

**ONTARIO
SUPERIOR COURT OF JUSTICE
(IN BANKRUPTCY AND INSOLVENCY)
COMMERCIAL LIST**

**IN THE MATTER OF THE PROPOSAL OF METRO 360
GENERAL PARTNERSHIP AND THE PARTNERS
THEREOF**

FACTUM

(Returnable June 17, 2020)

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PART I – INTRODUCTION

1. This factum is filed in support of a motion 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 the Metro 360 General Partnership (“**Metro 360**”), for an Order (the “**Initial Order**”), among other things, taking up and continuing the Proposal Proceedings (as defined below) under the *Companies’ Creditors Arrangement Act* (the “**CCAA**”).¹
2. The Partners are holding companies which together own 100% of Metro 360, a general partnership established under the laws of Ontario. Metro 360 operates a multi-faceted business that, prior to completing the TNG Transaction, was focused primarily on the wholesale distribution of books, magazines and newspapers across Canada. Metro 360 also has other business interests, including a consumer packaged goods distribution business and investments in emerging businesses.
3. On April 6, 2020, the Partners filed notices of intention to make a proposal pursuant to section 50.4(1) of the *Bankruptcy and Insolvency Act* (the “**BIA**”), commencing these Proposal Proceedings to seek to implement the TNG Transaction. KSV Kofman Inc. (“**KSV**”) was appointed as the Proposal Trustee. This Court approved the TNG Transaction on April 7, 2020 and it closed the next day on April 8, 2020.
4. While significant progress has been made to date in the Proposal Proceedings, Metro 360 requires the flexibility and stability afforded by the CCAA to develop and advance a restructuring plan

¹ Capitalized terms that are not defined herein have the meaning given to them in the affidavit of Daniel P. Shapiro sworn June 10, 2020 (the “**Shapiro Affidavit**”).

that will hopefully result in full repayment to Metro 360's creditors. Metro 360 intends to continue to operate its remaining businesses and complete the wind-down of the Literature Business, including the collection of outstanding accounts receivable and retrieval and return of unsold inventory (which Metro 360 estimates will take until at least the end of October 2020 to complete), and also to allow its business investments time to advance and mature. All of this will take time and, particularly due to current economic conditions resulting from the COVID-19 pandemic, it will likely take more than six months to formulate such a plan. Accordingly, the Partners and Metro 360 seek to continue the Proposal Proceedings under the CCAA, as they believe that the CCAA is the best forum for these proceedings and presents the best possible chance of maximizing value for all stakeholders of Metro 360.

5. While Metro 360 is not a party to the Proposal Proceedings (although certain protections afforded to the Partners in the Proposal Proceedings were extended to Metro 360) and as a partnership is not able to be an applicant in the CCAA proceedings, the Partners request that this Court exercise its jurisdiction to extend certain protections under the proposed Initial Order to Metro 360 as it is through Metro 360 that the Partners conduct their business operations.
6. For the reasons set out herein, the Partners and Metro 360 respectfully submit that the relief requested is in the best interests of their stakeholders and that it is fair, reasonable and appropriate for the Court to grant the requested Initial Order.

PART II – THE FACTS

A. BACKGROUND

7. Background information with respect to Metro 360, the Partners, the Literature Business and the issues which led to its sale pursuant to the TNG Transaction, and the commencement of the

Proposal Proceedings, is set out in the affidavit of Daniel P. Shapiro sworn on April 6, 2020 in connection with the approval of the TNG Transaction. Further information with respect to developments in the Proposal Proceedings and the relief requested on this motion is set out in the Shapiro Affidavit.

Shapiro Affidavit, at Exhibit "A"; Motion Record returnable June 17, 2020 (the "Motion Record"), Tab 2A.

B. THE PROPOSAL PROCEEDINGS AND CONTINUATION UNDER THE CCAA

8. Since commencing the Proposal Proceedings, Metro 360 and the Partners, in consultation with and with the assistance of the Proposal Trustee, have worked diligently to, among other things, complete and implement the TNG Transaction, facilitate the return of unsold Literature Business inventory to reduce Metro 360's payables, collect outstanding accounts receivable related to the Literature Business, maintain and grow its remaining consumer packaged goods businesses and continue to grow its business investments, all with a view to developing and advancing a value-maximizing restructuring plan intended to result in full repayment to Metro 360's creditors.

Shapiro Affidavit, at para. 14; Motion Record, Tab 2.

9. Metro 360's activities since the April 7 hearing are described in detail in the Shapiro Affidavit and include, among other things, the following:

- (a) completing the TNG Transaction on April 8, 2020 in accordance with the Approval and Vesting Order;
- (b) working diligently to facilitate the return and processing of unsold Literature Business inventory. As at May 23, 2020, inventory returns processed for refund through Metro 360's software system have reduced the amount of outstanding accounts payable by approximately \$25.8 million. The process of retrieving and returning unsold Literature

Business inventory is a considerable undertaking and Metro 360 estimates that it will take until at least the end of October 2020 to complete;

- (c) working diligently to collect its outstanding accounts receivable related to the Literature Business; and
- (d) reducing its employee headcount by approximately 335 employees following the sale of the Literature Business (the majority of such employees being offered employment with TNG as part of the TNG Transaction), and also implementing a temporary 20 percent wage cut for its management employees. Metro 360 currently has a staff of 43 employees to assist, among other things, with the wind-down of the Literature Business, the collection of outstanding accounts receivable and the operation of Metro 360's ongoing business activities.

Shapiro Affidavit, at paras. 15, 18 and 20; Motion Record, Tab 2.

10. The Partners and Metro 360 are seeking to continue the Proposal Proceedings under the CCAA pursuant to Section 11.6 of the CCAA. It is likely that it will take more than six months to develop a value-maximizing restructuring plan as any such plan will depend upon the performance of Metro 360's other businesses and investments. If the Proposal Proceedings continue and Metro 360 and the Partners fail to make one or more proposals or if such proposals are rejected by creditors, or if they fail to meet certain statutory timelines under the Proposal Proceedings, a bankruptcy would ensue. Accordingly, the CCAA is the best forum for these proceedings and presents the best possible chance of maximizing value for Metro 360's stakeholders.

Shapiro Affidavit, at paras. 34-36; Motion Record, Tab 2.

C. OBJECTIVE OF THE CCAA PROCEEDINGS

11. Metro 360 has completed the TNG Transaction, realizing and preserving value in the Literature Business assets (and in particular the accounts receivable), reducing creditor claims through inventory returns, and protecting the jobs of hundreds of employees. The Partners and Metro 360 continue to require creditor protection (which is best provided by the CCAA) in order to maintain the stability of Metro 360's remaining operating businesses and to provide additional time for Metro 360's business investments to mature so that a value-maximizing restructuring plan can be presented to Metro 360's creditors. Since this process will take a number of months, the stability and flexibility of the CCAA is believed to be the better alternative for all stakeholders.

Shapiro Affidavit, at para. 38; Motion Record, Tab 2.

12. While under CCAA protection, Metro 360 intends, among other things, to:
- (a) use the time and stability afforded by the CCAA to continue to manage and grow the remaining Metro 360 businesses and further develop its emerging business investments;
 - (b) continue to collect outstanding accounts receivable related to the Literature Business and to complete the retrieval and return of unsold Literature Business inventory;
 - (c) continue to explore opportunities for the sale of Non-Material Residual Assets and enter into and complete transactions in respect thereof in accordance with the proposed Initial Order; and
 - (d) develop a plan of compromise or arrangement within the CCAA proceedings that can be presented to Metro 360's creditors.

Shapiro Affidavit, at para. 39; Motion Record, Tab 2.

D. EXTENSION OF RELIEF TO METRO 360

13. Although Metro 360 is not an applicant to these proceedings (since it is a general partnership), the Partners and Metro 360 are requesting that the benefit of the protections and authorizations of the proposed Initial Order in favour of the Partners be extended for the benefit of Metro 360. These protections include the stay of proceedings and the restriction on the ability of contract counterparties to terminate or amend pre-filing agreements due to insolvency. These types of protections were extended to Metro 360 in the Proposal Proceedings, so granting this relief is consistent with the Proposal Proceedings.

Shapiro Affidavit, at para. 42; Motion Record, Tab 2.

E. CHARGES

(i) *Proposed Monitor and the Proposal Administration Charge*

14. KSV has agreed to act as Monitor in these CCAA Proceedings, subject to Court approval of its appointment. KSV became involved with Metro 360 in early March 2020 and was appointed as the Proposal Trustee in the Proposal Proceedings.

Shapiro Affidavit, at para. 53; Motion Record, Tab 2.

15. Pursuant to the Procedure Order, this Court granted the Proposal Administration Charge in favour of the Proposal Trustee, its legal counsel, and Goodmans (legal counsel to Metro 360 and the Partners) in an aggregate amount not to exceed \$300,000, securing the fees and reasonable disbursements of those parties. The Proposal Administration Charge ranked ahead of all Encumbrances (as defined in the Procedure Order) in favour of any creditors of the Partners or Metro 360.

Shapiro Affidavit, at para. 55; Motion Record, Tab 2.

16. Pursuant to the proposed Initial Order, the Partners are requesting that this Court continue the Proposal Administration Charge in the CCAA proceedings in the same amount and with the same priority as set out in the Procedure Order. The beneficiaries of the Proposal Administration Charge have contributed to the Proposal Proceedings and will continue to contribute to Metro 360's restructuring efforts under the CCAA.

Shapiro Affidavit, at para. 56; Motion Record, Tab 2.

(ii) Directors' Charge

17. The directors and officers of the Partners (the "**Directors and Officers**") have been actively involved in efforts to address the current challenging circumstances facing Metro 360, and the Partners require the active and committed involvement of the Directors and Officers going forward. However, the Partners do not maintain an insurance policy to cover the Directors and Officers for liabilities they may incur as directors or offices of the Partners. The Directors and Officers have expressed their desire for certainty with respect to potential personal liability if they continue in their current capacities. KSV is supportive of the Directors' Charge of \$300,000,

Shapiro Affidavit, at paras. 59-62; Motion Record, Tab 2.

Second Report of the Proposal Trustee dated June 10, 2020 (the "**Second Report**"), at para. 5.2.1(h).

(iii) KERP Charge

18. In an effort to ensure that Metro 360 employees who are essential to the wind-down of the Literature Business (and the related increase in value to stakeholders) continue their current employment, Metro 360, in consultation with the Proposal Trustee, has developed a key employee retention program (the "**KERP**") for three key employees in Metro 360's receivable and accounting groups (the "**KERP Participants**"). Their continued commitment is expected to have a direct and substantial effect on enhancing creditor recoveries.

Shapiro Affidavit, at para. 63; Motion Record, Tab 2.

19. Subject to Court approval of the KERP, each of the KERP Participants would be entitled to receive a specified amount (the “**KERP Payment**”) in one lump sum installment with payment of their final pay following September 30, 2020 (the “**Termination Date**”) in full and final satisfaction of any and all claims the KERP Participant might have had for severance or termination pay under statute or common law. The KERP (and a charge of \$180,000 in respect thereof) is supported by KSV.

Shapiro Affidavit, at para. 50; Motion Record, Tab 2.

Second Report, at para. 5.2.1(i).

PART III – LAW AND ARGUMENT

A. THE PROPOSAL PROCEEDINGS SHOULD BE CONTINUED UNDER THE CCAA

(i) Jurisdiction and Factors for Approval

20. Each of the Partners previously filed a notice of intention to file a proposal under the BIA. Pursuant to Section 11.6 of the CCAA, this Court has the jurisdiction to take up and continue the Proposal Proceedings under the CCAA as the Partners have not filed a proposal in the Proposal Proceedings.

CCAA, Section 11.6(a)

21. In *Clothing for Modern Times*, this Court set out the following factors for the Court to consider in determining whether to approve a motion to continue under the CCAA proposal proceedings which had been commenced under Part III of the BIA:
- (a) whether the moving parties have satisfied the sole statutory condition in Section 11.6, being that they have not filed a proposal under the BIA;
 - (b) whether the proposed continuation is consistent with the purposes of the CCAA; and

- (c) whether the moving parties have provided the Court with the information that would otherwise form part of an initial CCAA application pursuant to Section 10(2) of the CCAA.

Clothing for Modern Times Ltd., Re, 2011 ONSC 7522 at para 9 [*Clothing for Modern Times*].

22. In addition, moving parties seeking to continue proposal proceedings under Part III of the BIA under the CCAA must also demonstrate that they each are a “debtor company” to which the CCAA applies.

(ii) *The Criteria for Continuing the Proposal Proceedings under the CCAA is Met*

23. Metro 360 and the Partners submit that the proposed continuance of the Proposal Proceedings under the CCAA satisfies the criteria in Section 11.6(a) of the CCAA and the *Clothing for Modern Times* principles:

(a) *The Partners have not filed a Proposal*

24. The Partners each filed a notice of intention under Section 50.4(1) of the BIA on April 6, 2020, thereby commencing the Proposal Proceedings. The Partners have not filed a proposal under the BIA in the Proposal Proceedings.

(b) *The Proposed Continuation is Consistent with the Purposes of the CCAA*

25. Courts have identified, among other things, the following purposes of the CCAA: (a) to permit a company to carry on business and where possible, avoid the social and economic costs of liquidation; and (b) to maintain the status quo for a period to provide a structured environment in which an insolvent company can continue to carry on business and retain control over its assets while attempting to gain creditor approval of a proposed arrangement that will enable the company to remain in operation for the future benefit of the company and its stakeholders.

Canadian Airlines Corp., Re (2000), 19 CBR (4th) 1 at para 19.

26. Metro 360's intentions, as described in paragraph 12 above, are consistent with the underlying purposes of the CCAA. With the flexibility and stability afforded by the CCAA, Metro 360 will be able to continue to operate its remaining businesses, complete the wind-down of the Literature Business, and allow its business investments time to advance and mature, in each case with a view to maximizing value for Metro 360's creditors and eventually having Metro 360 emerge from creditor protection, thereby avoiding the harsh social and economic costs of liquidation.

(c) *The Requisite Information under Section 10(2) of the CCAA has been Provided*

27. An initial application under the CCAA pursuant to Section 10(2) of the CCAA must be accompanied by:

- (a) a statement indicating on a weekly basis, the projected cash flow of the debtor company;
- (b) a report containing the prescribed representations of the debtor company regarding the preparation of the cash-flow statement; and
- (c) copies of all financial statements, audited or unaudited, prepared during the year before the application or, if no such statements were prepared in that year, a copy of the most recent such statements.

CCAA, Section 10(2).

28. Metro 360's unaudited and unconsolidated financial statements as of December 31, 2019 are attached at Exhibit "G" to the Shapiro Affidavit. The unaudited and unconsolidated balance sheet for each of the Partners as at December 31, 2019, are attached as exhibits to the affidavit of Andrew Harmes, sworn June 14, 2020. Accordingly the requirement under Section 10(2)(c) of the CCAA is satisfied.

Shapiro Affidavit, at Exhibit "G"; Motion Record, Tab 2G.

Affidavit of Andrew Harmes sworn June 14, 2020 at Exhibits "A" and "B".

29. Metro 360's Cash-Flow Forecast covering the period of June 15, 2020 to September 18, 2020, is attached as Appendix "E" to the Second Report, thereby satisfying the requirement under Section

10(2)(a) of the CCAA. The Cash-Flow Forecast is accompanied by a statement from the Partners containing the prescribed representations regarding the preparation of the Cash-Flow Forecast, thereby satisfying the requirement under Section 10(2)(b) of the CCAA. The Cash Flow Forecast is also accompanied by the statutory report thereon filed by KSV, as proposed Monitor.

Second Report of the Proposal Trustee, at Appendices “E” and “F”.

30. Metro 360 and the Partners submit that the requisite information under Section 10(2) of the CCAA has been provided and that the *Clothing for Modern Times* factors have been satisfied.

(iii) *The Partners are Debtor Companies to Which the CCAA Applies*

31. The final factor for the Court to consider in determining whether the factors for continuing the Proposal Proceedings under the CCAA have been satisfied is whether the Partners are “debtor companies” to which the CCAA applies. The CCAA applies in respect of a “debtor company” if the total claims against the debtor company or affiliated debtor companies exceeds \$5 million. The term “debtor company” is defined in section 2 of the CCAA, in relevant part, as a “company” that is “bankrupt or insolvent”.

CCAA, Sections 2 (“debtor company”) and 3(1).

32. The Partners are eligible for protection under the CCAA as each is a “debtor company” and the total claims against the Partners exceed \$5 million.

(a) *The Partners are each a “Company” under the CCAA*

33. A “company” is defined by the CCAA, in relevant part, as “any company...incorporated by or under an Act of Parliament or of the legislature of a province.”

CCAA Section 2 (“company”).

34. Each of Alberta HoldCo and Rosebud HoldCo is a “company” within the meaning of the CCAA because they are incorporated under the laws of Alberta and Ontario, respectively.

Shapiro Affidavit, at paras. 1, 2 and 26 and Exhibit “A”; Motion Record, Tab 2.

(b) *The Partners Meet the Test for Insolvency*

35. In determining whether a company is insolvent, Courts have taken guidance from the definition of “insolvent person” in Section 2(1) of the BIA which, in relevant part, provides that an “insolvent person” is a person: (a) who is for any reason unable to meet his obligations as they generally become due; (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due; or (c) the aggregate of whose property is not, at a fair valuation, sufficient, or if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due. In addition, courts have recognized that a company is insolvent for the purposes of the CCAA if there is a reasonably foreseeable expectation that there is a looming liquidity condition or crisis that would result in the company being unable to pay its debts as they generally become due if a stay of proceedings and ancillary protection are not granted by the court.

BIA, Section 2 (“insolvent person”).

Stelco Inc., Re (2004), 48 C.B.R. (4th) 299 (Ont. Sup. Ct. J. [Commercial List]) at para. 4.

36. The Partners filed NOIs in April of 2020 to commence the Proposal Proceedings, thereby acknowledging their insolvency.

Shapiro Affidavit, at para. 6; Motion Record, Tab 2.

37. Further, the Partners meet the test for insolvency under the BIA given that they are jointly liable for all debts and obligations of Metro 360 pursuant to the *Partnerships Act* (Ontario). As

explained in the Shapiro Affidavit, Metro 360 is currently unable to satisfy in full its obligations to creditors and is therefore insolvent. Although Metro 360 has been able to significantly reduce the amount of outstanding accounts payable currently due to trade creditors, Metro 360 currently has total consolidated liabilities of approximately \$34.9 million. The Partners would not be able to pay their debts as they generally become due if Metro 360 were not to benefit from a stay of proceedings and the Partners were called upon to satisfy such amounts.

[Partnerships Act](#), R.S.O. 1990, c. P.5, Section 10(1).

Shapiro Affidavit, para. 29; Motion Record, Tab 2.

(c) *The Partners have Claims in Excess of \$5 million Outstanding*

38. As referenced above, the Partners are jointly liable for all debts and obligations of Metro 360, which has total consolidated liabilities of approximately \$34.9 million. As a result, the total claims against the Partners, even without taking the Partners' individual liabilities into account, far exceed the \$5 million threshold under the CCAA.

39. Accordingly, it is respectfully submitted that the Partners are insolvent within the meaning of the CCAA and each is a "debtor company" to which the CCAA applies.

B. EXTENSION OF THE INITIAL ORDER PROTECTIONS TO METRO 360

40. The proposed Initial Order includes an extension of the relief granted in the Initial Order to Metro 360. The CCAA expressly applies to companies, but not partnerships. However, this Court has determined that it has the power to extend stays of proceedings where it is just and reasonable to do so, including with respect to non-applicant parties.

[Lehndorff General Partner Ltd., Re](#), (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div.) at paras 5 and 16 [*Lehndorff*].

41. Courts have frequently exercised their inherent jurisdiction to extend the scope of the CCAA proceedings to encompass partnerships, including in circumstances where:

- (a) the operations of the partnership are closely related to the business of the applicants;
- (b) the obligations of the partnerships are so intertwined with those of the applicants that a successful restructuring would not be possible absent a stay of enforcement actions against the partnerships;
- (c) it is necessary to ensure that the purposes of the CCAA can be achieved; and
- (d) it is just and reasonable or just and convenient to do so.

[Lehdorff](#), *supra* at paras 5, 16 and 21.

[Cinram International Inc., Re, 2012 ONSC 3767](#) at para. 37 and Sch. C at paras. 64 [Cinram].

42. The Partners submit that it is just, reasonable and appropriate to extend the relief in the proposed Initial Order to Metro 360 because:

- (a) Metro 360 is a general partnership and its partners are Alberta HoldCo and Rosebud HoldCo;
- (b) the stay of proceedings under the BIA and the restriction under the BIA on the ability of contract counterparties to terminate or amend pre-filing agreements due to insolvency have both been extended in the Proposal Proceedings to Metro 360;
- (c) Metro 360 is the entity through which the Partners conduct their business operations as the Partners are holding companies that do not conduct any active business in the ordinary course, and it would be extremely detrimental to the Partners, to Metro 360, and to Metro 360's business operations and stakeholders if a stay of proceedings under the CCAA was not extended to Metro 360;

- (d) if any enforcement proceedings were commenced against Metro 360, it would cause significant disruption to the Partners and defeat the purpose of obtaining CCAA protection to preserve the stability of, and provide additional time to, Metro 360 and its business; and
- (e) any impairment or disruption of Metro 360's ongoing business will adversely impact its ability to file a plan of compromise or arrangement for consideration by its creditors.

Shapiro Affidavit, para. 42; Motion Record, Tab 2.

C. ENTITLEMENT TO MAKE CERTAIN PRE-CCAA PAYMENTS

43. To preserve normal course business operations for Metro 360's remaining businesses, the Partners are seeking authorization in the proposed Initial Order to pay certain expenses arising prior to the CCAA proceedings, including expenses for goods or services supplied to Metro 360 or to be supplied to Metro 360 that: (i) were incurred during the Proposal Proceedings or pertain to such period; or (ii) pertain to the period prior to the commencement of the Proposal Proceedings if, in the opinion of Metro 360 and with the consent of the Monitor, such payment is necessary for the operation or preservation of Metro 360's business.

Shapiro Affidavit, at paras. 45-47; Motion Record, Tab 2.

44. The Court has the jurisdiction to permit payment of pre-filing obligations in CCAA proceedings where the making of such payments is appropriate. Preservation of the status quo does not necessarily entail the preservation of the relative pre-stay debt status of each creditor.

[Canwest Global Communications Corp., Re](#) (2009), 59 C.B.R. (5th) 72 (Ont. Sup. Ct. J. [Commercial List]) [[Canwest Global](#)] at paras. 46-48.

[Cinram](#), *supra* at para. 37 and Sch. C at paras. 66-71.

45. Courts have considered a number of factors in granting authority to pay pre-filing obligations, including: (a) whether the goods and services were integral to the business of the applicant; (b) the applicant's need for the uninterrupted supply of the goods and services; (c) the effect on the applicant's ongoing operations and ability to restructure if it was unable to make pre-filing payments; and (d) the fact that no payments would be made without the consent of the monitor.

Cinram, *supra* at para. 37 and Sch. C at paras. 66-71.

Performance Sports Group Ltd., Re, 2016 ONSC 6800 at para. 25.

46. The authority to make certain pre-CCAA payments pursuant to the proposed Initial Order is appropriate as Metro 360 requires the ongoing commitment and support of its employees and professional advisors, and the continued supply of goods and services from its key vendors and service providers during the CCAA proceedings. In particular, the authority to make all payments for goods or services where the costs were incurred during the Proposal Proceedings (regardless of whether the supplier is considered to be a key vendor) is necessary and appropriate given the CCAA proceedings will have been preceded by a separate insolvency process.

D. THE CHARGES ARE APPROPRIATE AND SHOULD BE APPROVED

47. The Partners and Metro 360 are seeking the continuance of the Proposal Administration Charge in the CCAA proceedings, as amended by the Initial Order, and the approval of the Directors' Charge and the KERP Charge (collectively, the "**Charges**"), in the proposed Initial Order.
48. The proposed Initial Order provides for each of the Charges to constitute a charge over the Property that ranks in priority to all other Encumbrances (as each is defined in the Initial Order) in favour of any person, except for any secured creditor who did not receive notice of the motion for the Initial Order. As notice of this motion has been provided to the service list for the Proposal

Proceedings, as well as federal and Ontario taxing authorities, the Partners and Metro 360 believe that the Charges should have priority over all Encumbrances.

(i) Proposal Administration Charge

49. The Partners are requesting that the Proposal Administration Charge be continued in the CCAA proceedings in the same amount and with the same priority as set out in the Procedure Order.

Shapiro Affidavit at paras. 55-56; Motion Record, Tab 2.

50. Section 11.52 of the CCAA provides the Court with the jurisdiction to grant the requested continuance of the Proposal Administration Charge:

11.52(1) *Court may order security or charge to cover certain costs* – 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.

11.52(2) *Priority* – The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

CCAA, Section 11.52(1) and (2).

51. In *Canwest Publishing*, the Court provided a non-exhaustive list of factors to be considered in approving an administration charge, including: (a) the size and complexity of the business being restructured; (b) the proposed role of the beneficiaries of the charge; (c) whether there is unwarranted duplication of roles; (d) whether the quantum of the proposed charge appears to be fair and reasonable; (e) the position of the secured creditors likely to be affected by the charge; and (f) the position of the monitor.

[Canwest Publishing Inc. / Publications Canwest Inc., Re](#), 2010 ONSC 222 [*Canwest Publishing*] at para. 54.

52. The Partners and Metro 360 submit that it is appropriate for this Court to exercise its jurisdiction and continue the Proposal Administration Charge in the CCAA proceedings given that the beneficiaries of the charge have played and will continue to play critical roles in advancing Metro 360's restructuring and its efforts towards developing and presenting a value maximizing restructuring plan, and that there is no unwarranted duplication of roles among the parties. The quantum of the Proposal Administration Charge is the same as that which was approved by this Court in the Proposal Proceedings and is reasonable and appropriate in the circumstances. KSV, as the proposed Monitor, is supportive of the continuation of the Proposal Administration Charge in the CCAA proceedings.

Shapiro Affidavit at paras. 56-58; Application Record, Tab 2.

(ii) Directors' Charge

53. The Partners and Metro 360 are seeking a Court-ordered charge (the "**Directors' Charge**") over the Property in the amount of \$300,000 to secure the indemnity provided to the Directors and Officers in the Initial Order in respect of liabilities they may incur during the CCAA proceedings in their capacities as directors and officers.

Shapiro Affidavit at paras. 59-62; Motion Record, Tab 2.

54. Section 11.51 of the CCAA provides the court with the jurisdiction to grant the Directors' Charge in an amount the Court considers appropriate, provided notice is given to the secured creditors who are likely to be affected by it.

CCAA, Section 11.51.

55. This Court has granted director and officer charges pursuant to Section 11.51 in a number of cases. In *Canwest Global*, the Court outlined the test for granting such a charge:

I must also be satisfied with the amount and that the charge is for obligations and liabilities the directors and officers may incur after the commencement of proceedings. It is not to extend to coverage of wilful misconduct or gross negligence and no order should be granted if adequate insurance at a reasonable cost could be obtained.

[Canwest Global](#), *supra* at paras. 46-48.

56. The Partners and Metro 360 submit that approval of the Directors' Charge is warranted and necessary, and that it is appropriate in the present circumstances given that:

- (a) the Directors and Officers may be subject to potential liabilities in connection with these CCAA proceedings, and the Partners do not maintain an insurance policy to cover the Directors and Officers for liabilities they may incur as directors or officers of the Partners. The Directors and Officers have expressed their desire for certainty with respect to potential personal liability if they continue in their current capacities;
- (b) the Directors' Charge would only cover obligations and liabilities that the Directors and Officers may incur after the commencement of these CCAA proceedings and does not cover wilful misconduct or gross negligence;
- (c) the Directors and Officers have been actively involved in efforts to address the current circumstances facing Metro 360, including initial efforts with respect to the development of a restructuring plan, and Metro 360 will require the committed involvement of the Directors and Officers as it seeks to advance and implement such a plan; and
- (d) the amount of the Directors' Charge has been calculated, with the assistance of KSV as the Proposal Trustee and proposed Monitor, based on the estimated potential exposure of the Directors and Officers to certain corporate liabilities.

Shapiro Affidavit at paras. 61-62; Motion Record, Tab 2.

(iii) KERP Charge

57. The Partners and Metro 360 are seeking a Court-ordered charge (the “**KERP Charge**”) over the Property in the amount of \$180,000 as security for payments under the KERP.

Shapiro Affidavit at para. 52; Motion Record, Tab 2.

58. The KERP, which was developed by Metro 360 in consultation with the Proposal Trustee, is designed to encourage the three KERP Participants to continue their employment with Metro 360 through the Termination Date, at which time wind-down of the Literature Business is anticipated to be substantially complete. Metro 360 believes that it would be detrimental to the wind-down of the Literature Business, including the collection of accounts receivable and the return and processing of unsold Literature Business inventory, if the KERP Participants did not continue in their employment with Metro 360 through the Termination Date.

Shapiro Affidavit, at paras. 48-49; Motion Record, Tab 2.

59. The CCAA is silent with respect to the authorization of a KERP and the granting of a KERP Charge. The Court has jurisdiction pursuant to its general power under Section 11 of the CCAA to make any order that it considers appropriate in the circumstances. Courts have approved KERPs in many CCAA proceedings where the retention of certain employees has been deemed critical to a successful restructuring.

[Re U.S. Steel Canada Inc.](#), 2014 ONSC 6145 at para. 27.

[Re Timminco Ltd.](#), 2012 ONSC 506 at para. 75.

[Canwest Global](#), *supra* at para. 50.

60. Courts have considered a number of factors in determining whether to approve a KERP, and grant a KERP Charge, including:

- (a) whether the Monitor supports the KERP agreement and charge (to which great weight has been attributed);
- (b) whether the employees to which the KERP applies would consider other employment options in the absence of the KERP;
- (c) whether the continued employment of the employees to which the KERP applies is important for the stability of the business and to enhance the effectiveness of the marketing process;
- (d) the employees' history with and knowledge of the debtor;
- (e) the difficulty in finding a replacement to fulfill the responsibilities of the employees to which the KERP applies;
- (f) whether the KERP agreement was approved by the board of directors, including the independent directors, as the business judgment of the board should not be ignored;
- (g) whether the KERP is supported or consented to by secured creditors of the debtor; and
- (h) whether the payments under the KERP are payable upon the completion of the restructuring process.

Re Grant Forest Products Inc., [2009] OJ No. 3344 (Sup. Ct. [Commercial List]) at paras. 8-24.

Cinram, *supra* at para. 37 and Sch. C at para. 91.

Canwest Global, *supra* at paras. 49-50.

61. In *Aralez*, it was held that a court's role when asked to approve a KERP is "to assess the totality of circumstances to determine whether the process has provided a reasonable means for objective business judgment to be brought to bear and whether the end result is objectively reasonable."

Aralez Pharmaceuticals Inc. (Re), 2018 ONSC 6980 [*Aralez*] at para. 27.

62. The Court in *Aralez* reflected on the factors in *Cinram* and *Grant Forest*, and enumerated these three factors which provide a framework for courts to consider the objective business judgment underlining a proposed KERP:

- (a) the arm's length input, including from the Monitor, into the design, scope and implementation;
- (b) the necessity on a case-by-case basis of the retention program; and

- (c) whether the program's design reasonably relates to the goals pursued, which goals must be of demonstrable benefit to the objectives of the restructuring process.

Aralez, *supra* at para. 30.

63. The Partners and Metro 360 submit that the KERP complies with the factors set out above and is consistent with KERP arrangements that have been approved by CCAA courts. In particular:

- (a) the retention of the KERP Participants has been and will continue to be of vital importance to Metro 360 in connection with the wind-down of the Literature Business, and their continued efforts with respect to the collection of accounts receivable and the processing of returned inventory relating to the Literature Business is expected to maximize recoveries for the benefit of Metro 360's creditors;
- (b) the KERP was developed with the assistance of Metro 360's advisors and was reviewed and approved by the Proposal Trustee and proposed Monitor;
- (c) the KERP is limited to three key employees, whose efforts will have a direct correlation to creditor recoveries and the maximization of value, and whose services cannot be easily replicated or replaced at this time; and
- (d) the KERP seeks to encourage the KERP Participants to continue their employment with Metro 360 through the completion of the Termination Date of September 30, 2020, at which time Metro 360 expects it will have substantially completed the wind-down of the Literature Business.

Shapiro Affidavit at paras. 49 – 52; Motion Record, Tab 2.

Second Report, at para. 5.2.1(i).

64. Metro 360 respectfully submits that the KERP Charge is warranted and necessary in the circumstances and that it is appropriate for this Court to exercise its jurisdiction to approve the KERP and grant the KERP Charge.

E. THE CONFIDENTIAL APPENDIX SHOULD BE SEALED

65. The Partners and Metro 360 request that this Court seal the confidential appendix to the Second Report, which contains the letter agreements setting out the terms of the KERP, including the names and entitlements of the KERP Participants. This Court has the discretion pursuant to Section 137(2) of the *Courts of Justice Act* (Ontario) to order that any document filed in a civil proceeding be treated as confidential, sealed and not form part of the public record.

[*Courts of Justice Act, R.S.O. 1990*](#), c. C.43, s. 137(2).

66. In *Sierra Club of Canada v. Canada (Minister of Finance)*, a decision of the Supreme Court of Canada, the following test to determine when a sealing order should be made was adopted:

A confidentiality order under Rule 151 should only be granted when:

(a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk; and

(b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

[*Sierra Club of Canada v. Canada \(Minister of Finance\)*](#), [2002] 2 S.C.R. 522 [*Sierra Club*] at para. 53.

67. In *Canwest Global*, the Court applied the test from *Sierra Club* and approved a request by the applicants for the sealing of a confidential supplement containing unredacted copies of the applicants' key employee retention plans:

In this case, the unredacted KERPs reveal individually identifiable information including compensation information. Protection of sensitive personal and compensation information the disclosure of which could cause harm to the individuals and to the CMI Entities is an important

commercial interest that should be protected. The KERP participants have a reasonable expectation that their personal information would be kept confidential. As to the second branch of the test, the aggregate amount of the KERP has been disclosed and the individual personal information adds nothing. It seems to me that the second branch of the test has been met. The relief requested is granted.

Canwest Global, supra at para. 52.

68. With respect to the first branch of the *Sierra Club* test, the confidential appendix contains the names of the KERP Participants and the KERP Payment to each KERP Participant. Disclosure of the names and compensation information of the KERP Participants is sensitive personal information that should be protected. The KERP Participants also have a reasonable expectation that their names and compensation information will be kept confidential.

Shapiro Affidavit at para. 52; Motion Record, Tab 2.

69. Regarding the second branch of the *Sierra Club* test, it is submitted that keeping this information confidential will not have any deleterious effects. Outside the context of proposal proceedings, an individual's confidential personal and compensation information would be kept confidential and would not be in the public domain. In the circumstances, there is no compelling reason for allowing public disclosure of the individual compensation arrangements of KERP Participants.

F. THE RELIEF SOUGHT IS NECESSARY FOR THE CONTINUED OPERATIONS OF METRO 360 IN THE ORDINARY COURSE

70. When relief under Section 11 of the CCAA is sought at the same time as an initial application, the newly-enacted Section 11.001 requires that any such order be "reasonably necessary for the continued operations of the debtor company in the ordinary course of business" during the initial 10-day stay period.

CCAA, Section 11.001.

71. The policy concerns underlying the enactment of Section 11.001 are to limit the scope of the relief granted to a debtor company on an initial CCAA application to that which is critical because affected parties usually have no notice. Section 11.001 is intended to ensure that all parties have notice of the second hearing on day 10. Respectfully, those policy concerns, are not applicable on this motion. This is not an *ex parte* initial CCAA application. Rather, the Proposal Proceedings have been ongoing for more than 60 days and all of Metro 360's creditors who were owed more than \$250 at the date of the NOI filing have been given notice thereof. In addition, seven days' notice of this motion was provided to the service list maintained in the Proposal Proceedings, as well as to the federal and Ontario taxing authorities. The only material changes contained in the proposed Initial Order from the Proposal Proceedings are the creation of the Directors' Charge and the KERP Charge, and parties will have had 7 days' notice of those requests, satisfying the policy concerns noted above.
72. In any event, the relief in the proposed Initial Order is required during the initial stay period to preserve the value and normal course operations of Metro 360 and the Partners. The relief sought preserves the status quo, maintains the stability afforded by the Proposal Proceedings, and is necessary and appropriate at this stage.

PART IV – CONCLUSION

73. Metro 360 has made significant progress to date in the Proposal Proceedings, but requires the flexibility, stability and additional time afforded by the CCAA to continue to operate its remaining businesses and complete the wind-down of the Literature Business, in each case for the benefit of its stakeholders. Accordingly, the Partners are requesting that this Court grant the proposed Initial Order to convert and take up the Proposal Proceedings under the CCAA.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

June 14, 2020

GOODMAWS LLP
Goodmans LLP

SCHEDULE A

LIST OF AUTHORITIES

1. [*Clothing for Modern Times Ltd., Re*, 2011 ONSC 7522](#)
2. [*Canadian Airlines Corp., Re* \(2000\), 19 CBR \(4th\) 1](#)
3. [*Stelco Inc., Re*, \(2004\), 48 C.B.R. \(4th\) 299 \(Ont. Sup. Ct. J. \[Commercial List\]\)](#)
4. [*Re Lehndorff General Partners Ltd.* \(1993\), 17 C.B.R. \(3d\) 24 \(Ont. Gen. Div.\)](#)
5. [*Cinram International Inc., Re*, 2012 ONSC 3767](#)
6. [*Canwest Global Communications Corp., Re* \(2009\), 59 C.B.R. \(5th\) 72 \(Ont. Sup. Ct. J. \[Commercial List\]\)](#)
7. [*Performance Sports Group Ltd., Re*, 2016 ONSC 6800](#)
8. [*Canwest Publishing Inc. / Publications Canwest Inc., Re*, 2010 ONSC 222](#)
9. [*Re U.S. Steel Canada Inc.*, 2014 ONSC 6145](#)
10. [*Re Timminco Ltd.*, 2012 ONSC 506](#)
11. [*Re Grant Forest Products Inc.*, \[2009\] OJ No. 3344 \(Sup. Ct. \[Commercial List\]\)](#)
12. [*Aralez Pharmaceuticals Inc. \(Re\)*, 2018 ONSC 6980](#)
13. [*Sierra Club of Canada v. Canada \(Minister of Finance\)*, \[2002\] 2 S.C.R. 522](#)

SCHEDULE B

STATUTORY REFERENCES

BANKRUPTCY AND INSOLVENCY ACT

RSC 1985, c B-3, as amended

s. 2 (“insolvent person”)

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

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

COMPANIES' CREDITORS ARRANGEMENT ACT

RSC 1985, c C-36, as amended

s. 2 (“company”)

“company” means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the Bank Act, railway or telegraph companies, insurance companies and companies to which the Trust and Loan Companies Act applies.

s. 2 (“debtor company”)

“debtor company” means any company that

- (a) is bankrupt or insolvent,
- (b) has committed an act of bankruptcy within the meaning of the Bankruptcy and Insolvency Act or is deemed insolvent within the meaning of the Winding-up and Restructuring Act, whether or not proceedings in respect of the company have been taken under either of those Acts,

(c) has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act, or

(d) is in the course of being wound up under the Winding-up and Restructuring Act because the company is insolvent.

s. 3(1)

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

s. 10(2)

Documents that must accompany initial application – An initial application must be accompanied by

(a) a statement indicating, on a weekly basis, the projected cash flow of the debtor company;

(b) a report containing the prescribed representations of the debtor company regarding the preparation of the cash-flow statement; and

(c) copies of all financial statements, audited or unaudited, prepared during the year before the application or, if no such statements were prepared in that year, a copy of the most recent such statement.

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

11.001

Relief reasonably necessary – An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

s. 11.02(1)

General power of court – A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

s. 11.51(1)

Security or charge relating to director's indemnification – On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge -- in an amount that the court considers appropriate – in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

s. 11.51(2)

Priority – The court may order that the security or charge rank in priority over the claim of any secured creditors of the company

s. 11.51(3)

Restriction – indemnification insurance. – The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

s. 11.51(4)

Negligence, misconduct or fault – The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

s. 11.52(1)

Court may order security or charge to cover certain costs – 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 proceeding 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.

s. 11.52(2)

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

11.6

Bankruptcy and Insolvency Act matters – Notwithstanding the *Bankruptcy and Insolvency Act*,

(a) proceedings commenced under Part III of the *Bankruptcy and Insolvency Act* may be taken up and continued under this Act only if a proposal within the meaning of the *Bankruptcy and Insolvency Act* has not been filed under that Part; and

(b) an application under this Act by a bankrupt may only be made with the consent of inspectors referred to in section 116 of the *Bankruptcy and Insolvency Act* but no application may be made under this Act by a bankrupt whose bankruptcy has resulted from

(i) the operation of subsection 50.4(8) of the *Bankruptcy and Insolvency Act*, or

(ii) the refusal or deemed refusal by the creditors or the court, or the annulment, of a proposal under the *Bankruptcy and Insolvency Act*.

COURTS OF JUSTICE ACT

R.S.O. 1990, c. C.43

s.137(2)

Sealing documents – A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

PARTNERSHIPS ACT

R.S.O. 1990, c. P.5

s. 10(1)

Liability of partners – Except as provided in subsection (2), every partner in a firm is liable jointly with the other partners for all debts and obligations of the firm incurred while the person is a partner, and after the partner's death the partner's estate is also severally liable in a due course of administration for such debts and obligations so far as they remain unsatisfied, but subject to the prior payment of his or her separate debts.

**IN THE MATTER OF THE PROPOSAL OF METRO 360 GENERAL PARTNERSHIP AND
THE PARTNERS THEREOF**

Estate / Court File No.: 31-2636843

ONTARIO
SUPERIOR COURT OF JUSTICE
(IN BANKRUPTCY AND INSOLVENCY)
COMMERCIAL LIST
Proceeding commenced at Toronto

FACTUM
(Returnable June 17, 2020)

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