherwise stated.

B. The Undertaking and The Claims Procedure³

11. To, among other things, facilitate a transparent and orderly sale of the Non-Applicants' real property and to hold in trust any surplus funds realized therefrom for the benefit of creditors (including those with guarantee claims against Mr. Wang), Mr. Wang and the Non-Applicants executed an undertaking (the "**Undertaking**") in favour of the Court on March 11, 2019.⁴ The Undertaking was approved pursuant to an order issued by the Court on March 18, 2019.⁵ The events leading up to the Undertaking are summarized in the Report and further detailed in the Third Report of the Monitor dated February 26, 2019 and the Supplement to the Third Report of the Monitor dated March 12, 2019.

12. The Undertaking also provides that the Monitor is to conduct a claims process for the Applicants, the NOI Entities, the Non-Applicants, the directors and officers of the Applicants, the NOI Entities and the Non-Applicants and certain claims against Mr. Wang.⁶

13. As of the date of the Report, the surplus totals approximately \$6.7 million (the "**Surplus**"), of which approximately \$3.3 million is in trust with Bennett Jones and approximately \$3.4 million is in trust accounts maintained by the Proposal Trustee and the Monitor.⁷ The Surplus represents the sum of monies remaining from the sale of all properties owned by the Forme Group, including the Non-

³ Terms in this section not otherwise defined herein have the meanings ascribed to them in the Claims Procedure Order dated October 22, 2019.

⁴ Twenty-First Report, *supra* note 2 at section 2.1 at para 1.

⁵ *Ibid* at section 2.1 at para 1.

⁶ *Ibid* at section 2.1 at para 3.

⁷ *Ibid* at section 2.1 at para 4.

Applicants, net of repayment of all mortgages on those properties, Court-approved distributions to creditors with secured claims against Mr. Wang and the fees and costs of the Proceedings.⁸

14. On October 22, 2019, the Monitor sought and obtained an order (the "**Claims Procedure Order**") authorizing it to administer a claims procedure (the "**Claims Procedure**") to solicit and determine claims against the Applicants, the Non-Applicants, the NOI Debtors, the directors and officers of the Applicants, the Non-Applicants and the NOI Debtors, and Mr. Wang, solely in his capacity as a guarantor, surety or indemnitor of any obligation of any of the Applicants, the NOI Debtors or the Non-Applicants, and in his capacity as an owner of the Elm Properties, and not in any other capacity.⁹

15. On or prior to the Claims Bar Date, approximately 125 creditors filed Claims totaling approximately \$89 million.¹⁰ Notices of Revision or Disallowance ("**NORDs**") or Notices of Acceptance have been issued to substantially all claimants who filed Claims in the Claims Procedure against the Forme Group entities with surplus funds (the "**Surplus Entities**") other than in respect of the Claims filed by Tarion, the Birchmount Purchasers and the Condo Corporation (each as defined below).¹¹

16. Of the Claims filed in the Claims Procedure, there were eight (8) secured claims filed by certain creditors (collectively, the "**Secured Creditors**") totaling approximately \$12 million (with interest and costs continuing to accrue) (collectively, the "**Secured Claims**" and each a "**Secured Claim**").¹² Pursuant to Orders granted by the Court on August 27, 2020, November 12, 2020 and February 25, 2021 (collectively, the "**Distribution Orders**"), the Court authorized the Monitor to

⁸ *Ibid* at section 2.1 at paras 5 and 6.

⁹ *Ibid* at section 1.0 at para 8.

¹⁰ *Ibid* at section 3.0 at para 3.

¹¹ *Ibid* at section 3.0 at para 5.

¹² *Ibid* at section 3.1 at para 1.

make distributions from the Surplus in respect of certain of the Secured Claims up to the full amount owing.¹³

17. In connection with the foregoing, and as further detailed below, the Monitor is seeking to make a distribution of approximately \$51,000 to First Source on account of the 1296 Wang Secured Claim.¹⁴ The Monitor also intends to make a further distribution to the remaining Secured Creditors totaling approximately \$561,000 in accordance with the Distribution Orders.¹⁵

(a) First Source Secured Claims

18. First Source Financial Management Inc. ("**First Source**") filed certain Proofs of Claim in the Claims Procedure against each of 250 Danforth Development Inc. ("**250 Danforth Inc.**"), 3310 Kingston Development Inc. and 1296 Kennedy Development Inc. ("**1296 Kennedy Inc.**"). First Source also filed Claims against Mr. Wang, including one on a secured basis. In connection with the foregoing, the Monitor issued Notices of Revision or Disallowance.¹⁶ In response, First Source filed Notices of Dispute, but only in connection with its Claims against Mr. Wang. First Source also provided evidence of its security in connection with its Claim against Mr. Wang involving 1296 Kennedy Inc. (the "**1296 Wang Secured Claim**").¹⁷

19. Following the Monitor's review of the additional materials provided by First Source, as well as discussions with First Source's counsel, the Monitor and First Source settled the 1296 Wang Secured Claim for \$75,000.¹⁸

¹³ *Ibid* at section 3.1 at para 2.

¹⁴ *Ibid* at section 3.1.1 at para 4.

¹⁵ *Ibid* at section 3.1 at para 3.

¹⁶ *Ibid* at section 3.1.1 at para 1.

¹⁷ *Ibid* at section 3.1.1 at para 2.

¹⁸ *Ibid* at section 3.1.1 at para 2.

20. The Monitor is now seeking authorization to make a distribution to First Source in the amount of approximately \$51,000 (the "**Proposed First Source Distribution**"), which is the same pro-rata distribution being made to the Secured Creditors.¹⁹

(b) Unsecured Claims

21. Unsecured Claims in the amount of approximately \$22.7 million have been filed against the Surplus Entities, and unsecured Claims in the amount of approximately \$12.8 million have been filed against 250 Danforth Inc., being the only non-Surplus Entity with funds available for distribution to unsecured creditors.²⁰

22. The Monitor has recently settled and finalized certain significant unsecured Claims, including the Claims of the Canada Revenue Agency, Tarion Warranty Corporation's ("**Tarion**"), the purchasers of 35 condominium units (the "**Birchmount Purchasers**") at a condominium project owned by 2358825 Ontario Inc. (the "**Birchmount Applicant**") and the condominium corporation of the Birchmount Applicant (the "**Condo Corporation**").²¹

C. Fee Allocation, Fee Accrual and the Proposed Distributions

23. Determining the funds available for distribution to unsecured creditors of each of the Surplus Entities required an allocation of professional fees incurred throughout the proceedings (the "**Fee Allocation**"), which total approximately \$5.9 million.²² The Monitor performed a fee allocation exercise that considered several factors and used its business judgment with respect to the Fee Allocation and believes the fee allocation to be fair, reasonable and equitable in the circumstances.²³

¹⁹ *Ibid* at section 3.1.1 at para 4.

²⁰ *Ibid* at section 3.2 at para 1.

²¹ *Ibid* at section 3.2.2 and 3.2.3

²² *Ibid* at section 4.1 at para 1.

²³ *Ibid* at section 4.1 at para 4.

24. The Monitor's fee allocation methodology was based on its consideration of the following factors:

- (a) the super-priority of the Administration Charge granted under the Initial Order, as it relates to the Applicants;
- (b) the terms and provisions of the Undertaking as it relates to the Non-Applicants, which contemplated that professional fees incurred by the Monitor and its legal counsel would be paid from the surplus proceeds generated from the sale of Non-Applicant properties;
- (c) the equal allocation of fees and costs across all Forme Group entities where the related activity was on behalf of all entities in the Forme Group;
- (d) the allocation of fees and costs to a specific Forme Group entity where those fees and costs are directly attributable to a specific entity; and
- (e) a reallocation of fees and costs incurred by non-Surplus Entities to those entities in the Forme Group that have funds available for distribution.²⁴

25. The Fee Accrual represents a holdback for the fees and disbursements of the Monitor and Bennett Jones from May 1, 2022 to the CCAA Termination Date. The Monitor believes the Fee Accrual is reasonable and appropriate in the circumstances.²⁵ To the extent the Fee Accrual exceeds the further costs of the Monitor and Bennett Jones, the Monitor is seeking authority to distribute the balance to unsecured creditors on the same basis that the Proposed Distributions will be paid to unsecured creditors of the Surplus Entities.²⁶

²⁴ *Ibid* at section 4.1 at para 3.

²⁵ *Ibid* at section 7.0 at para 1.

²⁶ *Ibid* at section 7.0 at para 2.

26. In connection with the foregoing, at this time the Monitor is proposing to make:
- (a) the Proposed Distributions, which includes approximately \$2.2 million to Pollard in its capacity as Licensed Insolvency Trustee of the Pollard Estates and approximately \$3.7 million to other unsecured creditors of the Surplus Entities;
 - (b) the Proposed First Source Distribution; and
 - (c) a further distribution on account of the Secured Claims in accordance with the Distribution Orders.²⁷

D. The Releases and the Proposed Discharge of the Monitor

27. The CCAA Termination and Discharge Order releases the Monitor and counsel to the Monitor and each of their respective affiliates and officer, directors, partners, employees and agents during the CCAA Proceedings (collectively, the "**Released Parties**" and each a "**Released Party**") from the Released Claims.²⁸

28. The Released Claims do not include any claim or liability arising out of any gross negligence or wilful misconduct on the part of the applicable Released Party.²⁹

29. Prior to filing the Discharge Certificate, the Monitor intends to, subject to Court approval:
- (a) facilitate the Proposed Distributions on behalf of the Forme Group;
 - (b) make the Proposed First Source Distribution;
 - (c) make final distributions to the Secured Creditors;
 - (d) pay any final professional fees from the Fee Accrual; and

²⁷ *Ibid* at section 4.0 at para 1.

²⁸ *Ibid* at section 5.0 at para 1.

²⁹ *Ibid* at section 5.0 at para 2.

- (e) facilitate any further distributions to creditors from: (i) the Fee Accrual if the fees and costs incurred to the CCAA Termination Date are less than the Fee Accrual or; (ii) if any additional funds come into the Monitor's possession.³⁰

30. At this time, the Monitor is recommending that it be discharged upon the filing of the Discharge Certificate (the "**CCAA Termination Date**") as, subject to completing the outstanding matters outlined in the preceding paragraph, its duties and responsibilities under the Initial Order and other orders granted in the CCAA Proceedings will have been completed or substantially completed.³¹

E. Stay Extension

31. The CCAA Termination and Distribution Order seeks an extension of the Stay Period from September 30, 2022 to the earlier of: (i) December 31, 2022; or (ii) the CCAA Termination Date.³²

32. The Monitor supports the Stay Extension given that, *inter alia*:

- (a) as "super" Monitor in these CCAA Proceedings, it is the Monitor's view (which has been confirmed in previous Orders in the CCAA Proceedings) that the good faith and due-diligence standard should focus on the Monitor's conduct;
- (b) subject to Court approval, it will enable the Monitor to complete its administration of the CCAA Proceedings on an orderly basis prior to filing the Discharge Certificate;
- (c) the Fee Accrual is meant to provide the Monitor with sufficient funding to complete its administration during the Stay Extension; and
- (d) no creditor will be prejudiced if the proposed Stay Extension is granted.³³

³⁰ *Ibid* at section 5.0 at para 4.

³¹ *Ibid* at section 5.0 at para 3.

³² *Ibid* at section 1.1 at para 1(i)(iii).

³³ *Ibid* at section 6.0 at para 1.

PART III: ISSUES

33. The issues to be considered on this motion are whether the Court should:
- (a) approve the Proposed Distributions and the Fee Accrual and authorize and direct the Monitor to make the Proposed Distributions on behalf of the Forme Group;
 - (b) authorize the termination of the CCAA Proceedings and the discharge of the Monitor at the CCAA Termination Date;
 - (c) approve the releases in favour of the Released Parties; and
 - (d) extend the Stay Period.

PART IV: LAW AND ARGUMENT

A. The Proposed Distributions and the Fee Accrual Should be Approved and the Proposed Distributions Should be Authorized

1. The Proposed Distributions Should be Approved and Authorized

34. This Court has broad power in a CCAA proceeding to do what is just in the circumstances.³⁴ Section 11 of the CCAA provides that a court may make any order it considers appropriate in the circumstances.³⁵

35. The Court has the authority to approve distributions to creditors during a CCAA proceedings, including outside of a plan of compromise or arrangement.³⁶ This concept applies regardless of whether the creditors receiving a distribution are secured or unsecured.³⁷

³⁴ [U.S. Steel Canada Inc. \(Re\)](#), 2016 ONCA 662 at paras. 53 and 78.

³⁵ [Companies Creditors' Arrangement Act](#), RSC 1985, c. C-36, at s. 11 [CCAA].

³⁶ [Nortel Networks Corp., Re](#), 2014 ONSC 4777 at paras 53-55 [Nortel].

³⁷ [Re Mobilicity](#), Distribution Order granted August 14, 2015, Court File No. CV-13-10274-00CL.

36. There is nothing in the CCAA that precludes a distribution of cash to creditors of the debtor during the pendency of CCAA proceedings.³⁸ In *Nortel*, Justice Newbould stated the following:

"I see no difference between an interim distribution, as in the case of *AbitibiBowater*, or a final distribution, as in the case of *Timminco*, or a distribution to an unsecured or secured creditor, so far as a jurisdiction to make the order is concerned without any plan of arrangement".³⁹

37. Accordingly, this Court has the jurisdiction to grant an order approving the Proposed Distributions and authorizing the Monitor to make the Proposed Distributions on behalf of the Forme Group. The Monitor notes that substantially similar relief has been granted by this Court in recent proceedings, including where a distribution was made to unsecured creditors without a plan of compromise or arrangement.⁴⁰

38. The Monitor has realized on substantially all of the assets of the Forme Group in accordance with the Initial Order. The Monitor has also reviewed and resolved all of the Claims (as defined in the Claims Procedure Order), to the extent applicable, filed pursuant to the Claims Procedure Order against entities in the Forme Group with funds available for distribution.⁴¹

39. The Monitor submits that the Proposed Distributions are appropriate given that:

- (a) the Proposed Distributions have been determined in accordance with the Claims Procedure Order;
- (b) the Proposed Distributions are being distributed in accordance with the Undertaking;

³⁸ *AbitibiBowater Inc.*, 2009 QCCS 6461 (Que. S.C.) at para 71.

³⁹ *Nortel*, *supra* note 36 at para 58.

⁴⁰ *Carillion Canada Holdings Inc., et al.*, Distribution Order granted August 4, 2021, Court File No. CV-18-590812-00CL and *FIGR Brands Inc. et al.*, Stay Extension, Distribution, WEPPA and Fee Approval Order granted February 2, 2022, Court File No. CV-21-00655373-00CL.

⁴¹ Twenty-First Report, *supra* note 2 at section 3.0 at para 5 and 6 and at section 5.0 at para 3.

- (c) the distribution to Pollard will enable it to administer claims and make distributions to creditors of the Pollard Estates; and
- (d) the Proposed Distributions are net of the Fee Allocation.⁴²

40. Prior to determining the Proposed Distributions, the Monitor was required to allocate professional fees secured by the Administration Charge among the Forme Group entities.⁴³ This Court has the authority to approve an allocation of costs secured by a priority charge that is fair and equitable.⁴⁴ Where an allocation is *prima facie* fair, the onus falls on an opposing creditor to satisfy the Court that the proposed allocation of costs is unfair or prejudicial.⁴⁵ In allocating costs in insolvency proceedings, Courts have also recognized that it must be done on a case-by-case basis, that a strict accounting in the division of costs is neither necessary nor desirable as it can be economically self-defeating and have held that a strict accounting is antithetical to the objectives of the CCAA.⁴⁶ As set out in the Report, the methodology for the Fee Allocation and the Fee Allocation itself are fair, reasonable and equitable in the circumstances and are consistent with the priorities set out in the Initial Order, the Proposals and as contemplated in the Undertaking.⁴⁷

41. In connection with the Proposed Distributions, or any other distributions contemplated under the CCAA Termination and Distribution Order or other Court orders issued in these CCAA Proceedings, the Monitor is seeking relief that, in making or facilitating any of the foregoing, that it is not "distributing" in its personal or corporate capacity, nor shall it be considered to have "distributed" any funds or assets for the purposes of any of the Statutes (as that term is defined in the CCAA Termination and Distribution Order), and the Monitor shall not incur any liability, including

⁴² *Ibid* at section 4.4 at para 1.

⁴³ *Ibid* at section 4.1 at para 1.

⁴⁴ [Medican Holdings Ltd., Re, 2013 ABQB 224](#) at para 25 [*Medican*].

⁴⁵ *Ibid* at para 39; [Atlantica Diversified Transportation Systems Inc. \(Re\), 2018 NSSC 77](#) at para 25 [*Atlantica*].

⁴⁶ *Ibid* at para 37; [Atlantica](#) at para 25; [Hunjan International Inc., Re, 2006, 21 C.B.R. \(5th\) 276 \(Ont. S.C.J.\)](#) at para 4.

⁴⁷ Twenty-First Report, *supra* note 2 at section 4.1 at paras 3 and 4.

for greater certainty any tax liability regardless of how or when such liabilities may have arisen, for making any distributions, payments or deliveries or failing to withhold amounts.⁴⁸ The Monitor believes this protection is reasonable and appropriate in the circumstances⁴⁹ and notes that similar relief has been granted by this Court in recent proceedings.⁵⁰

42. The Monitor respectfully submits that the Court should approve the Proposed Distributions and the related relief.

2. The Fee Accrual should be Approved

43. In connection with the CCAA Termination and Distribution Order, the Monitor is seeking approval of the Fee Accrual which will be used to cover the fees and costs of the Monitor and Bennett Jones from May 1, 2022 to the CCAA Termination Date.⁵¹ To the extent the Fee Accrual exceeds the further fees and costs of the Monitor and Bennett Jones, the Monitor is seeking authority to distribute the remainder to unsecured creditors on the same basis that the Proposed Distributions are to be paid to unsecured creditors of the Surplus Entities.⁵²

44. The Monitor respectfully submits that the Fee Accrual is appropriate in the circumstances and should be approved by this Court and that it would be a waste of time and money to require a further motion for an insignificant distribution in the event that a portion of the Fee Accrual is unused or if further monies come into the hands of the Monitor (which is not expected).

⁴⁸ *Ibid* at section 4.4 at para 2.

⁴⁹ *Ibid* at section 4.4 at para 2.

⁵⁰ [Carillion Canada Holdings Inc., et al.](#), Distribution Order granted August 4, 2021, Court File No. CV-18-590812-00CL and [FGR Brands Inc. et al.](#), Stay Extension, Distribution, WEPPA and Fee Approval Order granted February 2, 2022, Court File No. CV-21-00655373-00CL.

⁵¹ *Ibid* at section 7.0 at para 1.

⁵² *Ibid* at section 7.0 at para 2.

B. The CCAA Proceedings Should be Terminated and the Monitor Should be Discharged

45. As discussed above, section 11 of the CCAA vests this Court with broad discretion to make any order that it considers appropriate in the circumstances.⁵³ The discretion conferred by section 11 of the CCAA is not boundless.⁵⁴ Rather, it must be exercised in furtherance of the CCAA's remedial objectives, having regard to whether:

- (a) the order sought is appropriate in the circumstances;
- (b) the applicant is acting in good faith; and
- (c) the applicant is acting with due diligence.⁵⁵

46. As "super" Monitor in these CCAA Proceedings, the good faith and due diligence standard should focus on the conduct of the Monitor. This Court has previously affirmed in these CCAA Proceedings that references to "Applicants" acting in good faith refers to the Monitor.⁵⁶

47. An order under section 11 of the CCAA will be appropriate where it "advances the policy objectives underlying the CCAA".⁵⁷ These objectives include maximizing creditor recovery and providing a "timely, efficient and impartial resolution of a debtor's insolvency".⁵⁸

48. Having regard to the foregoing considerations, the Monitor submits that it is appropriate for this Court to terminate the CCAA Proceedings in the manner contemplated by the CCAA Termination and Distribution Order given that:

- (a) the Forme Group no longer has any business or operations and, once the Monitor makes the Proposed Distributions (if approved) and completes certain outstanding

⁵³ *CCAA*, *supra* note 35 at s 11.

⁵⁴ [9354-9186 Québec Inc v. Callidus Capital Corp.](#), 2020 SCC 10 [*Callidus*] at para 49; [Entrec Corporation \(Re\)](#), 2020 ABQB 751 at para 3 [*Entrec*].

⁵⁵ *Callidus*, *ibid*; *Entrec*, *ibid*; [Ted Leroy Trucking \[Century Services\] Ltd. Re.](#), 2010 SCC 60 at paras 70-71 [*Century Services*].

⁵⁶ Twenty-First Report, *supra* note 2 at section 6.0 at para 1(a).

⁵⁷ *Callidus*, *ibid* at para 50; *Century Services*, *ibid*.

⁵⁸ *Callidus*, *ibid* at paras 40, 46.

sundry matters, the Monitor will have completed its duties and responsibilities under the Initial Order and other orders granted in the CCAA Proceedings;

- (b) the Monitor has completed its administration of the Claims Procedure;
- (c) the Monitor has acted in good faith and with due diligence by discharging its duties and obligations under the CCAA, the Initial Order and other orders issued in the CCAA Proceedings; and
- (d) all sundry matters will have been completed by the CCAA Termination Date.⁵⁹

C. The Limited Releases in Favour of the Released Parties are Appropriate

49. The broad discretion provided to courts under section 11 of the CCAA to "make any order" considered appropriate in the circumstances includes the authority to grant third party releases.⁶⁰ This authority has previously been exercised by courts when granting approval and vesting orders, approving settlements, and when terminating CCAA proceedings, in each case, absent a plan of compromise or arrangement.⁶¹

50. When determining whether it is appropriate to grant such releases under section 11 of the CCAA, courts have drawn on the well-established factors for approving releases under plans of compromise or arrangement.⁶² When modified to accommodate cases in which there is no plan of compromise or arrangement, these factors include whether:

- (a) the claims to be released are rationally connected to the restructuring;

⁵⁹Twenty-First Report, *supra* note 2 at section 5.0 at para 3 and 4 and at section 6.0 at para 1(a).

⁶⁰*Re Green Relief Inc.*, 2020 ONSC 6837 at paras 16-17, 23-26 [*Green Relief*]; *Entrec* *supra* note 54 at paras 3-7, 9.

⁶¹*Green Relief*, *ibid*; *Entrec*, *ibid*; *In the Matter of a Plan of Compromise or Arrangement of DEL Equipment Inc.* (October 29, 2020), Toronto, CV-19-629552-00CL (CCAA Termination Order) at para 17; *In the Matter of a Plan of Compromise or Arrangement of Golf Town Canada Holdings Inc., Golf Town Canada Inc. and Golf Town GP II Inc.* (March 29, 2018), Toronto, CV-16-11527-00CL (CCAA Termination Order) at para 14; *Nortel Networks Corporation (Re)*, 2010 ONSC 1708 at para 82.

⁶²*Green Relief*, *ibid* at para 27; *Entrec*, *ibid* at paras 7, 9. See also, *Lydian International Limited (Re)*, 2020 ONSC 4006 at para 54.

- (b) the restructuring can succeed without the releases;
- (c) the parties to be released contributed to the restructuring;
- (d) the releases benefit the debtor as well as its creditors generally;
- (e) the debtor's creditors have knowledge of the nature and effect of the releases; and
- (f) the releases are fair, reasonable and not overly-broad.⁶³

51. No one factor is determinative.⁶⁴

52. Applied here, the factors considered by courts in approving releases in favour of third parties support approving the proposed releases given, among other things, that:

- (a) the Released Claims are entirely connected to the restructuring;
- (b) the Released Parties have made, and continue to make, significant contributions to the CCAA Proceedings and the Forme Group's restructuring efforts;
- (c) the Released Claims are sufficiently narrow and not overly broad – they do not include any claim or liability arising out of any gross negligence or willful misconduct on the part of the applicable Released Party that is not permitted to be released pursuant to subsection 5.1(2) of the CCAA; and
- (d) notice has been provided that the Released Parties are seeking releases in respect of the Released Claims.⁶⁵

⁶³ *Green Relief*, *ibid*; *Entrec*, *ibid*.

⁶⁴ *Green Relief*, *ibid* at para 28.

⁶⁵ Twenty-First Report, *supra* note 2 at section 5.0 at paras 1 and 2.

D. The Stay of Proceedings Should be Extended

53. The Stay Period is currently set to expire on September 30, 2022. Subsection 11.02(2) of the CCAA gives this Court the authority to grant an extension of the Stay Period for any period it considers necessary. To do so, this Court must be satisfied that circumstances exist that make the order appropriate and that the applicant (or the Monitor in this case⁶⁶) has acted, and is acting, in good faith and with due diligence.⁶⁷

54. The Monitor submits that the Stay Extension is appropriate in the circumstances given that:

- (a) the Monitor has acted and continues to act in good faith and with due diligence;
- (b) the proposed Stay Extension will provide the Monitor with time to make the Proposed Distributions, the Proposed First Source Distribution, final distributions to Secured Creditors, and any further distributions, if applicable, to creditors to the extent the Fee Accrual is not fully utilized and/or any additional funds come into the Monitor's possession, as well as to complete any sundry matters in advance of terminating the CCAA Proceedings;
- (c) while the Monitor expects to file the Discharge Certificate in advance of the expiry of the Stay Period, the Stay Extension will avoid the cost of a further Court attendance if there is any delay;
- (d) it will enable the Monitor to complete its administration of the CCAA Proceedings on an orderly basis prior to filing the Discharge Certificate;

⁶⁶ *Ibid* at section 6.0 at para 1.

⁶⁷ *CCAA*, *supra* note 35 s 11.02(2).

- (e) should the Fee Accrual be approved, there will be sufficient liquidity to fund these CCAA Proceedings until the CCAA Termination Date; and
- (f) the Monitor does not believe that the Stay Extension will prejudice any creditor.⁶⁸

PART V: RELIEF REQUESTED

55. For the reasons set out above, the Monitor submits that the Court should grant the Order sought.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

June 17, 2022



BENNETT JONES LLP

⁶⁸ Twenty-First Report, *supra* note 2 at section 6.0 at para 1.

SCHEDULE A – APPLICANTS

3310 Kingston Development Inc.
1296 Kennedy Development Inc.
1326 Wilson Development Inc.
5507 River Development Inc.
4439 John Development Inc.
2358825 Ontario Ltd.
250 Danforth Development Inc.
159 Carrville Development Inc.
169 Carrville Development Inc.
189 Carrville Development Inc.
27 Anglin Development Inc.
29 Anglin Development Inc.

SCHEDULE B – LIST OF AUTHORITIES

Cases Cited

1.	<u>U.S. Steel Canada Inc. (Re)</u> , 2016 ONCA 662
2.	<u>Nortel Networks Corp., Re</u> , 2014 ONSC 4777
3.	<u>AbitibiBowater Inc.</u> , 2009 QCCS 6461 (Que. S.C.)
4.	<u>Medican Holdings Ltd., Re</u> , 2013 ABQB 224
5.	<u>Atlantica Diversified Transportation Systems Inc. (Re)</u> , 2018 NSSC 77
6.	<u>Hunjan International Inc., Re</u> , 2006, 21 C.B.R. (5th) 276 (Ont. S.C.J.)
7.	<u>9354-9186 Québec Inc v. Callidus Capital Corp.</u> , 2020 SCC 10
8.	<u>Entrec Corporation (Re)</u> , 2020 ABQB 751
9.	<u>Ted Leroy Trucking [Century Services] Ltd, Re</u> , 2010 SCC 60
10.	<u>Re Green Relief Inc.</u> , 2020 ONSC 6837
11.	<u>Nortel Networks Corporation (Re)</u> , 2010 ONSC 1708
12.	<u>Lydian International Limited (Re)</u> , 2020 ONSC 4006

Other Sources

1.	<u>Re Mobilicity</u> , Distribution Order granted August 14, 2015, Court File No. CV-13-10274-00CL
2.	<u>Carillion Canada Holdings Inc., et al.</u> , Distribution Order granted August 4, 2021, Court File No. CV-18-590812-00CL
3.	<u>FIGR Brands Inc. et al.</u> , Stay Extension, Distribution, WEPPA and Fee Approval Order granted February 2, 2022, Court File No. CV-21-00655373-00CL.
4.	<u>In the Matter of a Plan of Compromise or Arrangement of DEL Equipment Inc.</u> (October 29, 2020), Toronto, CV-19-629552-00CL (CCAA Termination Order)
5.	<u>In the Matter of a Plan of Compromise or Arrangement of Golf Town Canada Holdings Inc., Golf Town Canada Inc. and Golf Town GP II Inc.</u> (March 29, 2018), Toronto, CV-16-11527-00CL (CCAA Termination Order)

SCHEDULE C – STATUTES AND REGULATIONS

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

Section 11

General Power of Court

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

Stays, etc. — initial application

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 10 days,

- (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act or the *Winding-up and Restructuring Act*;
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Stays, etc. — other than initial application

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

- (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Burden of proof on application

(3) The court shall not make the order unless

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

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

Restriction

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

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 at Toronto

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capacity as Court-appointed monitor and not in
its personal capacity