

**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 LOYALTYONE, CO.

(the "**Applicant**")

**FACTUM OF THE APPLICANT
(COMEBACK HEARING RETURNABLE MARCH 20, 2023)**

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PART I - NATURE OF THIS MOTION

1. At this Comeback Hearing,¹ the Applicant seeks two orders which are critical to provide stability to the Applicant's Business and to allow it to pursue a going-concern solution for the benefit of the Applicant's stakeholders, including the holders of approximately 10 million active Collector accounts, approximately 750 employees, Partners, Reward Suppliers, the Credit Agreement Lenders, and other unsecured creditors.
2. The Applicant is of the view that the requested relief, including approval of the Transaction Support Agreement, the DIP Financing Facility, and the SISP, with BMO as the Stalking Horse Purchaser, provides the best path forward by allowing the Applicant to test the market while also assuring stakeholders that the AIR MILES® business will continue as a going concern.
3. First, the Applicant seeks the ARIO, which, along with customary restructuring relief, also:

¹ Terms not otherwise defined herein have the meaning given to them in the Affidavit of Shawn Stewart sworn March 10, 2023 (the "**Initial Stewart Affidavit**") or the Affidavit of Shawn Stewart, sworn March 13, 2023 (the "**Second Stewart Affidavit**").

- (a) authorizes the Applicant to borrow funds under the DIP Financing Facility, with BMO as DIP Lender, in order to, among other things, finance the Applicant's working capital requirements and make intercompany loans to LVI;
 - (b) grants the DIP Lender's Charge in an amount of US\$70 million (plus interest, fees and expenses);
 - (c) authorizes the Applicant to enter into the Transaction Support Agreement *nunc pro tunc*, approves the Transaction Support Agreement, and directs the Applicant to comply with its obligations thereunder;
 - (d) extends the Stay of Proceedings until May 18, 2023 and confirms pre-filing obligations may not be set off against post-filing obligations without further Court order;
 - (e) increases the Administration Charge and the Directors' Charge to the maximum amounts of \$3 million and \$15.408 million, respectively;
 - (f) approves the Employee Retention Plans and grants the Employee Retention Plans Charge to the maximum amount of \$5.35 million; and
 - (g) approves the retention of the Financial Advisor and grants the Financial Advisor Charge to the maximum amount of US\$6 million to secure payment of the Transaction Fee.
4. Second, the Applicant seeks the SISP Approval Order, which, among other things:
- (a) authorizes the Applicant's entry into the Stalking Horse Purchase Agreement solely for use as a "stalking horse bid" in connection with the SISP;
 - (b) approves the Bid Protections and grants the Bid Protections Charge for the benefit of the Stalking Horse Purchaser to the maximum amount of US\$4 million; and

(c) approves the SISP, authorizes the Applicant to implement the SISP pursuant to the terms thereof, and authorizes and directs the Applicant, the Financial Advisor, and the Monitor to perform their respective obligations and to do all things reasonably necessary to perform their obligations under the SISP.

5. The relief sought by the Applicant at the Comeback Hearing is supported by its largest Partner (BMO), the Consenting Stakeholders (who represent over 66^{2/30}% of the Credit Agreement Lenders by value), and the Monitor.

PART II - SUMMARY OF FACTS

A. BACKGROUND

6. The LoyaltyOne Entities operate the marketing program known as the AIR MILES[®] Reward Program or AIR MILES[®].²

7. Following the granting of the Initial Order on March 10, 2023, the Applicant has been working in good faith and with due diligence to: (i) stabilize its business and operations; (ii) advise its stakeholders of this CCAA Proceeding including by sending the notice as required by the Initial Order to the Specified Collectors; and (iii) respond to creditor and stakeholder inquiries.³

8. To date, the response from stakeholders, both internally and externally, has in large part been both supportive and optimistic. Partners, Reward Suppliers, and other commercial stakeholders have expressed their general support for the business and a desire to see the AIR MILES[®] Reward Program transition to a financially stable purchaser.⁴

² Initial Stewart Affidavit at para. 5.

³ Second Stewart Affidavit at paras. 7-9.

⁴ Second Stewart Affidavit at para. 8.

B. DIP FINANCING FACILITY

9. In order to fund its ongoing operations and to facilitate the SISP and this CCAA Proceeding, the Applicant, as borrower, and BMO, as DIP Lender, have entered into the DIP Term Sheet pursuant to which the DIP Lender has agreed to make available the DIP Financing Facility on the terms set out therein, including:⁵

- (a) Maximum Principal Amount: US\$70 million;
- (b) Term: for a term ending the earlier of: (i) the occurrence of any event of default under the DIP Term Sheet in respect of which the DIP Lender has demanded repayment; (ii) the closing of one or more sale transactions for all or substantially all of the assets of the Applicant in connection with the SISP; (iii) the Stalking Horse Purchase Agreement being the Successful Bid in the SISP, but not being completed due to the failure of any condition precedent to be satisfied before closing (unless waived); and (iv) June 30, 2023;
- (c) Interest Rate: Base Rate plus 6.00% per annum;
- (d) Default Rate: plus 2% per annum; and
- (e) Fees: (i) an upfront fee of US\$1.4 million; and (ii) a standby fee, calculated at 1.25% per annum on the daily unadvanced portion of the DIP Financing Facility.

10. All interest and fees to be paid under the DIP Term Sheet are payable by adding the amount of such interest or fees, as applicable, to the principal amount of the DIP Obligations.

11. The DIP Term Sheet also requires that all funds advanced under the DIP Financing Facility be secured by the DIP Lender's Charge, subordinate only to the Administration Charge, the

⁵ Initial Stewart Affidavit at para. 165; Terms not otherwise defined in this section have the meaning provided to them in the DIP Term Sheet.

Directors' Charge, the Employee Retention Plans Charge, the Financial Advisor Charge, and the Reserve Security.⁶

12. It is a condition precedent to advances under the DIP Term Sheet that, among other things, the ARIO and the SISP Approval Order are granted on or before March 20, 2023.⁷

13. As set out in the Cash Flow Statement appended to the Pre-Filing Report, the Applicant cannot meet its obligations without the funding provided for in the DIP Financing Facility. The Applicant requires the DIP Financing Facility to, among other things: (i) fund ongoing operations to stabilize the business; (ii) pursue the SISP (if approved); and (iii) fund the Intercompany DIP Loan to LVI.⁸

14. The DIP Term Sheet provides that the Applicant may use an amount consistent with the budget (approximately US\$30 million) to fund the Intercompany DIP Loan to LVI. The Intercompany DIP Loan will enable LVI to continue to provide the Applicant with critical operational support, including the provision of the Intercompany Services. In addition, the Intercompany DIP Loan will fund the U.S. Proceedings which provide another avenue of potential recovery for the Credit Agreement Lenders through the establishment of a liquidating trust expected to pursue claims against its former parent, Bread Financial Holdings, Inc., and other parties.⁹ The terms of the Intercompany DIP Loan and the Order of the U.S. Bankruptcy Court approving the Intercompany DIP Loan are required, under the DIP Term Sheet, to be in a form acceptable to the DIP Lender.¹⁰ A hearing is scheduled for 12:00 p.m. (CT) on March 20, 2023 before the U.S. Bankruptcy Court to seek approval of the Intercompany DIP Loan in the U.S. Proceedings if the relief requested by this Court is granted.¹¹

⁶ Initial Stewart Affidavit at para. 164.

⁷ Initial Stewart Affidavit at Exhibit "P", s. 8.

⁸ Initial Stewart Affidavit at para. 9.

⁹ Initial Stewart Affidavit at paras. 167-168.

¹⁰ Initial Stewart Affidavit at para. 167, Exhibit "P" s. 10.

¹¹ Second Stewart Affidavit at para. 25.

C. TRANSACTION SUPPORT AGREEMENT

15. On March 10, 2023, LVI, the Applicant and certain affiliates (the “**Company Parties**”) entered into the Transaction Support Agreement with the Credit Facility Agent and certain Credit Agreement Lenders holding approximately 48% of the aggregate outstanding principal amount under the Credit Facilities.¹² Subsequently, the Credit Facility Agent and additional Credit Agreement Lenders executed the Transaction Support Agreement. It has now been executed by Consenting Stakeholders holding greater than 66^{2/3}% of the aggregate outstanding principal amount under the Credit Facilities.¹³

16. Subject to and in accordance with its terms, the Transaction Support Agreement requires that the Consenting Stakeholders support: (i) this CCAA Proceeding, including the ARIO, the SISF, the Stalking Horse Purchase Agreement, and the DIP Financing Facility; (ii) the sale of BrandLoyalty; (iii) the Intercompany DIP Loan; and (iv) the Combined Plan in the U.S. Proceedings.¹⁴

17. Subject to and in accordance with its terms, pursuant to the Transaction Support Agreement: (i) each of the Consenting Stakeholders has agreed to, among other things: (a) support the implementation and consummation of the TSA Transactions; (b) not directly or indirectly support any Alternative Transaction (as defined in the Transaction Support Agreement, provided that they may support an alternative transaction selected pursuant to the SISF); (c) not file any document with this Court, the U.S. Bankruptcy Court, or any other court that is inconsistent with the Transaction Support Agreement; and (d) cooperate in good faith and coordinate with the Company Parties to structure and implement the TSA Transactions in a tax-efficient manner; and (ii) each of the Consenting Lenders has agreed to, among other things and subject to certain

¹² Second Stewart Affidavit at para. 15.

¹³ First Report of the Monitor at 5.0.2.

¹⁴ Second Stewart Affidavit at para. 16.

exceptions: (a) deliver any applicable means of voting or participating in the TSA Transactions; and (b) not opt out of the release provisions in the Combined Plan.¹⁵

18. Most importantly from the Applicant's perspective, the Consenting Stakeholders have, subject to and in accordance with the terms of the Transaction Support Agreement, agreed to: (i) support the relief sought in the ARIO, including the Employee Retention Plans, the DIP Financing Facility, and each of the Charges provided for therein; (ii) support the SISP Approval Order; (iii) not submit, or (as to the Consenting Lenders) direct the Credit Facility Agent to submit, a credit bid in the SISP; (iv) support the transaction selected as the Successful Bid in the SISP; and (v) support an approval and vesting order in respect of the transaction selected as the Successful Bid in the SISP. Pursuant to the terms of the Transaction Support Agreement, each of the Orders sought by the Applicant at the Comeback Hearing must be in the form attached thereto, or as otherwise agreed to by the Consenting Lenders. Similarly, the making of such Orders is also a condition precedent to the DIP Financing Facility and the Stalking Horse Purchase Agreement.¹⁶

19. The Transaction Support Agreement provides important certainty in this CCAA Proceeding to stakeholders, the Stalking Horse Purchaser, and other potential purchasers. The Consenting Stakeholders' support of the path forward is important to each of the other heads of relief sought in this Motion. The forms of Orders sought on this Motion are the forms approved by the Consenting Lenders and their approval is a condition of such continued support.¹⁷

D. EMPLOYEE RETENTION PLANS

20. The Applicant, with the assistance of the Restructuring Advisor and in consultation with the Monitor, has developed the Employee Retention Plans with two key components, each designed to ensure that employees remain with the company during this CCAA Proceeding:

¹⁵ Second Stewart Affidavit at para. 17.

¹⁶ Second Stewart Affidavit at para. 18.

¹⁷ Second Stewart Affidavit at paras. 18-20.

- (a) Retention Plan: This plan replaces a pre-filing program with a retention-based program to prevent attrition. The previous targets were not realistic given the CCAA Proceeding. The plan has been amended to provide for monthly installment payments. Upon closing a transaction for the sale of the AIR MILES® business, the payment for the then current month becomes payable. No further amounts will be payable following closing. Approximately 500 of the Applicant's employees are eligible for this plan and the total estimated cost is \$720,000 per month; and
- (b) Key Employee Retention Plan (the "KERP"): This plan provides a retention program for 20 key executives and employees who have been identified by the Applicant as crucial to the conduct of the business during this CCAA Proceeding, the conduct of the SISP, and the closing of a transaction thereunder. It also provides retention bonuses for an additional five employees who are at risk of departure if their historic compensation is not replaced. The total cost of the KERP with respect to the 20 key executives and employees, exclusive of the five historic compensation payments, is \$3,101,247. The total cost of the five historic compensation payments is \$114,000.¹⁸

21. Stability and certainty for both internal and external stakeholders is key to the success of this CCAA Proceeding. As set out in the Initial Stewart Affidavit, the Applicant has a workforce of approximately 750 people. The Applicant believes that without the Employee Retention Plans, it will face significant attrition in its workforce. Because the Applicant has proposed a competitive sales process where the ultimate transaction and the purchaser's intentions with respect to employees is unknown at this time, the uncertainty for employees must be mitigated through a reasonable retention program. Therefore, the Applicant is seeking the approval of the Employee Retention Plans and the granting of the Employee Retention Plans Charge as set out in the

¹⁸ Initial Stewart Affidavit at paras. 175-176; First Report of the Monitor at 7.2.

proposed ARIO. The Employee Retention Plans and the Employee Retention Plans Charge are supported by the DIP Lender, the Consenting Stakeholders, and the Monitor.¹⁹

E. THE CHARGES

22. The ARIO also provides for increases in the amount of the Administration Charge (to \$3 million) and the Directors' Charge (to \$15.409 million).²⁰ These increases reflect the increased potential exposure to the beneficiaries of those charges from that quantified for the first 10 days of this CCAA Proceeding.

23. The Applicant seeks approval of its retention of PJT Partners LP as Financial Advisor to assist in developing and conducting the SISP. In addition to all of the work the Financial Advisor has done to date to assist with the development of the Stalking Horse Bid, it is anticipated that the Financial Advisor will spend significant time canvassing the market to try to identify higher and better bids in the SISP. As part of the proposed ARIO, the Applicant seeks the approval of the related "Financial Advisor Charge" in the amount of US\$6 million to secure amounts payable to the Financial Advisor as the Transaction Fee.²¹ The Financial Advisor Charge only secures the Transaction Fee payable to the Financial Advisor in circumstances of a successful completion and closing of a restructuring or sale transaction.

F. STALKING HORSE PURCHASE AGREEMENT

24. Under the terms of the Stalking Horse Purchase Agreement, BMO as Stalking Horse Purchaser has agreed to purchase substantially all of the operating assets of the Applicant and to assume certain liabilities, conditional on, among other things, approval of this Court. The

¹⁹ Initial Stewart Affidavit at paras. 52, 175, 177; First Report of the Monitor at 7.3.3.

²⁰ Initial Stewart Affidavit at para. 181.

²¹ Initial Stewart Affidavit at para. 181 and Exhibit "R".

Stalking Horse Purchase Agreement sets a cash purchase price of US\$160 million, subject to certain adjustments, plus the assumption of certain operating liabilities.²²

25. The Stalking Horse Purchase Agreement is the product of intense negotiations among the Stalking Horse Purchaser, the Applicant, and their respective advisors and is supported by the Consenting Stakeholders pursuant to the terms of the Transaction Support Agreement.²³

26. Approval of the Stalking Horse Purchase Agreement for use solely as a “stalking horse bid” in the SISP provides significant benefits to the Applicant and its employees, creditors, and Collectors, including: (i) creating consumer confidence and ensuring a going-concern outcome for the AIR MILES[®] Reward Program; and (ii) establishing a baseline purchase price in order to stimulate competitive bidding for the AIR MILES[®] Reward Program under the proposed SISP.²⁴

27. The Stalking Horse Purchase Agreement provides that if the Stalking Horse Bid is not the Successful Bid, BMO will be entitled to payment of: (i) an expense reimbursement up to the maximum amount of US\$1 million (unless such expenses are otherwise reimbursed pursuant to the terms of the DIP Term Sheet); and (ii) a break fee equal to US\$3 million (together, the “**Bid Protections**”). The Bid Protections are payable to BMO upon the closing of, and from the proceeds received from, an alternative Successful Bid.²⁵

28. The maximum amount payable to BMO under the Bid Protections, in aggregate, is US\$4 million (2.5% of the Purchase Price excluding the Assumed Liabilities). Both the Financial Advisor and the Monitor have reviewed the Bid Protections and advised that they are in line with market terms (as noted in the First Report, on the low end of the market), consistent with market practice, and reasonable given the circumstances.²⁶

²² Initial Stewart Affidavit at paras. 12, 141.

²³ Initial Stewart Affidavit at para. 141; Second Stewart Affidavit at para. 16.

²⁴ Initial Stewart Affidavit at para. 137.

²⁵ Initial Stewart Affidavit at para. 142.

²⁶ Initial Stewart Affidavit at para. 143; First Report of the Monitor at 4.6.4 and 4.8.

29. It is a condition of the Stalking Horse Purchase Agreement that the Bid Protections be secured by the Bid Protections Charge, with priority over all other security interests, but ranking subordinate to all other charges pursuant to the ARIO and the Reserve Security.²⁷

G. THE SISP

30. The proposed SISP provides the Applicant with an opportunity to test the market through a Court-approved process of sufficient duration to provide a reasonable and robust market test.²⁸ The proposed SISP sets out a minimum solicitation period of 35 days to permit the Applicant, with the assistance of the Financial Advisor and the oversight of the Monitor, to solicit interested parties to submit a binding offer meeting the requirements enumerated in the SISP and provides for the Applicant to proceed with an auction process, if necessary.²⁹

31. A summary of the key milestones under the proposed SISP are as follows:³⁰

<u>Milestone</u>	<u>Date</u>
SISP Approval Order	March 20, 2023
Commence Solicitation	No later than March 23, 2023
Qualified Bid Deadline	April 27, 2023 (5:00 pm ET)
Auction (if necessary)	May 4, 2023
Approval and Vesting Order (if no Auction)	May 15, 2023, subject to court availability
Approval and Vesting Order (if Auction)	May 18, 2023, subject to court availability
Closing of Successful Bid	June 30, 2023, subject to extension

32. Typical of a SISP of this nature, interested parties must enter into a non-disclosure agreement and agree to the additional measures that are required by the Applicant to protect competitively sensitive information in form and substance satisfactory to the Applicant and submit a binding offer meeting the requirements enumerated in the SISP, as determined by the Applicant, in consultation with the Monitor and the Financial Advisor. If one or more Qualified Bids (other

²⁷ Initial Stewart Affidavit at para. 144 and Exhibit "O", s. 9.2.

²⁸ Initial Stewart Affidavit at paras. 148, 160-161.

²⁹ Initial Stewart Affidavit at paras. 149, 150, 158.

³⁰ Initial Stewart Affidavit at para. 158.

than the Stalking Horse Bid) has been received by the Applicant on or before the Qualified Bid Deadline, the Applicant will proceed with the Auction as proposed in the SISP.³¹

33. The SISP authorizes the Applicant to provide general updates and information in respect of the SISP to counsel to any creditor on a confidential basis if such counsel: (i) confirms in writing that the creditor will not bid in the SISP; and (ii) executes a confidentiality agreement with the Applicant. Consenting Stakeholders and their advisors are also provided certain information and consultation rights throughout the proposed SISP.³²

34. The SISP was developed in consultation with and is supported by the Financial Advisor, the DIP Lender, the Stalking Horse Purchaser, the Monitor, and the Consenting Stakeholders.³³

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

35. The principal issues on this Motion are whether this Court should grant the requested Orders, including the relief set out in paragraphs 3 and 4 above.

A. DIP FINANCING

36. The proposed DIP Financing Facility is necessary to ensure that the Applicant has sufficient liquidity throughout this CCAA Proceeding.

37. This Court's jurisdiction to approve interim financing and related priority charges is codified in 11.2 of the CCAA. The guiding consideration in granting such relief is what will best serve the interests of all of the debtor company's stakeholders.³⁴ Courts must also consider the factors in ss. 11.2(4) of the CCAA. Here, each factor weighs in favour of approval:

³¹ Initial Stewart Affidavit at para. 154.

³² Initial Stewart Affidavit at para. 157; Second Stewart Affidavit at Exhibit "C" (Exhibit D, SISP).

³³ Second Stewart Affidavit at para. 19. First Report of the Monitor at 4.1.3 and 4.8.1.

³⁴ *Great Basin Gold Ltd., Re*, [2012 BCSC 1459](#) at para. 15.

- (a) The period during which the company is expected to be subject to CCAA proceedings. The proposed DIP Financing Facility provides financing sufficient to support the Applicant throughout the proposed SISP.³⁵
- (b) How the company's business and financial affairs are managed during the proceedings. The Applicant's management is actively engaged and is advised by advisors with substantial experience in restructuring and CCAA proceedings. The proposed cash flow reflects expenditures necessary to operate the AIR MILES® business as a going concern during the proposed SISP.
- (c) Whether the company's management has the confidence of its major creditors. The relief sought by the Applicant has the consent of, not only BMO as its most significant Partner, but also the Consenting Stakeholders and the Monitor.
- (d) Whether the loan would enhance the prospects of a viable compromise or arrangement being made. The Applicant lacks the liquidity to continue operating the AIR MILES® business without access to the DIP Financing Facility. That facility will permit the Applicant to pursue a going concern solution, through the proposed SISP, for the benefit of its stakeholders.³⁶
- (e) The nature and value of the company's property. The value of the Applicant's business depends upon the continued confidence of Collectors and Partners in the AIR MILES® Reward Program.³⁷ The DIP Financing Facility provides the

³⁵ Pre-Filing Report at Appendix B.

³⁶ Initial Stewart Affidavit at paras. 94, 99.

³⁷ Initial Stewart Affidavit at para. 113.

necessary liquidity to the Applicant to allow the AIR MILES[®] Reward Program to continue uninterrupted operations, thereby preserving value for stakeholders.³⁸

- (f) Whether any creditor would be materially prejudiced as a result of the security or charge. The proposed DIP Lender's Charge would rank behind the Reserve Trustee's security over the Reserve Account. As such, Collectors will not be prejudiced by the DIP Lender's Charge. Further, subject to the approval of the Transaction Support Agreement, the Consenting Stakeholders, who are the only other significant secured creditors of the Applicant, support the DIP Financing Facility. Therefore, the affected secured creditors have independently made the determination in accordance with the relevant agreements to support the DIP Financing Facility, removing the uncertainty that often exists with respect to material prejudice on impacted creditors.
- (g) The monitor's report in respect of the reasonableness of the company's cash flow statement.³⁹ The Monitor has provided its view that the Applicant's cash flow statement is reasonable as required by the CCAA, and that it is supportive of the proposed DIP Financing Facility.⁴⁰

38. The proposed DIP Financing Facility includes among the permitted uses, the making of a senior secured loan to LVI. Approval of the Intercompany DIP Loan, as part of the approval of the DIP Financing Facility, is appropriate because, among other things: (i) it will permit the Applicant to access the Intercompany Services provided by LVI, which are necessary for the operation of the business;⁴¹ and (ii) it will provide LVI with the liquidity necessary to pursue the U.S. Proceedings. The U.S. Proceedings are expected to provide a further avenue of recovery for the

³⁸ Pre-Filing Report at Appendix B; Initial Stewart Affidavit at para. 99.

³⁹ [CCAA, s. 11.2\(1\) & \(4\)](#).

⁴⁰ First Report of the Monitor at 3.3.1.

⁴¹ Initial Stewart Affidavit at para. 169.

Consenting Stakeholders (as secured creditors of LVI) through the creation of a liquidating trust, which is expected to pursue claims against Bread and other parties.⁴²

39. The Intercompany DIP Loan will allow the Applicant to continue to operate the AIR MILES® business and pursue its sale as a going-concern, consistent with the CCAA's objectives.⁴³ Subject to the granting of an order in the U.S. Proceedings, the Intercompany DIP Loan will be secured by a charge in the U.S. Proceedings over LVI's current and future assets.⁴⁴ This relief is supported by the Monitor, the DIP Lender, and the Consenting Stakeholders.

B. TRANSACTION SUPPORT AGREEMENT

40. This Court has frequently exercised its discretion under s. 11 of the CCAA to approve restructuring support agreements among debtor companies and their creditors to facilitate a going-concern solution.⁴⁵ For example, in *Just Energy Group Inc. et al.*, this Court approved an agreement among the debtor companies and, among others, their secured lenders. Under that agreement, the lenders agreed to support a going concern solution in a sales process, including by supporting a stalking horse transaction.⁴⁶

41. In *Canwest Publishing Inc.*, this Court approved a support agreement that contemplated, among other things, a solicitation process to test the market and attempt to effect a going concern sale. Some elements considered in the Court's decision were the support of the Monitor, the fact the terms of the agreement were the subject of lengthy and intense arm's length negotiations, and with the support agreement, there was an enhanced likelihood of the continuation of going

⁴² Initial Stewart Affidavit at paras. 167-168.

⁴³ *Century Services Inc. v. Canada (Attorney General)*, [2010 SCC 60](#) at paras. [15](#), [59](#); *9354-9186 Quebec inc. v. Callidus Capital Corp.*, [2020 SCC 10](#) at paras. [42-46](#).

⁴⁴ Initial Stewart Affidavit at para. 167.

⁴⁵ See, for example, *U.S. Steel Canada Inc., Re*, [2016 ONSC 7899](#) at paras. [39-41](#) (citing *Stelco Inc., Re* (2005), 78 O.R. (3d) 254, 2005 CarswellOnt 6283 at paras. 18-19 (CA)).

⁴⁶ *Just Energy Group Inc. et al.* (August 18, 2022), ONSC (Commercial List), Court File No. CV-21-00658423-00CL ([Endorsement](#)); *Just Energy Group Inc., et al (Re)*, (August 18, 2022), ONSC (Commercial List), Court File No. CV-21-00658423-00CL ([SISP Approval Order](#)).

concern operations, the preservation of jobs, and the maximization of value for stakeholders.⁴⁷ Similar considerations apply here.⁴⁸

42. The Transaction Support Agreement does not purport to undermine or otherwise restrict creditors' (or the Applicant's) discretion to solicit and consider offers in the SISP that might provide a better recovery for stakeholders. Rather, the SISP allows the Applicant to solicit additional offers that may result in higher recoveries. The Consenting Stakeholders have agreed to support any transaction resulting from the SISP.⁴⁹

43. The Consenting Stakeholders' support of the relief requested at the Comeback Hearing is conditioned upon Court approval of the Transaction Support Agreement. The Consenting Stakeholders' support is a critical component of the Applicant's proposed path forward to ensure the AIR MILES[®] business continues as a going concern. Similar to the support agreements approved in *Just Energy*, *U.S. Steel*, *Stelco*, and *Canwest* the Transaction Support Agreement provides stability and certainty for the Applicant's stakeholders, and potential bidders.

44. Given the stability and certainty ensured by the Transaction Support Agreement, and the enhanced likelihood of the continuation of the Applicant's going concern operations, the preservation of jobs and the maximization of value for stakeholders to result therefrom, the Monitor is supportive of the Transaction Support Agreement's approval.⁵⁰

⁴⁷ *Canwest Publishing Inc.*, [2010 ONSC 222](#) at paras. [27-29](#) [*Canwest*].

⁴⁸ Second Stewart Affidavit at paras. 14, 20; First Report of the Monitor at 5.0.3.

⁴⁹ Second Stewart Affidavit at paras. 17, 18.

⁵⁰ First Report of the Monitor at 5.0.3.

C. EMPLOYEE RETENTION PLANS

45. This Court has approved employee retention plans and charges in a number of proceedings.⁵¹ Factors generally considered by the Court include the following:⁵²

- (a) The approval of the Monitor. The Employee Retention Plans were developed by the Applicant and the Restructuring Advisor, in consultation with the Monitor.⁵³ The Monitor, the DIP Lender, and the Consenting Stakeholders support the approval of the Employee Retention Plans and Employee Retention Plan Charge.
- (b) Whether the beneficiaries of the plan are likely to consider other employment opportunities if the charge is not approved. The Applicant's employees have faced and will continue to face increased hardship and uncertainty during this CCAA Proceeding. Given that a portion of the employees' historical compensation would not be available without the Employee Retention Plans, the Applicant believes it will face significant attrition without the Employee Retention Plans.⁵⁴
- (c) Whether the beneficiaries of the plan are crucial to the successful restructuring of the debtor company. The Applicant requires the continued services of its employees to avoid any disruptions to the AIR MILES® Rewards Program that could affect Collector and Partner confidence. The proposed beneficiaries of the more targeted KERP are employees with significant experience and specialized expertise. They are essential to the success of this CCAA Proceeding.⁵⁵ More generally, the Applicant's employees are essential to continuing the AIR MILES®

⁵¹ *Ontario Securities Commission v. Bridging Finance Inc.*, [2021 ONSC 4347](#) at paras. [13](#), [17](#). See also *Just Energy Group Inc. et al.*, [2021 ONSC 7630](#) at paras. [7-25](#) [*Just Energy KERP*]; *Target Canada Co., Re*, [2015 ONSC 303](#) at para. [59](#) [*Target*] (emphasizing the need for stability in a sale and including a charge for 520 store level management employees).

⁵² *Aralez Pharmaceuticals Inc. (Re)*, [2018 ONSC 6980 \(CanLII\)](#), at para [29](#) [*Aralez*]; *Just Energy KERP* at paras. [8-16](#).

⁵³ Initial Stewart Affidavit at para. 175; First Report of the Monitor at 7.0.2.

⁵⁴ Initial Stewart Affidavit at paras. 175-177.

⁵⁵ Second Stewart Affidavit at para. 11; First Report of the Monitor at 7.2.1 and 7.3.3.

business as a going concern and to a successful SISP. The need for stability in the Applicant's business cannot be overstated.⁵⁶

- (d) Whether a replacement could be found in a timely manner should the beneficiary elect to terminate his or her employment with the debtor company. The AIR MILES[®] business is complex and onboarding new employees would be a time-consuming and costly process, introducing incremental unbudgeted costs and potential prejudice to this CCAA Proceeding. Moreover, given the proposed cadence of this CCAA Proceeding and the proposed SISP, finding employees with comparable skills and knowledge would be very difficult.
- (e) The business judgment of the board of directors of the debtor company. The Applicant's board has exercised its business judgment and has consulted with both the Restructuring Advisor and the Monitor in formulating the Employee Retention Plans. In its view, the Employee Retention Plans are necessary to facilitate and encourage the continued participation of employees to guide the business through this CCAA Proceeding to preserve value for stakeholders.

D. STAY EXTENSION

46. On an application other than an initial application, ss. 11.02(2) of the CCAA gives this Court discretion to grant a stay of proceedings for any period that it considers necessary, provided it is satisfied that such an extension is appropriate and that the debtor company has acted and continues to act in good faith and with due diligence.⁵⁷

47. The requested Stay Extension is appropriate and necessary to, among other things, enable the Applicant to: (i) continue to operate and stabilize the AIR MILES[®] business; and (ii) if approved, implement the SISP. During the Initial Stay Period, the Applicant acted and continues

⁵⁶ *Aralez* at para. 29; *Target* at para. 59.

⁵⁷ CCAA, s. 11.02(2), (3).

to act in good faith and with due diligence and is working to advance this CCAA Proceeding. The Stay Extension coincides with the date by which the Applicant intends to return to Court to seek an Approval and Vesting Order.⁵⁸

48. Sections 11 and 11.02 of the CCAA allow this Court to stay rights held by creditors if the exercise of those rights could jeopardize the restructuring process, including creditors' rights to effect pre-filing versus post-filing compensation (set-off).⁵⁹ As the Supreme Court of Canada held in *Montréal (City) v. Deloitte Restructuring Inc.*, the circumstances in which courts will allow pre-filing versus post-filing set-off are "rare".⁶⁰ Completion of the SISP without disruption of the AIR MILES[®] business is the Applicant's priority at this time. Any attempt to exercise set-off in this manner risks both distracting the Applicant and interfering with the SISP. The requested order staying pre-filing/post filing set-off, subject to further Order of the Court is therefore appropriate.

E. ADMINISTRATION CHARGE

49. The CCAA authorizes this Court to grant a priority charge over a debtor company's assets for professional fees and disbursements on notice to affected secured creditors.⁶¹ The factors to be considered are well established in the case law.⁶²

50. The increase of the Administration Charge to \$3 million is fair and reasonable given the number of beneficiaries, the size and complexity of the Applicant's business, and the complexity of this CCAA Proceeding. The amount of this increase has been determined with guidance from the Monitor and is supported by the Monitor, the DIP Lender, and the Consenting Stakeholders.⁶³

⁵⁸ Second Stewart Affidavit at paras. 7-11; Initial Stewart Affidavit at para. 158.

⁵⁹ *Montreal (City) v. Deloitte Restructuring Inc.*, [2021 SCC 53](#) at para. [62](#) [*Montreal (City)*]. See also *Carillion Canada Inc.*, [2022 ONSC 4617](#) at paras. [29](#), [70](#).

⁶⁰ *Montreal (City)* at para. [58](#).

⁶¹ [CCAA, s. 11.52](#).

⁶² Courts have considered: (i) the size and complexity of the business being restructured; (ii) the proposed role of the beneficiaries of the charge; (iii) whether there is an unwarranted duplication of roles; (iv) whether the quantum of the proposed charge appears to be fair and reasonable; (v) the position of the secured creditors likely to be affected by the charge; and (vi) the position of the Monitor: *Canwest* at para. [54](#).

⁶³ Initial Stewart Affidavit at para. 182; Second Stewart Affidavit at para. 16.

F. DIRECTORS' CHARGE

51. In deciding whether to grant or increase a directors' charge, this Court must be satisfied that: (i) notice has been given to the likely affected secured creditors; (ii) the amount is appropriate; (iii) the Applicant could not obtain adequate indemnification insurance for the Directors and Officers at a reasonable cost; and (iv) the charge does not apply to obligations incurred by a director or officer as a result of their gross negligence or wilful misconduct.⁶⁴

52. Notice has been given to the Applicant's secured creditors. In addition, while insurance remains in place, the complexity of the overall enterprise and the exclusions and conditions of the insurance, create risk that such insurance may not provide sufficient coverage.⁶⁵ The proposed increase from \$10.521 million to \$15.409 million has been determined with guidance from the Restructuring Advisor, in consultation with the Monitor, to reflect these potential liabilities.⁶⁶ The D&O Indemnity secured by the Directors' Charge does not apply to any obligations incurred as a result of gross negligence or wilful misconduct. The increase is supported by the Monitor, the DIP Lender, and the Consenting Stakeholders.⁶⁷

G. FINANCIAL ADVISOR ENGAGEMENT AND FINANCIAL ADVISOR CHARGE

53. This Court has also previously exercised its discretion under s. 11 of the CCAA to approve agreements engaging financial advisors in complex CCAA proceedings, particularly where the assets to be sold are complicated.⁶⁸ The CCAA authorizes this Court to grant a priority charge

⁶⁴ *Jaguar Mining Inc., Re*, [2014 ONSC 494](#) at para. 45.

⁶⁵ Initial Stewart Affidavit at paras. 126-131

⁶⁶ First Report of the Monitor at 9.3.2 and 9.3.3.

⁶⁷ Initial Stewart Affidavit at paras. 181-182.

⁶⁸ *Just Energy Corp., Re*, [2021 ONSC 1793](#) at paras. 113, 126 [*Just Energy Initial Order*]. This charge was subsequently increased to \$8.6 million: *Just Energy Group Inc., et al (Re)*, (March 19, 2021), ONSC (Commercial List), Court File No. CV-21-00658423-00CL ([ARIO](#)) at para. 52 [*Just Energy ARIO*]; *Sanjel Corporation (Re)*, (April 4, 2016), ABQB, Court File No. 1601-03143 ([Initial Order](#)) at para. 6 (in which the Alberta Court of Queen's Bench (as it then was) granted charges to financial advisors in the maximum aggregate amounts of US\$6.1 million and US\$500,000).

over a debtor company's assets to secure such fees and expenses.⁶⁹ The factors to be considered are the same as those considered when granting an administration charge.⁷⁰

54. The Financial Advisor's Charge is fair and reasonable given the size and complexity of the Applicant's business and the complexity of the restructuring proposed in this CCAA Proceeding. The Financial Advisor will leverage its expertise to assist the Applicant in marketing the unique and complex AIR MILES® business.⁷¹ The Financial Advisor's Charge is supported by the Monitor, the DIP Lender, and the Consenting Stakeholders and is consistent with similar charges this Court has recently approved in similar circumstances.

H. APPROVAL OF THE STALKING HORSE AGREEMENT

55. It is well accepted that a stalking horse transaction is a beneficial mechanism to support a SISF and provide certainty to the Applicant and its stakeholders.⁷² The value of the Stalking Horse Purchase Agreement is already apparent. Both internal and external stakeholders have reacted positively to the news that a well-known Canadian financial institution has expressed an interest in acquiring the Applicant's business.⁷³

56. Similarly, the Applicant's request for the Bid Protections Charge is well grounded in the authorities. As this Court recently noted, "...fees, in addition to compensating Stalking Horse purchasers for the time, resources and risk taken in developing the agreement, also represent

⁶⁹ [CCAA, s. 11.52](#).

⁷⁰ Courts have considered, in the context of a Financial Advisor charge: (i) the size and complexity of the business being restructured; (ii) the proposed role of the beneficiaries of the charge; (iii) whether there is an unwarranted duplication of roles; (iv) whether the quantum of the proposed charge appears to be fair and reasonable; (v) the position of the secured creditors likely to be affected by the charge; and (vi) the position of the Monitor; and (vii) the incentives created by the charge: *Canwest* at paras. [54-55](#).

⁷¹ For example, see Initial Stewart Affidavit at para. 161.

⁷² *PCAS Patient Care Automation Services Inc.*, [2012 ONSC 2840](#) at paras. [17-20](#), citing *CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.*, [2012 ONSC 1750](#) at paras. [6-8](#), [17](#) [*CCM Master*]; *Just Energy Group Inc. et al. (Re)*, (August 18, 2022), ONSC (Commercial List), Court File No. CV-21-00658423-00CL ([Endorsement](#)).

⁷³ Second Stewart Affidavit at para. 8.

the price of stability.”⁷⁴ The evidence in this matter is clear – Collector confidence, stability, and certainty are key to the protection of the Applicant’s business.

57. The quantum of the Bid Protections under the Stalking Horse Purchase Agreement (2.5% of the purchase price)⁷⁵ is well within the reasonable range accepted by the courts. In *CCM Master*, for example, this Court held that reasonable ranges are between 1.8% and 5% of the value of the bid.⁷⁶ Similarly, in *Re Danier Leather Inc.*, this Court held that break-fees in the range of 3% and expense reimbursements in the range of 2% were reasonable.⁷⁷ The Financial Advisor and the Monitor have both confirmed that the proposed Bid Protections are reasonable in the circumstances.⁷⁸

58. The Stalking Horse Purchase Agreement requires that the Bid Protections be secured by a charge on the Applicant’s Property in favour of the Stalking Horse Purchaser.⁷⁹ Similar charges have been approved in a number of cases, including recent decisions.⁸⁰

59. In light of the benefits provided to the Applicant and its stakeholders, the Stalking Horse Purchase Agreement should be approved solely for use in respect of the SISP, including the requested Bid Protections Charge. The Applicant will return to Court to seek approval of any Successful Bid resulting from the SISP (if approved) and does not seek any relief approving the sale and vesting of any of the Property as part of the Stalking Horse Purchase Agreement approval at this time.

⁷⁴ *Green Growth Brands (Re)*, [2020 ONSC 3565](#) at para. [52](#) [*Green Growth*]; *Danier Leather Inc., Re*, [2016 ONSC 1044](#) at para. [46](#); *Just Energy Group Inc. et al. (Re)*, (August 18, 2022), ONSC (Commercial List), Court File No. CV-21-00658423-00CL ([Endorsement](#)).

⁷⁵ Initial Stewart Affidavit at para. 143.

⁷⁶ *CCM Master* at para. [13](#).

⁷⁷ See also *Danier* at para. [42](#).

⁷⁸ Initial Stewart Affidavit at para. 143; First Report of the Monitor at 4.6.4 and 4.8.1.

⁷⁹ Initial Stewart Affidavit at Exhibit “P”, s. 13.

⁸⁰ See, for example, *Just Energy SISP* at para. [10](#); *Quest University Canada (Re)*, [2020 BCSC 1845](#) at paras. [56](#), [57](#), [63](#).

I. SISP

60. It is well recognized that this Court has jurisdiction to approve a sale process in relation to a debtor company's business and assets "to establish the boundaries of the playing field and act as a referee in the process", prior to the development (or even in the absence) of a plan of compromise or arrangement.⁸¹ Such court approval adds additional certainty that the process will be honoured, absent exceptional circumstances.⁸² This Court has recently approved single phase sale and investment solicitation processes of a similar nature and duration.⁸³ In approving a sales process, this Court has considered, among other things, the following factors:⁸⁴

- (a) Is a sale warranted at this time? A sale resulting in a continuation of the AIR MILES® business as a going concern represents the best available outcome for stakeholders. There is no other realistic option available to the Applicant to continue to operate as a going concern given its liquidity challenges.
- (b) Will the sale be of benefit to the whole "economic community"? The SISP will benefit the economic community as a whole, as it is designed to solicit the highest and best bid and to continue the AIR MILES® Reward Program as a going concern to the benefit of the Applicant's stakeholders including Collectors, Partners, Reward Suppliers, employees, and other vendors.

⁸¹ *Stelco Inc., Re* (2005), 75 O.R. (3d) 5, 2005 CarswellOnt 1188 (SC [Commercial List]) at para. 44. See also, *Nortel Networks Corp. (Re)* (2009), 55 C.B.R. (5th) 229, [2009 CanLII 39492](#) (SC [Commercial List]) at para. 48 [*Nortel*].

⁸² Once a sale process has been approved by the Court, it has an interest in maintaining the integrity of that process: see, for example, *Brainhunter Inc., Re*, [2010 ONSC 1035](#) at para. 47.

⁸³ *Acerus Pharmaceuticals Corporation, et al.*, (March 9, 2023), ONSC (Commercial List), Court File No. CV-23-00693595-00CL (SISP Approval and Extension to Stay of Proceedings) at paras. 3-7; *Flowr Corporation, et al.*, (October 28, 2022), ONSC (Commercial List), Court File No. CV-22-00688966-00CL (SISP Order).

⁸⁴ *Nortel* at para. 49. Although *Nortel* was decided prior to the 2009 amendments to the CCAA, which incorporated provisions on asset sales including section 36, the factors set out in *Nortel* continue to apply: *Brainhunter Inc. (Re)* (2009), 62 C.B.R. (5th) 41, [2009 CanLII 72333](#) (ONSC) at paras. 13-19 [*Brainhunter*]; *Green Growth* at para. 61.

- (c) Do any of the debtors' creditors have a bona fide reason to object to a sale? The SISP is designed to solicit the highest and best bid for the benefit of, among others, the Applicant's creditors. It is expected that all distributable proceeds from a transaction under the SISP will, after satisfaction of priority amounts, flow to the benefit of the Credit Agreement Lenders given the significant secured obligations owing to them and the likelihood that they will suffer a significant shortfall.⁸⁵ Notably, the SISP has the support of the Consenting Stakeholders.
- (d) Is there a better viable alternative? The SISP is the only viable avenue to continue the AIR MILES[®] business as a going concern. It must be undertaken expeditiously to prevent any further uncertainty from potentially eroding the value of the AIR MILES[®] business.

61. In addition, this Court is entitled to consider whether the proposed SISP is likely to satisfy the requirements of s. 36 of the CCAA, even though a sale is not yet proposed, including:⁸⁶

- (a) That the process is fair and that the best price will be obtained. The SISP is fair, transparent, and objective. In particular, it is designed to facilitate a process to market the AIR MILES[®] business to obtain the best possible price and achieve a going concern solution for the benefit of all stakeholders, without unduly prolonging the process. The Applicant, with the advice of the Financial Advisor, is of the view that the SISP will adequately canvass the market to maximize value for stakeholders in the circumstances.⁸⁷
- (b) Whether the Monitor supports the SISP and the Stalking Horse Bid. The Monitor has expressed support for the SISP.⁸⁸

⁸⁵ Initial Stewart Affidavit at para. 12.

⁸⁶ *Brainhunter* at paras. 15-19; CCAA, s. 36(3).

⁸⁷ Initial Stewart Affidavit at para. 161.

⁸⁸ First Report of the Monitor at 4.8.1.

- (c) The extent to which creditors were consulted. The Consenting Stakeholders (who are the fulcrum creditors) were consulted during the development of the SISP. The proposed SISP also provides that the Applicant will continue to consult with advisors to the Consenting Stakeholders, among others, throughout the SISP.⁸⁹

62. The Applicant submits that the totality of the factors considered in connection with a SISP weigh in favour of approving the proposed SISP and authorizing the Applicant, the Financial Advisor, and the Monitor to undertake their obligations thereunder.

PART IV - ORDER REQUESTED

63. For all of the reasons above, the Applicant requests that this Court grant the requested ARIO and SISP Approval Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of March, 2023.



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⁸⁹ Initial Stewart Affidavit at para. 148, 157.

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Acerus Pharmaceuticals Corporation, et al.*, (March 9, 2023), ONSC (Commercial List), Court File No. CV-23-00693595-00CL (SISP Approval and Extension to Stay of Proceedings)
2. *Aralez Pharmaceuticals Inc. (Re)*, [2018 ONSC 6980 \(CanLII\)](#)
3. *9354-9186 Quebec inc. v. Callidus Capital Corp.*, [2020 SCC 10](#)
4. *Brainhunter Inc. (Re)* (2009), 62 C.B.R. (5th) 41, [2009 CanLII 72333](#) (ONSC)
5. *Brainhunter Inc. (Re)*, [2010 ONSC 1035](#)
6. *Canwest Publishing Inc.*, [2010 ONSC 222](#)
7. *Carillion Canada Inc.*, [2022 ONSC 4617](#)
8. *CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.*, [2012 ONSC 1750](#)
9. *Century Services Inc. v. Canada (Attorney General)*, [2010 SCC 60](#)
10. *Danier Leather Inc., Re*, [2016 ONSC 1044](#)
11. *Flowr Corporation, et al.*, (October 28, 2022), ONSC (Commercial List), Court File No. CV-22-00688966-00CL (SISP Order)
12. *Great Basin Gold Ltd., Re*, [2012 BCSC 1459](#)
13. *Green Growth Brands (Re)*, [2020 ONSC 3565](#)
14. *Jaguar Mining Inc., Re*, [2014 ONSC 494](#)
15. *Just Energy Corp., Re*, [2021 ONSC 1793](#)
16. *Just Energy Group Inc. et al.*, [2021 ONSC 7630](#)
17. *Just Energy Group Inc., et al (Re)*, (March 19, 2021), ONSC (Commercial List), Court File No. CV-21-00658423-00CL ([ARIO](#))
18. *Just Energy Group Inc. et al. (Re)*, (August 18, 2022), ONSC (Commercial List), Court File No. CV-21-00658423-00CL ([Endorsement](#))
19. *Just Energy Group Inc., et al (Re)*, (August 18, 2022), ONSC (Commercial List), Court File No. CV-21-00658423-00CL ([SISP Approval Order](#))
20. *Montreal (City) v. Deloitte Restructuring Inc.*, [2021 SCC 53](#)
21. *Nortel Networks Corp. (Re)* (2009), 55 C.B.R. (5th) 229, [2009 CanLII 39492](#) (SC [Commercial List])
22. *Ontario Securities Commission v. Bridging Finance Inc.*, [2021 ONSC 4347](#)
23. *PCAS Patient Care Automation Services Inc.*, [2012 ONSC 2840](#)

24. *Quest University Canada (Re)*, [2020 BCSC 1845](#)
25. *Sanjel Corporation (Re)*, (April 4, 2016), ABQB, Court File No. 1601-03143 ([Initial Order](#))
26. *Stelco Inc., Re* (2005), 75 O.R. (3d) 5, 2005 CarswellOnt 1188 (SC [Commercial List])
27. *Stelco Inc., Re* (2005), 78 O.R. (3d) 254, 2005 CarswellOnt 6283 (CA)
28. *Target Canada Co., Re*, [2015 ONSC 303](#)
29. *U.S. Steel Canada Inc., Re*, [2016 ONSC 7899](#)

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY - LAWS

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

General Power of Court

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

Stays, etc. — initial application

...

Stays, etc. — other than initial application

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

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

Burden of proof on application

(3) The court shall not make the order unless

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

...

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.

...

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.

...

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.

Restriction on disposition of business assets

...

Factors to be considered

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

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF LOYALTYONE, CO.

Court File No. CV-23-00696017-00CL

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

PROCEEDING COMMENCED AT
TORONTO

**FACTUM OF THE APPLICANT
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