

**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 957855 ALBERTA LTD. (FORMERLY
NEWSWEST INC.) AND ROSEBUD CREEK FINANCIAL
CORP. IN RESPECT OF METRO 360 GENERAL
PARTNERSHIP**

Applicants

FACTUM OF THE APPLICANTS

Motion for Sanction Order
Returnable January 14, 2022

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PART I - INTRODUCTION

1. This factum is filed by 957855 Alberta Ltd. (formerly NewsWest Inc.) (“**Alberta HoldCo**”) and Rosebud Creek Financial Corp. (“**Rosebud HoldCo**” and, together with Alberta HoldCo, the “**Partners**”), as the partners of Metro 360 General Partnership (“**Metro 360**” and, together with the Partners, the “**CCAA Entities**”), in support of a motion by the CCAA Entities for an Order (the “**Sanction Order**”), among other things, (a) sanctioning the CCAA Entities’ Plan of Compromise and Arrangement dated December 16, 2021 (as amended, and as it may be further amended, modified, varied and/or supplemented in accordance with its terms, the “**Plan**”) pursuant to the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “**CCAA**”), (b) granting certain ancillary relief relating to the implementation of the Plan and these CCAA proceedings, and (c) terminating these CCAA proceedings and discharging KSV as Monitor of the CCAA Entities effective upon the filing of the Monitor’s Plan Completion Certificate (as defined below).¹

2. The Plan results from extensive efforts by the CCAA Entities, with assistance from the Monitor, to develop a restructuring plan that preserves the value of the CCAA Entities and their interests in the Subsidiaries, and provides creditors with the opportunity to be repaid in full over time. If implemented, the Plan will, among other things, provide for a significant initial cash distribution to Affected Creditors – an amount which, because Intercompany Claims would not participate in the initial distribution, is projected to be greater than what Affected Creditors would receive in a bankruptcy or liquidation scenario – and enable Affected Creditors to potentially

¹ Capitalized terms used but not defined herein have the meanings given to them in the Plan or in the Affidavit of Daniel P. Shapiro sworn January 7, 2022 (the “**Shapiro Affidavit**”). Unless otherwise stated, all monetary amounts contained herein are expressed in Canadian dollars.

receive the rest of their claims over time through the proceeds of the Promissory Note, all in exchange for the full and final settlement of their Affected Claims.

Shapiro Affidavit at para. 3; Motion Record returnable January 14, 2022 (the “**Motion Record**”), Tab 2, p. 20 [[CL p. A102;A20](#)].

3. At the meeting of Affected Creditors to vote on the Plan (the “**Creditors’ Meeting**”) held virtually on December 16, 2021 pursuant to the Meeting Order (as defined below), the Plan received unanimous support and was approved by every Affected Creditor present in person or by proxy. In addition, every Convenience Class Creditor was deemed to vote for the Plan as they will be paid 100% of their Proven Claims in cash on Plan implementation (or receive \$2,500 if such creditor elected to be treated as a Convenience Class Creditor).

Shapiro Affidavit at para. 4; Motion Record, Tab 2, p. 20 [[CL p. A102;A20](#)].

Eighth Report of the Monitor dated January 7, 2022 (the “**Monitor’s Eighth Report**”), at para. 5.4 [[CL p. E8;E8](#)].

4. The CCAA Entities believe that the Plan is fair, reasonable, and the best available result in the circumstances, as shown by the unanimous approval by Affected Creditors at the Creditors’ Meeting. The CCAA Entities respectfully submit that the requested relief pursuant to the proposed Sanction Order is in the best interests of the CCAA Entities and their respective stakeholders, and that it is appropriate for the Court to approve the Plan and grant the requested Sanction Order.

Shapiro Affidavit at para. 5; Motion Record, Tab 2, p. 21 [[CL p. A103;A21](#)].

PART II – FACTS

A. BACKGROUND

5. The Partners are holding companies that together hold 100% of the interests of Metro 360. Metro 360 operates a multi-faceted business that, before completing the TNG Transaction, was

focused mainly on the Literature Business. Metro 360's business is now focused on the distribution of consumer-packaged goods and the various businesses in which it and Rosebud HoldCo have an equity interest, including the Subsidiaries. A number of the Subsidiaries are early stage businesses with promising growth potential, and the CCAA Entities believe that preserving their interest in the Subsidiaries will maximize value for the benefit of the CCAA Entities and their respective stakeholders.

Shapiro Affidavit at para. 9; Motion Record, Tab 2, p. 22 [[CL p. A104;A22](#)].

6. On April 6, 2020, the Partners initiated the Proposal Proceedings under the *Bankruptcy and Insolvency Act* (Canada) in order to implement the sale of the Literature Business in the TNG Transaction as quickly as possible. The Literature Business was particularly impacted by the onset of the COVID-19 pandemic and was in urgent need of stabilization. Further details regarding the Literature Business and the events leading to the TNG Transaction are in the affidavits of Daniel P. Shapiro sworn on April 6, 2020 (the “**Initial Affidavit**”) and June 10, 2020. The TNG Transaction was approved by this Court and subsequently completed on April 8, 2020.

Shapiro Affidavit at para. 10 and Exhibits “B” and “C”; Motion Record, Tab 2, pp. 22, 91 and 122 [CL, pp. [A104;A22](#), [A173;A91](#) and [A204;A122](#)].

7. The Proposal Proceedings were continued under the CCAA pursuant to an Initial Order dated June 17, 2020, in order to provide the CCAA Entities with stability and the time and framework within which they could return Literature Business inventory for credit and advance a value-maximizing restructuring plan.

Shapiro Affidavit at para. 12; Motion Record, Tab 2, pp.22 [[CL p. A104;A22](#)].

8. On September 16, 2020, this Court granted a Claims Procedure Order approving the Claims Process for the identification, quantification and resolution of claims against the CCAA Entities, as well as their present and former officers and directors. From late 2020 through early 2021, the CCAA Entities, in consultation with the Monitor, substantially completed the Claims Process, subject to the resolution of certain potential claims advanced by the Canada Revenue Agency (the “**CRA**”) relating to the CCAA Entities’ potential tax liabilities, which the CCAA Entities disagreed with and objected to.

Shapiro Affidavit at paras. 13,14; Motion Record, Tab 2, p. 23 [[CL p. A105:A23](#)].

9. During that same period, the CCAA Entities, with the assistance of their counsel and the Monitor, developed the initial terms of a draft restructuring plan. However, because of the size and complexity of the potential CRA claims, a plan could not be filed until they were resolved.

Shapiro Affidavit at para. 14; Motion Record, Tab 2, p. 23 [[CL p. A105:A23](#)].

10. The CCAA Entities entered into the Claims Agreement with the CRA on October 21, 2021, which, among other things, determined the amount of the CRA’s claims against the CCAA Entities to be accepted in the Claims Process and addressed in a plan filed by the CCAA Entities in these proceedings. This enabled the CCAA Entities to move forward with the proposed Plan. On November 17, 2021, the CCAA Entities sought and obtained an order (the “**Meeting Order**”), among other things, authorizing the CCAA Entities to hold the virtual Creditors’ Meeting to consider and vote on the Plan.

Shapiro Affidavit at para. 15; Motion Record, Tab 2, p. 23 [[CL p. A105:A23](#)].

B. THE CREDITORS' MEETING

11. The CCAA Entities and the Monitor have complied with the notice and other requirements set forth in the Meeting Order.

Shapiro Affidavit at paras. 18-22; Motion Record, Tab 2, pp. 24 [[CL p. A106:A24](#)].

Monitor's Eighth Report, at para. 3.2 [[CL p. E6:E6](#)].

12. Pursuant to the Meeting Order, the Creditors' Meeting took place on December 16, 2021 at 1:00 p.m. (Toronto time) virtually because of the ongoing COVID-19 pandemic and to facilitate participation by as many Affected Creditors as possible given their dispersion across North America. The quorum requirement for the Creditors' Meeting was satisfied, and the chair of the Creditors' Meeting declared that the Creditors' Meeting was properly constituted.

Shapiro Affidavit at paras. 21 and 23; Motion Record, Tab 2, p. 25 [[CL p. A107:A25](#)].

Monitor's Eighth Report, at Appendix "E" [[CL p. E65:E65](#)].

13. Pursuant to the Meeting Order, Affected Creditors were classified for purposes of voting and receiving distributions under the Plan as a single class. Unaffected Creditors, which includes Intercompany Creditors, were not entitled to vote on the Plan at the Creditors' meeting in respect of their Unaffected Claims.

Shapiro Affidavit at para. 22; Motion Record, Tab 2, p. 25 [[CL p. A107:A25](#)].

14. At the Creditors' Meeting, the Plan was approved unanimously. All 705 of the Affected Creditors who voted (or were deemed to vote pursuant to the Meeting Order) at the Creditors' Meeting, representing approximately \$8.123 million of the Voting Claims, voted for the Plan.

Shapiro Affidavit at para. 24; Motion Record, Tab 2, p. 25 [[CL p. A107:A25](#)].

Monitor's Eighth Report at para. 5.3 and Appendix "E" [\[CL pp. E8:E8 and E65:E65\]](#).

C. THE PLAN

15. The CCAA Entities developed the Plan, in consultation with the Monitor, with a view to preserving the value of the CCAA Entities and their interests in the Subsidiaries, and providing creditors with the opportunity to be repaid in full over time.

Shapiro Affidavit at para. 27; Motion Record, Tab 2, p. 26 [\[CL p. A108:A26\]](#).

16. The Plan, which is described in detail in the Meeting Order Affidavit and in the Shapiro Affidavit, provides for, among other things:

- (a) a cash payment to Convenience Class Creditors in an amount equal to the lesser of
 - (i) 100% of their Proven Claims, and (ii) \$2,500;
- (b) a cash payment to Affected Creditors, other than Convenience Class Creditors, in an amount equal to their *pro-rata* share of the Creditor Distribution Pool after deducting amounts paid to Convenience Class Creditors, based on the value of their Proven Claims;
- (c) issuance by the CCAA Entities of the Promissory Note in the principal amount equal to the balance of all Proven Claims that remain after payment of all Convenience Class Creditors and the initial distribution to Affected Creditors referred to in paragraph (b) above, to be issued by the CCAA Entities on a joint and several basis to the Monitor in trust for Affected Creditors other than Convenience Class Creditors. The combination of the initial cash distribution from the Creditor Distribution Pool and the entitlement to the proceeds of the Promissory Note is

intended to enable Affected Creditors (other than Convenience Class Creditors) to potentially have their Proven Claims paid in full over time;

- (d) distribution of Net Proceeds received by any CCAA Entity in connection with a sale or other disposition of their equity interest in any Subsidiary, or any sale or other disposition by any Subsidiary of all or a majority of the aggregate value of its assets (in each case, a “**Transaction**”), on a *pro-rata* basis to (i) Affected Creditors with Promissory Note Entitlements and (ii) Intercompany Creditors with Intercompany Claims;
- (e) creation of the Investment Reserve that the CCAA Entities may use, in consultation with the Monitor, to acquire equity securities of a Subsidiary so that they can prevent (or limit) the dilution of their equity interests in the Subsidiaries; and
- (f) certain releases in favour of (i) the CCAA Entities, the Directors, the Officers, and the CCAA Entities’ current and former employees, advisors, legal counsel and agents; (ii) the Monitor and its current and former affiliates, directors, officers and employees and all of their respective advisors, legal counsel and agents; and (iii) the Intercompany Creditors and their respective current and former affiliates (excluding the CCAA Entities), and their respective current and former members, shareholders, directors, officers and employees, advisors, legal counsel and agents (the “**Released Parties**”) in respect of claims relating to the CCAA Entities, the Plan and these CCAA proceedings (the “**Releases**”).

17. Affected Creditors under the Plan consist of all creditors who hold a Claim (including CRA Claims, claims of former employees, and claims of other general unsecured creditors) other than an Unaffected Claim. Unaffected Creditors, which includes Intercompany Creditors, will not receive any consideration or distributions under the Plan in respect of their Unaffected Claims, provided that Intercompany Creditors will be entitled to share in the Net Proceeds of any Transaction or any subsequent distribution to holders of Promissory Note Entitlements of Excess Cash, as detailed in the Meeting Order Affidavit and the Shapiro Affidavit. The terms of the Plan are also described in detail in the Plan Assessment Report.

Shapiro Affidavit at para. 27; Motion Record, Tab 2, p. 26 [[CL p. A108:A26](#)].

Monitor's Eighth Report, at Appendix "B" [[CL p. E34:E34](#)].

18. The CCAA Entities believe that the Plan represents a fair and reasonable outcome in the circumstances and that their stakeholders will derive a greater benefit from the implementation of the Plan than would result in a bankruptcy or liquidation scenario. The Plan provides Affected Creditors (which does not include Intercompany Creditors) with a substantial initial distribution and entitlement to the Promissory Note, through which Affected Creditors can benefit (along with the Intercompany Creditors) from future value created or realized in the Subsidiaries and potentially receive repayment in full of their Proven Claims over time. The Plan also enables the CCAA Entities to complete an efficient exit from CCAA protection, as the CCAA Entities will be relieved from various obligations imposed on them by the Initial Order upon Plan implementation, thereby permitting the CCAA Entities to work to continue to grow the Subsidiaries so that value for these businesses can be maximized in due course and distributed to Affected Creditors and Intercompany Creditors. The Monitor has confirmed its view that the Plan is fair and reasonable and that it supports approval of the Plan.

Shapiro Affidavit at para. 39; Motion Record, Tab 2, p. 31 [[CL p. A113;A31](#)].

D. TERMINATION OF THE CCAA PROCEEDINGS

19. Pursuant to the proposed Sanction Order, upon receipt of written notice from the CCAA Entities of the fulfilment or waiver of the conditions precedent set out in section 11.1 of the Plan, the Monitor is authorized and directed to deliver to counsel to the CCAA Entities and file with this Court, a certificate signed by the Monitor (the “**Monitor’s Plan Implementation Date Certificate**”) certifying that (a) the Monitor has received written confirmation from the CCAA Entities that the conditions precedent set out in section 11.1 of the Plan have been satisfied or waived, as applicable, (b) the Plan Implementation Date has occurred and (c) the Plan is effective in accordance with its terms and the terms of the Sanction Order.

Shapiro Affidavit at para. 44; Motion Record, Tab 2, p. 33 [[CL p. A115;A33](#)].

20. The Sanction Order provides that, upon delivery of the Monitor’s Plan Implementation Date Certificate, (a) the Initial Order will be amended to delete certain of the duties and powers granted to the Monitor under it, so that the Monitor will not have to perform any of those specific duties or exercise any of those specific powers thereafter, (b) the CCAA Entities will no longer be subject to the restrictions, obligations, requirements or provisions in various specified provisions of the Initial Order so that, from and after the Plan Implementation Date, the CCAA Entities will effectively be able to operate outside the CCAA proceedings, (c) the Directors’ Charge will be terminated, discharged and released, and (d) the releases and injunctions set out in Article 9 of the Plan (which includes releases in favour of the Monitor) shall be binding and effective as at the Plan Implementation Date.

Shapiro Affidavit at para. 45; Motion Record, Tab 2, p. 33 [[CL p. A115;A33](#)].

21. The Sanction Order does not discharge KSV as the Monitor upon the filing of the Monitor's Plan Implementation Date Certificate. Rather, in addition to deleting certain specific powers and duties of the Monitor which had been created in the Initial Order, the Sanction Order specifies in paragraph 33 the ongoing reporting and other duties and obligations of the Monitor as provided under the Plan.

Shapiro Affidavit at para. 47; Motion Record, Tab 2, p. 34 [[CL p. A116:A34](#)].

22. The Sanction Order does provide for the ultimate discharge of the Monitor and termination of the CCAA proceedings after the Promissory Note is repaid in full. In particular, the Sanction Order provides that once all obligations owing under the Promissory Note have been paid in full, the Monitor is authorized and directed to provide notice to the service list that the Monitor intends, following the expiry of the Objection Period (defined below), to issue a certificate (the "**Monitor's Plan Completion Certificate**") certifying that (a) the repayment in full of the Promissory Note has occurred, and (b) effective upon the filing of the Monitor's Plan Completion Certificate, the Proposal Administration Charge is discharged, the Monitor is discharged and the CCAA proceedings are terminated.

Shapiro Affidavit at para. 48; Motion Record, Tab 2, p. 35 [[CL p. A117:A35](#)].

23. If the CCAA Entities and the Monitor do not receive notice of any opposition to the CCAA proceedings being terminated before 5:00 p.m. (Toronto time) on the date that is seven days after the Monitor delivers such notice (the "**Objection Period**"), or if a notice of opposition is received before the expiry of the Objection Period but no motion materials are served and filed under the proposed Sanction Order, then the Monitor is authorized and directed to serve and file the Monitor's Plan Completion Certificate, at which time these CCAA proceedings will be terminated, KSV will

be discharged and released from its duties as Monitor, and the Proposal Administration Charge will be terminated, discharged and released.

Shapiro Affidavit at para. 49; Motion Record, Tab 2, p. 35 [[CL p. A117:A35](#)].

24. Notwithstanding the reduction of the Monitor's obligations upon the Plan Implementation Date, KSV is authorized pursuant to the proposed Sanction Order to perform its functions and fulfill its obligations under the Plan to facilitate implementation of the Plan, including, among other things, to create, hold funds in and distribute amounts from the Investment Reserve Account and to perform its reporting obligations as set out in the Plan. The proposed Sanction Order also provides that, upon the delivery of the Monitor's Plan Completion Certificate, KSV will be released of all claims relating to its activities as Monitor, whether before, on or after the date of the Sanction Order.

Shapiro Affidavit at para. 50; Motion Record, Tab 2, p. 36 [[CL p. A118:A36](#)].

E. STAY PERIOD

25. The stay of proceedings under the Initial Order expires on February 28, 2022 (the "**Stay Period**"). If the Plan is approved by this Court, the CCAA Entities intend to work to implement the Plan as soon as reasonably possible, and in any event, before the expiry of the Stay Period. Accordingly, the proposed Sanction Order provides that the Stay Period will expire on the earlier of (a) the delivery of the Monitor's Plan Implementation Date Certificate pursuant to the terms of this Sanction Order, and (b) February 28, 2022.

Shapiro Affidavit at para. 51; Motion Record, Tab 2, p. 36 [[CL p. A118:A36](#)].

PART III - ISSUES AND THE LAW

26. The issue on this motion is whether the Court should approve the Plan as fair and reasonable and grant the Sanction Order.

A. THE REQUIREMENTS FOR PLAN APPROVAL HAVE BEEN MET

27. Pursuant to section 6(1) of the CCAA, the Court has the discretion to sanction a plan of compromise or arrangement where the requisite double majority of creditors has approved the plan. The effect of the Court's approval is to bind the company and its creditors.

[CCAA](#), Section 6(1).

28. The general requirements for court approval of a CCAA plan are well established:

- (a) there must be strict compliance with all statutory requirements;
- (b) all materials filed and procedures carried out must be examined to determine if anything has been done or purported to have been done which is not authorized by the CCAA; and
- (c) the plan must be fair and reasonable.

[Target Canada Co. \(Re\)](#), 2016 ONSC 316 at para. [70](#) and cases cited therein.

(1) There has been Strict Compliance with Statutory Requirements

29. The first and second requirements of the test for the sanction of a plan of compromise or arrangement under the CCAA relate to compliance with the procedural requirements of the CCAA and court orders granted during the CCAA proceedings. With respect to the first part of the test, factors that may be considered by the courts include whether: (a) the applicant(s) come within the definition of a "debtor company" under section 2 of the CCAA; (b) the applicant(s) or affiliated

debtor companies have total claims in excess of \$5 million; (c) the notice calling the creditors' meeting was sent in accordance with the order of the court; (d) the creditors were properly classified; (e) the meeting of creditors was properly constituted; (f) voting was properly carried out; and (g) plan was approved by the requisite majorities.

[Canwest Global Communications Corp., Re](#), 2010 ONSC 4209 at para. 15 [*Canwest Global*].

[Canadian Airlines Corp., Re](#), 2000 ABQB 442 at para. 62 [*Canadian Airlines*].

30. The CCAA Entities have complied with the procedural requirements of the CCAA and the Orders granted in these CCAA proceedings. In particular:

- (a) in granting the Initial Order, this Court determined that the Partners qualified as “debtor companies” to which the CCAA applies and that the Partners’ liabilities exceed the \$5 million threshold amount under the CCAA;
- (b) prescribed notices to creditors and other interested persons as required under the Initial Order, the Claims Procedure Order and the Meeting Order were delivered within the timeframes and as required by such Orders. In addition, the Monitor also prepared a frequently asked questions and answers document addressing common questions about the Plan, which the Monitor posted on its website.
- (c) the classification of the Affected Creditors into the single Unsecured Creditors’ Class for the purpose of voting on the Plan was approved by this Court pursuant to the Meeting Order, and such classification was not opposed at the hearing to approve the Meeting Order on November 17, 2021;
- (d) the Creditors’ Meeting was properly constituted and the voting was properly carried out in accordance with the Meeting Order; and

- (e) the CCAA Entities far exceeded the statutory “double majority” needed to approve the Plan, as every Affected Creditor present in person or by proxy at the Creditors’ Meeting voted unanimously to approve the Plan.

Shapiro Affidavit at paras. 19-20, 24; Motion Record, Tab 2, pp. 24-26 [[CL pp. A106:A24-A108:A26](#)].

Monitor’s Eight Report, at paras. 3.2, 3.3, 5.2, 5.3, and 4.4 [[CL pp. E6:E6 and E8:E8](#)].

31. Sections 6(3), 6(5) and 6(6) of the CCAA provide that the Court may not sanction a plan unless payment of certain Crown claims, employee claims and pension claims is provided for.

[CCAA](#), Sections [6\(3\)](#), [6\(5\)](#) and [6\(6\)](#).

[Canwest Global](#), *supra* at para. [16](#).

32. All of these provisions are satisfied in this case. In particular:

- (a) Government Source Deductions (section 6(3) of the CCAA): The Plan treats Government Priority Claims, which consists of all Claims of Governmental Authorities enumerated in Section 6(3) of the CCAA outstanding on the Filing Date that have not been paid by the Plan Implementation Date, as Unaffected Claims. Such claims, if any, will not be compromised under the Plan and will be paid as required by the CCAA.
- (b) Wages/Employee Amounts (section 6(5) of the CCAA): The CCAA Entities will pay employee priority claims in the aggregate amount of approximately \$10,000 on or before the Plan Implementation Date.
- (c) Pension Plan Amounts (section 6(6) of the CCAA): As described in the Initial Affidavit, Metro 360’s Ontario-based employees participate in a defined contribution

pension plan administered through the Partners, pursuant to which employees are required to contribute a certain percentage of their earnings, with Metro 360 matching such contributions on a dollar-for-dollar basis (the “**Pension Plan**”). As stated in the Initial Affidavit, the Pension Plan was fully funded as at April 1, 2020, just a few days before the Proposal Proceedings on April 6, 2020. The Partners have continued to remit pension contributions throughout the CCAA proceedings in the ordinary course and, to the best of the CCAA Entities’ knowledge, no such amounts are outstanding and in any event are not affected by the Plan as any claim would constitute a Post-Filing Claim.

Shapiro Affidavit at para. 43 and Exhibit “B”; Motion Record, Tab 2, pp. 32 and 91 [[CL pp. A114:A32](#) and [A173:A91](#)].

Monitor’s Eighth Report at para. 6.1(f) [[CL p. E9:E9](#)].

33. In addition, in accordance with section 6(8) of the CCAA, the Plan provides that all Persons holding Equity Claims (in their capacity as a holder of an Equity Claim) will not receive any distributions under the Plan or otherwise receive any other compensation in respect of their Equity Claims (provided that the equity held by the existing shareholders of the Partners and the Partners’ interests in Metro 360 will remain unaffected by the Plan).

[CCAA](#), section [6\(8\)](#).

Plan at section 4.5; Motion Record, Tab 2, Exhibit “A”, p. 59 [[CL p. A141:A59](#)].

34. As a result, it is submitted that the statutory requirements for the sanction of the Plan under section 6 of the CCAA have been satisfied.

(2) Nothing has been Done or Purported to be Done that is Not Authorized by the CCAA

35. With respect to the second part of the test for sanction of a plan under the CCAA, courts may rely on the reports of the Monitor and on other parties in assessing whether anything has been done or purported to have been done that is not authorized by the CCAA.

[*Canwest Global*](#), *supra* at para. 17.

[*Canadian Airlines*](#), *supra* at para. 64.

36. Throughout the course of these CCAA proceedings, the CCAA Entities have acted in good faith and with due diligence and have complied with the requirements of the CCAA and the Orders of this Court. The Monitor's reports to the Court have identified no conduct or action by the CCAA Entities that is not authorized by the CCAA and have stated that the Partners and Metro 360 have acted in good faith and with due diligence. The Court has also made such a finding in granting several stay extension orders throughout these CCAA proceedings. The CCAA Entities are unaware of any basis for asserting that they have proceeded in a manner that is not authorized by the CCAA.

Shapiro Affidavit at para. 42; Motion Record, Tab 2, p 32 [[CL p. A114:A32](#)].

Monitor's Eighth Report, at para. 6.1(b) [[CL p. E9:E9](#)].

37. Accordingly, it is submitted that the second part of the plan sanction test has been met.

(3) The Plan is Fair and Reasonable

38. When considering whether a plan is fair and reasonable, the Court measures the fairness and reasonableness of a plan against the available commercial alternatives, weighs the equities and balances the relative degrees of prejudice that would flow from granting or refusing the relief being sought under the CCAA:

The court's role on a sanction hearing is to consider whether the plan fairly balances the interests of all the stakeholders. Faced with an

insolvent organization, its role is to look forward and ask: does this plan represent a fair and reasonable compromise that will permit a viable commercial entity to emerge? It is also an exercise in assessing current reality by comparing available commercial alternatives to what is offered in the proposed plan.

[Canadian Airlines](#), *supra* at paras. [3](#), [174](#), [179](#).

[Canwest Global](#), *supra* at para. [19](#).

39. Factors considered by courts in considering whether a plan is fair and reasonable in the circumstances of a particular case have included: (a) classification of creditors and creditor approval; (b) what creditors would receive on liquidation or bankruptcy compared to the plan; (c) alternatives to the plan and bankruptcy; (d) oppression of the rights of creditors; (e) unfairness to shareholders; and (f) the public interest.

[Canwest Global](#), *supra* at para. [21](#).

40. An important measure of whether a plan is fair and reasonable is the level of approval by creditors. Courts have consistently found that it is not for the Court to second guess the business judgment of affected creditors that have approved a CCAA plan. While a Court's approval of a CCAA plan should not be a "rubber stamp", strong creditor support for the Plan creates an inference of fairness and reasonableness and Courts ought not second guess the business judgment of the affected creditors.

[Vicwest Corp., Re](#), (2003), 125 ACWS (3d) 761 (Ont. Sup. Ct. J.) at para. [19](#).

[Olympia & York Developments Ltd. v Royal Trust Co.](#) (1993), 17 CBR (3d) 1 (Ont. Ct. J. (Gen. Div.)) at paras. 36-38.

[Canadian Airlines](#), *supra* at para. [97](#).

41. It is submitted that the Plan is fair and reasonable in the circumstances given, among other things:

- (a) the classification of the Affected Creditors into one single voting class is justifiable as all such creditors have unsecured Claims against the CCAA Entities, and was approved by this Court pursuant to the Meeting Order without opposition;
- (b) the Plan treats the Affected Creditors fairly and provides, among other things, for a significant initial cash distribution to Affected Creditors and the possibility for Affected Creditors who do not receive full recovery in the initial distribution to potentially receive the remainder of their claims over time through the proceeds of the Promissory Note, in full and final satisfaction of the Affected Claims;
- (c) the Monitor has stated that, subject to certain underlying assumptions, the initial cash distribution that Affected Creditors are projected to receive under the Plan is greater than that which they would receive in a near term bankruptcy or liquidation scenario, even after considering the reserves contemplated under the Plan;
- (d) the Plan is designed to allow the Subsidiaries time to continue to grow their businesses, with the assistance of the CCAA Entities, and to enable Affected Creditors to benefit along with the Intercompany Creditors from any future value that can be created;
- (e) all of the Affected Creditors with Voting Claims that voted on the Plan at the Creditors' Meeting, in person or by proxy, voted for its approval;

- (f) the Releases provided under the Plan are appropriate in the circumstances, as further discussed below;
- (g) the Plan serves the public interest and the broader purpose of the CCAA by allowing the CCAA Entities to achieve a restructuring and emerge from CCAA protection so that they can continue to work to grow their consumer packaged goods business and the Subsidiaries and their businesses, which would not be possible without a successful CCAA plan of compromise and arrangement;
- (h) the CCAA Entities do not currently have any other viable alternative to the proposed Plan; and
- (i) the Monitor has concluded that the Plan is fair and reasonable and the best alternative in the circumstances for all Affected Creditors.

Shapiro Affidavit at paras. 38-41; Motion Record, Tab 2, p. 31 [[CL p. A113:A31](#)].

Monitor's Eighth Report, Appendix "B" at paras. 7.0(2)(a) and 8.1(i) [[CL pp. E54:E54](#) and [E58:E58](#)].

42. The CCAA Entities believe that the Plan is fair and reasonable, is in the best interests of the CCAA Entities and their stakeholders and ought to be approved by the Court.

B. THE RELEASES ARE APPROPRIATE

43. The CCAA permits the inclusion of third party releases in a plan of compromise or arrangement where those releases are reasonably connected to the proposed restructuring. Courts have on several occasions approved plans containing third party releases.

[ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.](#), 2008 ONCA 587 at paras. [43](#), [74-75](#) [[ATB Financial](#)].

[Canwest Global](#), *supra* at paras. [28-29](#).

[SkyLink Aviation Inc., Re](#), 2013 ONSC 2519 at para. [30](#).

[Sino-Forest Corp., Re](#), 2012 ONSC 7050 at para. [71](#).

[Rubicon Minerals Corporation, Re](#), (8 December 2016), Toronto, Ont. Sup. Ct. J. (Commercial List) CV-16-11566-00CL (Sanction Order) at para. 20 [[Rubicon](#)].

[Forever XXI ULC, Re](#) (4 August 2020), Toronto, Ont. Sup. Ct. J. (Commercial List) CV-19-00628233-00CL (Sanction and Vesting Order) at paras. 27-28.

44. The Court has the jurisdiction to sanction a plan containing third party releases where the factual circumstances indicate that the third party releases are appropriate. CCAA courts have approved third party releases in the context of plans of arrangement where the releases are rationally related to a resolution of the debtors' claims, benefit creditors generally and are not overly broad. Factors considered by courts in determining whether to approve third party releases include:

- (a) whether the parties to be released are necessary and essential to the restructuring of the debtor;
- (b) whether the claims to be released are rationally related to the purpose of the plan and necessary for it;
- (c) whether the plan would fail without the releases;
- (d) whether the parties who are to have claims against them released are contributing in a tangible and realistic way to the plan;
- (e) whether the plan would benefit not only the debtor companies but creditors generally;
- (f) whether the creditors voting on the plan had knowledge of the nature and effect of the releases;
- (g) whether the releases are fair and reasonable and not overly broad;

- (h) whether the releases are opposed by any party to the proceedings; and
- (i) whether the Monitor considers the releases to be fair and reasonable.

[ATB Financial](#), *supra* at paras. [70-71](#).

[Canwest Global](#), *supra* at para. [30](#).

[Nortel Networks Corp., Re](#), 2010 ONSC 1708 at paras. [79-82](#).

45. The above are not mandatory criteria and no individual factor determines the issue of approval of a release.

[Kitchener Frame Ltd., Re](#), 2012 ONSC 234 at para. [82](#).

46. The Releases provided under the Plan protect the Released Parties (including the CCAA Entities' directors, officers and advisors) from potential claims relating to the CCAA Entities based on conduct taking place on or prior to the Plan Implementation Date. The Releases are rationally related to the purpose of the Plan and are necessary for the successful restructuring of the CCAA Entities.

Plan at section 9.1; Motion Record, Tab 2, Exhibit "A", p. 69 [[CL p. A151:A69](#)].

Shapiro Affidavit at para. 36; Motion Record, Tab 2, p. 30 [[CL p. A112:A30](#)].

47. The Released Parties, including the Intercompany Released Parties, have contributed in tangible and material ways to the development and advancement of the Plan. In particular, the Release in favour of the Intercompany Released Parties is being granted in consideration for the Intercompany Creditors agreeing that they would not participate in the initial distribution under the Plan. As the Intercompany Claims account for approximately \$11 million (or 37%) of all Claims against the CCAA Entities, their agreement to not participate in the initial distribution significantly increases the amount of cash that is to be distributed to third-party Affected Creditors on the Initial Distribution Date.

Shapiro Affidavit at para. 38; Motion Record, Tab 2, p. 31 [[CL p. A113:A31](#)].

48. Full disclosure of the Releases was made to Affected Creditors in the Plan filed with the Court pursuant to the Meeting Order and posted on the Monitor's Website pursuant to the Meeting Order for Affected Creditors to access, and in the Plan Assessment Report. No party has objected to the Releases. The Monitor is also of the view that the Releases are fair and reasonable in the circumstances.

Meeting Order Affidavit at Exhibit "A"; Motion Record of the Applicant returnable November 17, 2021, Tab 2, Exhibit "A".

Monitor's Eight Report, Exhibit "B", at para. 5.3.1(l)(i) [[CL p. E51:E51](#)].

C. **TERMINATION OF THE CCAA PROCEEDINGS**

49. Courts have granted Orders terminating CCAA proceedings and discharging the Monitor upon implementation of an approved CCAA plan of compromise or arrangement.

[Yatsen Group of Companies Inc. et al.](#) (20 September 2021), Toronto, Ont. Sup. Ct. J. (Commercial List) CV-21-00655505-00CL (Sanction Order) at paras. 18 and 27.

[Fraser Papers Inc., Re](#) (10 February 2011), Toronto, Ont. Sup. Ct. J. (Commercial List) CV-09-8231-00CL (Sanction Order) at paras. 23, 25, 32.

[Travelbrands Inc., Re](#) (14 January 2016), Toronto, Ont. Sup. Ct. J. (Commercial List) CV-15-10980-00CL (Plan Sanction and Termination Order) at paras. 10, 21, 23.

[Rubicon](#), *supra* at paras. 22 and 30.

[Roberts Company Canada Limited, Re](#) (26 October 2020), Toronto, Ont. Sup. Ct. J. (Commercial List) CV-20-00643158-00CL (Sanction Order) at para. 41.

50. In addition, this Court has broad discretion under Section 11 of the CCAA to make any order that it considers appropriate in the circumstances, subject to any restrictions under the CCAA. CCAA courts have routinely exercised both their inherent and statutory jurisdiction to grant relief to a debtor company that advances the progress of the proceedings and "fills the gaps" between

provisions of the CCAA in a way that is consistent with the broad public policy objectives of the CCAA.

[9354-9186 Québec inc. v. Callidus Capital Corp.](#), 2020 SCC 10 at paras. [65](#) and [67](#).

51. In this case, the proposed Sanction Order provides for (a) the CCAA Entities to be released upon Plan implementation from the restrictions, obligations, requirements or provisions in certain specified provisions of the Initial Order so that, from and after the Plan Implementation Date, the CCAA Entities will effectively be able to operate outside the CCAA, and (b) the termination of the CCAA proceedings and the discharge of the Monitor effective upon the filing of the Monitor's Plan Completion Certificate.

Shapiro Affidavit at para. 48; Motion Record, Tab 2, p. 35 [[CL p. A117:A35](#)].

52. The CCAA Entities submit that it is appropriate for this Court to grant the requested Sanction Order given:

- (a) upon the implementation of the Plan, the CCAA Entities will make the significant initial cash distribution to Affected Creditors and issue the Promissory Note in the aggregate principal amount equal to the balance of all Proven Claims that remain after payment of the initial distribution, and the focus of the CCAA Entities at such time will be on working to grow their consumer packaged goods business and the Subsidiaries and their businesses, so that additional value can be created for Affected Creditors. There will be no further restructuring activities to advance pursuant to the CCAA once the Plan has been implemented;
- (b) the proposed Sanction Order provides for the CCAA Entities to effectively exit from CCAA protection. If the CCAA Entities were to remain subject to these CCAA

proceedings with no relief from the various obligations imposed on them by the Initial Order while the Promissory Note remained outstanding, their ability to seek to grow their business and the Subsidiaries would be weakened;

- (c) Affected Creditors will continue to have visibility into the performance of the CCAA Entities and the Subsidiaries through continued the Monitor's reporting obligations, as required by the Plan;
- (d) the Plan contains appropriate safeguards that will continue to benefit Affected Creditors post-implementation, including that (i) Intercompany Creditors have agreed to forbear from seeking repayment of the Intercompany Claims until the Promissory Note has been repaid or matured, and (i) Mr. Shapiro will not receive equity consideration in his personal capacity that is not made available to the CCAA Entities unless as part of a general management incentive plan; and
- (e) the CCAA Entities' motion for the proposed Sanction Order is supported by the Monitor.

Shapiro Affidavit at para. 27, and 44-48; Motion Record, Tab 2, pp. 26 and 33 [CL pp. [A108:A26](#), and [A115:A33](#)].

Monitor's Eighth Report, at para. 6.0(2) and Appendix "B" [CL pp. [E9:E9](#) and [E34:E34](#)].

PART IV- RELIEF REQUESTED

53. The Plan achieves the best available outcome for the CCAA Entities and their stakeholders in the circumstances. A key focus of the CCAA Entities throughout these CCAA proceedings has been to provide for the possibility of full repayment to creditors over time. The proposed Plan achieves this, by providing Affected Creditors with a cash distribution and, with respect to Affected

Creditors that are not Convenience Class Creditors, an entitlement to the Promissory Note so that they can benefit from future value created or realized in the Subsidiaries. The proposed Plan has received unanimous support from Affected Creditors at the Creditors' Meeting, and is supported by the Monitor.

54. It is appropriate in the circumstances that the Sanction Order effectively release the CCAA Entities from these CCAA proceedings upon Plan implementation, and provide for the CCAA proceedings to be terminated and the Monitor released effective upon the filing of the Monitor's Plan Completion Certificate. This structure will enable the CCAA Entities to efficiently exit CCAA protection so that they can work to grow their remaining business and those of the Subsidiaries, while also ensuring that appropriate oversight exists.

55. For all of the above-stated reasons, the CCAA Entities respectfully request that this Court grant the relief sought in the proposed Sanction Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

January 11, 2022


Goodmans LLP

SCHEDULE A

LIST OF AUTHORITIES

1. [Target Canada Co. \(Re\)](#), 2016 ONSC 316
2. [Canwest Global Communications Corp., Re](#), 2010 ONSC 4209
3. [Canadian Airlines Corp., Re](#), 2000 ABQB 442
4. [Vicwest Corp., Re](#), (2003), 125 ACWS (3d) 761 (Ont. Sup. Ct. J.)
5. [Olympia & York Developments Ltd. v Royal Trust Co.](#) (1993), 17 CBR (3d) 1 (Ont. Ct. J. (Gen. Div.))
6. [ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.](#), 2008 ONCA 587
7. [SkyLink Aviation Inc., Re](#), 2013 ONSC 2519
8. [Sino-Forest Corp., Re](#), 2012 ONSC 7050
9. [Rubicon Minerals Corporation, Re](#), (8 December 2016), Toronto, Ont. Sup. Ct. J. (Commercial List) CV-16-11566-00CL (Sanction Order)
10. [Forever XXI ULC, Re](#) (4 August 2020), Toronto, Ont. Sup. Ct. J. (Commercial List) CV-19-00628233-00CL (Sanction and Vesting Order)
11. [Nortel Networks Corp., Re](#), 2010 ONSC 1708
12. [Kitchener Frame Ltd., Re](#), 2012 ONSC 234
13. [Yatsen Group of Companies Inc. et al.](#) (20 September 2021), Toronto, Ont. Sup. Ct. J. (Commercial List) CV-21-00655505-00CL (Sanction Order)
14. [Fraser Papers Inc., Re](#) (10 February 2011), Toronto, Ont. Sup. Ct. J. (Commercial List) CV-09-8231-00CL (Sanction Order)
15. [Travelbrands Inc., Re](#) (14 January 2016), Toronto, Ont. Sup. Ct. J. (Commercial List) CV-15-10980-00CL (Plan Sanction and Termination Order)
16. [Roberts Company Canada Limited, Re](#) (26 October 2020), Toronto, Ont. Sup. Ct. J. (Commercial List) CV-20-00643158-00CL (Sanction Order)
17. [9354-9186 Québec inc. v. Callidus Capital Corp.](#), 2020 SCC 10

SCHEDULE B

STATUTORY REFERENCES

COMPANIES' CREDITORS ARRANGEMENT ACT

RSC 1985, c C-36, as amended

s. 6(1)

Compromises to be Sanctioned by court – If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be — other than, unless the court orders otherwise, a class of creditors having equity claims, — present and voting either in person or by proxy at the meeting or meetings of creditors respectively held under sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court and, if so sanctioned, is binding

(a) on all the creditors or the class of creditors, as the case may be, and on any trustee for that class of creditors, whether secured or unsecured, as the case may be, and on the company; and

(b) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act or is in the course of being wound up under the Winding-up and Restructuring Act, on the trustee in bankruptcy or liquidator and contributories of the company.

s. 6(3)

Restriction — certain Crown claims – Unless Her Majesty agrees otherwise, the court may sanction a compromise or arrangement only if the compromise or arrangement provides for the payment in full to Her Majesty in right of Canada or a province, within six months after court sanction of the compromise or arrangement, of all amounts that were outstanding at the time of the application for an order under section 11 or 11.02 and that are of a kind that could be subject to a demand under

(a) subsection 224(1.2) of the Income Tax Act;

(b) any provision of the Canada Pension Plan or of the Employment Insurance Act that refers to subsection 224(1.2) of the Income Tax Act and provides for the collection of a contribution, as defined in the Canada Pension Plan, an employee's premium, or employer's premium, as defined in the Employment Insurance Act, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts; or

(c) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the Income Tax Act, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the Income Tax Act, or

(ii) is of the same nature as a contribution under the Canada Pension Plan if the province is a “province providing a comprehensive pension plan” as defined in subsection 3(1) of the Canada Pension Plan and the provincial legislation establishes a “provincial pension plan” as defined in that subsection.

s. 6(5)

Restriction — employees, etc – The court may sanction a compromise or an arrangement only if

(a) the compromise or arrangement provides for payment to the employees and former employees of the company, immediately after the court’s sanction, of

(i) amounts at least equal to the amounts that they would have been qualified to receive under paragraph 136(1)(d) of the Bankruptcy and Insolvency Act if the company had become bankrupt on the day on which proceedings commenced under this Act, and

(ii) wages, salaries, commissions or compensation for services rendered after proceedings commence under this Act and before the court sanctions the compromise or arrangement, together with, in the case of travelling salespersons, disbursements properly incurred by them in and about the company’s business during the same period; and

(b) the court is satisfied that the company can and will make the payments as required under paragraph (a).

s. 6(6)

Restriction — pension plan – If the company participates in a prescribed pension plan for the benefit of its employees, the court may sanction a compromise or an arrangement in respect of the company only if

(a) the compromise or arrangement provides for payment of the following amounts that are unpaid to the fund established for the purpose of the pension plan:

(i) an amount equal to the sum of all amounts that were deducted from the employees’ remuneration for payment to the fund,

(ii) if the prescribed pension plan is regulated by an Act of Parliament,

(A) an amount equal to the normal cost, within the meaning of subsection 2(1) of the Pension Benefits Standards Regulations, 1985, that was required to be paid by the employer to the fund, and

(B) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision,

within the meaning of subsection 2(1) of the Pension Benefits Standards Act, 1985,

(C) an amount equal to the sum of all amounts that were required to be paid by the employer to the administrator of a pooled registered pension plan, as defined in subsection 2(1) of the Pooled Registered Pension Plans Act, and

(iii) in the case of any other prescribed pension plan,

(A) an amount equal to the amount that would be the normal cost, within the meaning of subsection 2(1) of the Pension Benefits Standards Regulations, 1985, that the employer would be required to pay to the fund if the prescribed plan were regulated by an Act of Parliament, and

(B) an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the Pension Benefits Standards Act, 1985, if the prescribed plan were regulated by an Act of Parliament,

(C) an amount equal to the sum of all amounts that would have been required to be paid by the employer in respect of a prescribed plan, if it were regulated by the Pooled Registered Pension Plans Act; and

(b) the court is satisfied that the company can and will make the payments as required under paragraph (a).

[s. 6\(8\)](#)

Payment — equity claims – No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

[s. 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.

[s. 11.02\(2\)](#)

General Power of Court – Stays, etc. – initial application – 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.

s. 11.02(3)

Burden of proof on application – 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.

**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
957855 ALBERTA LTD. (FORMERLY NEWSWEST INC.) AND ROSEBUD CREEK
FINANCIAL CORP. IN RESPECT OF METRO 360 GENERAL PARTNERSHIP**

Applicants

Court File No. CV-20-00642783-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**
Proceeding commenced at Toronto

**FACTUM OF THE APPLICANTS
(Motion Returnable January 14, 2022)**

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