Court File No. CV-24-00730869-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

TWO SHORES CAPITAL CORP.

Applicant

- and -

PRODUCTIVITY MEDIA INC., PRODUCTIVITY MEDIA INCOME FUND I LP and PRODUCTIVITY MEDIA LENDING CORP. I

Respondents

APPLICATION under section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985 c. B-3, and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c c.43, as amended

FACTUM OF THE ELLEMENT FUNDS
(Motion for directions under s. 60 of the *Trustee Act*, R.S.O. 1990, c. T.23, returnable March 6, 2025)

March 5, 2025

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PART I - OVERVIEW

1. The KM Represented Funds, listed on **Schedule "A"** herein, invested a portion their pension, health, and other benefit funds' assets in the Productivity Media Income Fund I LP (the "**PMI Fund**"), which ultimately turned out to be a fraudulently operated organization. The KM Represented Funds have lost approximately $140M CAD. The total unitholder losses are approximately $291M CAD.

2. The PMI Fund, along with its general partner, Productivity Media Income Inc. ("**PMI**"), is now in receivership. The alleged fraudster, former CEO William Santor, is deceased as of December 28, 2024. KSV Restructuring Inc., the Receiver appointed by the sole secured creditor of PMI, Two Shores Capital Corp. ("**Two Shores**"), has been making efforts to collect various assets to pay back Two Shores' $4M CAD loan to the PMI Fund. Two Shores is now refusing to fund the receivership to pursue further recoveries. Instead, it has said that it will wait out the repayment of its loan through passive collections that come into the estate. Without further funding, the Receiver cannot pursue further collections which means the KM Represented Funds as well as all other unitholders are at risk of obtaining no recovery from the estate for their losses.

3. The Trustees of the KM Represented Funds (the "**Trustees**"), as well as certain other unitholders, formed a Steering Committee and have been in negotiations with the Receiver, the PMI Fund, and PMI to establish a funding mechanism to: (i) loan funds to the receivership so that the receiver can continue with their collection and recovery efforts; and (ii) buy out the Two Shores' secured loan and take over the secured position in this proceeding.

4. The KM Represented Fund Trustees and the other unitholders on the Committee are prepared to engage in these transactions, subject to the approval of this court, and confirmation of no opposition by the applicable pension regulators.

5. Since the KM Represented Funds include certain registered pension plans, they are subject to various pension regulatory minimum standards legislation in Ontario, Saskatchewan and Manitoba. Pension regulators in these jurisdictions have been contacted and confirmed that they take no position on the motion.

6. With respect to court approval, the KM Represented Fund Trustees request the approval of the investment in Two Shores' secured loan pursuant to section 60 of the *Trustee Act*, R.S.O. 1990, c. T.23, which authorizes the court to provide their opinion, advice or direction with respect to the management or administration of trust assets.

7. In the circumstances of this case and where there is no other practical alternative to facilitate the continuation of the receivership and recovery efforts, the KM Represented Fund Trustees respectfully request the approval of the court pursuant to section 60 of the *Trustee Act*.

8. The courts have held that approval under section 60 of the *Trustee Act* should be given if the trustees: (i) have the authority to follow through with their proposed action; (ii) have acted in good faith; and (iii) have acted fairly among beneficiaries. These factors are readily met in this case and court approval should be given.

9. In support of the investment in Two Shores' secured loan, confidential appendices containing sensitive commercial information, including recovery estimates and the contribution of each fund to the investment, should be sealed.

PART II - THE FACTS

A. Background

10. The KM Represented Funds consist of several pension, health and other benefit trust funds set up by various Union locals and central bodies of multi-locals for their members to provide pension benefits, health benefits and other benefits for their respective Union members.[1]

11. As part of the administration of the KM Represented Funds, fund assets are invested in various vehicles and products in both public and private placements to generate investment income for the funds.[2]

12. Beginning in 2021, Westfield Partners Ltd. **("Westfield"),** in its role as an exempt market dealer, approached the KM Represented Funds with an investment proposal for the investment of the funds' assets. Westfield was distributing limited partnerships units of the PMI Fund that were expected to generate positive returns for investors through its business of providing short-term financing products focused on the film and media industry.[3]

13. After reviewing the investment materials and financial information provided by the PMI Fund and Westfield, the KM Represented Funds agreed to invest varying amounts of the funds' assets in Class F units and entered into a limited partnership agreement with PMI, the General Partner to the PMI Fund.[4]

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[1] Affidavit of David Small sworn February 28, 2025, Motion Record, Tab 2 (the "**Small Affidavit**") at para. 2.
[2] *Ibid* at para. 5.
[3] *Ibid* at para. 6.
[4] *Ibid* at para. 7.

14. In July 2024, the then Chief Executive Officer of PMI, William Santor, obtained a short term $2.5M USD secured loan from Two Shores to provide cash for the daily operations of PMI. The loan is secured in first priority position against the assets of the PMI Fund, and PMI and the Productivity Media Lending Corp. I ("**PMLC**") as guarantors.[5]

15. In mid-August 2024, Westfield informed PMI that it had been made aware of allegations from two anonymous whistleblower sources that William Santor had caused the PMI Fund to advance fund assets to fake entities that Santor controlled, and that Santor also had pressured at least one media project sales agent to sign a false audit confirmation (the "**Allegations**").[6]

16. On August 26, 2024, PMI placed Mr. Santor on a leave of absence. PMI, through its legal counsel, DLA Piper (Canada) LLP, retained PricewaterhouseCoopers LLP ("**PwC**") to investigate the Allegations.[7]

17. On August 27, 2024, PMI notified unitholders of the Allegations and advised that Mr. Santor would be placed on a leave of absence while the PwC investigation was ongoing.[8]

18. The alleged fraud constituted a material change and event of default under the Two Shores loan agreement. Two Shores proceeded to make a demand against the PMI Fund, as borrower, and PMI and PMLC, as guarantors of the loan. The indebtedness owing to Two Shores, which now amounted to approximately $3.1M USD, has not been repaid.[9]

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[5] *Ibid* at para. 8.
[6] *Ibid* at para. 11.
[7] *Ibid* at para. 14.
[8] *Ibid* at para. 15.
[9] *Ibid* at para. 19.

Receivership, Santor Litigation & Mareva Injunction and Norwich Order

19. On November 19, 2024, Two Shores brought an application before the Ontario Superior Court of Justice to appoint KSV Restructuring Inc. as receiver and manager (the "**Receiver**"), without security, of all of the assets, undertakings and properties of PMI, the PMI Fund, and PMLC. The Application Record disclosed the scale of the fraud Allegations against Mr. Santor and others, and the potential losses suffered by unitholders.[10]

20. Following the appointment of the Receiver, PMI, as the general partner of the PMI Fund, filed a lawsuit on November 22, 2024, against Mr. Santor, his wife, and their companies claiming $44M CAD compensation for fraud (the "**Santor Litigation**"). As part of that action, PMI applied for a Mareva and Norwich Order in Ontario, which were ultimately granted and have since been continued to March 24, 2025.[11]

21. In conjunction with the Santor Litigation, on December 5, 2024, PMI, as the general partner of the PMI Fund, filed an *ex parte* application before the Grand Court of the Cayman Islands against Mr. Santor, his wife, and their companies for an order prohibiting the disposal of their assets. That application was granted on December 6, 2024, and following a continuation order, remains in force.[12]

Receivership Funding Agreement

22. Following the issuance of the above-noted court orders, the Receiver required funds to advance its investigation and the Santor Litigation. Two Shores did not want to advance further

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[10] *Ibid* at para. 20.
[11] *Ibid* at para. 21.
[12] *Ibid* at para. 22.

monies to fund the Receiver, and the PMI Fund unitholders were therefore approached for funding. After reviewing the Two Shores loan documents and security, as well as legal opinions from counsel for Westfield and the Receiver, the KM Represented Funds and other unitholders decided that the purchase of Two Shores' security (the "**Proposed Assignment Transaction**") was the most practical alternative in the circumstances to try and obtain recoveries. Accordingly, several PMI Fund unitholders (the "**Funding Unitholders**") entered into a Funding Agreement to pool their trust fund assets *pro rata* to: (i) acquire the debt and security of Two Shores; and (ii) periodically fund the Receiver's ongoing activities to further its investigation of the fraud. Pursuant to the Funding Agreement, funds would be advanced through a new trust established by the Funding Unitholders and overseen by Westfield in a new limited role as a custodial trustee to help facilitate the funding.[13]

23. Pursuant to Article 4 of the Funding Agreement, the Funding Unitholders, by a majority vote pursuant to article 8.2, formed an *ad hoc* Steering Committee comprised of KM-represented unitholders and one other unitholder: Turn8 Private Wealth (who is not represented by KM).[14]

24. Under the terms of the Funding Agreement, Westfield is not authorized under the Funding Agreement to unilaterally advance funds to the Receiver. This requirement applies not only to periodic funding requests from the Receiver, but also to the acquisition of Two Shores' debt and security instruments, pursuant to article 5.1(c) of the Funding Agreement.[15]

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[13] *Ibid* at para. 23.
[14] *Ibid* at para. 24.
[15] *Ibid* at paras. 25-26.

25. Given that several Funding Unitholders were trusts involving pension, health and other benefit funds, the KM Represented Funds understood that any investment in the Proposed Assignment Transaction was conditional on the trustees of those funds acting in compliance with their fiduciary duties, including performing the appropriate due diligence in obtaining applicable pension regulatory approval. In the absence of such, it was unlikely that the Proposed Assignment Transaction would be approved by the majority of the Steering Committee, which is a requirement under article 5.1(c) of the Funding Agreement.[16]

26. In mid-December 2024, the Receiver contacted the Steering Committee to advise them that it immediately and urgently required funds to continue with its recovery activities. Given the urgency conveyed by the Receiver, the Steering Committee agreed to loan $750,000 CAD, with interest, to the receivership. This loan is secured by a receiver's certificate, but on agreement of the parties, it is subordinated to the Two Shores secured loan.[17]

27. On or around December 28, 2024, Mr. Santor was found deceased at his home in the Cayman Islands.[18]

Proposed Assignment Transaction of Two Shores Secured Loan

28. The economic terms of the Two Shores security are:

(a) A principal debt of $2.5M USD due and owing from the PMI Fund, by its general partner, PMI;

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[16] *Ibid* at para. 27.
[17] *Ibid* at para. 28.
[18] *Ibid* at para. 29.

(b) as demand has been made on the principal debt, interest on the debt accrues at 24% per annum, calculated daily and compounded monthly;

(c) guarantees from PMI and PMLC for the entire indebtedness;

(d) a security package consisting of:

(i) a general security agreement dated as of July 25, 2024 granted the PMI Fund, by its general partner, PMI, PMI and PMLC in favour of Two Shores;

(ii) a promissory note dated as of July 25, 2024 granted by the PMI Fund in favour of Two Shores;

(iii) a Blocked Account Agreement (with Trigger) dated as of July 25, 2024 between Bank of Montreal, PMI and Two Shores; and

(iv) a Blocked Account Agreement (with Trigger) dated as of July 25, 2024 between Bank of Montreal, the PMI Fund and Two Shores.[19]

29. To purchase this secured debt and the security package to go along with it, Two Shores has requested an amount equal to the total indebtedness.[20]

30. In order to properly assess this investment and in compliance with its fiduciary duty, the KM Represented Funds retained Ernst & Young Inc. ("**EY**") as their financial advisor to evaluate

[19] *Ibid* at para. 31.
[20] *Ibid* at para. 32.

the potential recoveries to PMI, the Two Shores' security, and the probability for a return on such an investment.[21]

31. EY has assessed the Proposed Assignment Transaction and has reported to the KM Represented Funds that there will likely be sufficient assets recovered by the Receiver to repay the Funding Unitholders with respect to the Proposed Assignment Transaction, with interest, and also to repay the $750,000 CAD advanced by the Steering Committee in December 2024.[22]

32. In reliance on the EY Report, the Trustees are inclined to proceed with the Proposed Assignment Transaction. The requisite funds have been advanced to Westfield, who currently holds them in trust, and subject to court and regulatory approval, the majority of the Steering Committee are expected to vote in favour of instructing Westfield to release the funds and proceed with the Proposed Assignment Transaction.[23]

33. The Proposed Assignment Transaction is prudent in the circumstances as it provides the only practical alternative of salvaging from PMI the original investments of the KM Represented Funds.

34. The Trustees acknowledge that they have a fiduciary duty to act in the best interests of their beneficiaries. In the case of pension fund trustees, this duty is reflected in pension minimum standards legislation. On February 13, 2025, KM informed the Financial Services Regulatory Authority of Ontario of the Proposed Assignment Transaction. On February 28, 2025, FSRA wrote

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[21] *Ibid* at para. 33.
[22] *Ibid* at para. 34.
[23] *Ibid* at para. 35.

to KM advising that it does not take a position with respect to the Proposed Assignment Transaction or this motion.[24]

35. In addition, several of the KM Represented Funds are regulated in other jurisdictions by the Pension Commission of Manitoba and the Financial and Consumer Affairs Authority of Saskatchewan. KM has also informed these provincial regulators of the Proposed Assignment Transaction. Both pension regulators have confirmed that they will not take a position on the motion with respect to the Proposed Transaction.[25]

PART III - THE ISSUES

36. The Trustees submit that there are two issues to be determined on this motion:

i. Is participation in the Proposed Assignment Transaction by each of the KM-Represented Fund Trustees consistent with their fiduciary duties in respect of the management and administration of the property of the pension, health and other benefit funds?

ii. Should the EY Report and Funding Agreement be sealed?

37. The Trustees submit that both issues should be answered in the affirmative.

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[24] *Ibid* at para. 39.
[25] *Ibid* at para. 40.

PART IV - THE LAW & ARGUMENT

A. Participation in the Proposed Assignment Transaction is Consistent with the Fiduciary Duties of the Trustees

38. Section 60 of the *Trustee Act* entitles trustees to seek the opinion, advice, and direction of the court with respect to the management or administration of a trust:

> **Applications to Court for Advice**
>
> **Trustee, etc., may apply for advice in management of trust property**
>
> **60** (1) A trustee, guardian or personal representative may, without the institution of an action, apply to the Superior Court of Justice for the opinion, advice or direction of the court ***on any question*** respecting the management or administration of the trust property or the assets of a ward or a testator or intestate.
>
> **Indemnity of trustee, etc., acting as advised**
>
> (2) The trustee, guardian or personal representative acting upon the opinion, advice or direction given ***shall be deemed, so far as regards that person's responsibility, to have discharged that person's duty as such trustee, guardian or personal representative, in the subject-matter of the application***, unless that person has been guilty of some fraud, wilful concealment or misrepresentation in obtaining such opinion, advice or direction. [emphasis added]

39. This entitlement of trustees can take two forms. The first is for the court's assistance on trust management or administration issues. The second is for legal protection of trustees against the claims of beneficiaries. As noted recently by the Court of Appeal for Ontario: proceedings under this section "are intended to assist, and in some cases provide legal protection to the trustee against beneficiaries for actions to be taken by the trustee in the administration of the trust or estate." [26]

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[26] *Bunker v. Veall*, 2023 ONCA 501, at para. 13.

40. Importantly, the legal protection provided by the court's directions is not absolute. The additional protective feature of section 60(2) of the *Trustee Act* is that the court's declaration that a trustee has discharged his or her duties is not applicable if the trustee is guilty of fraud, willful concealment or misrepresentation in the obtaining of the opinion, advice and direction from the court. There is no evidence or issue of such conduct in the case at bar.

41. Much like the current motion, section 60 of the *Trustee Act* has been considered by courts to assist trustees in unorthodox commercial investment matters. In *McKay Estate v. Love*, [27] the estate owned a large piece of land, and the province was offering to purchase the land for a significant sum of money. There was the potential that future expropriation claims were worth more, but those claims came with both additional costs and uncertainty. The sole, court-appointed executor decided to sell the land to the government and applied to the court under section 60 of the *Trustee Act* and Rule 14.05(3)(f) of the *Rules of Civil Procedure,* R.R.O. 1990, Reg. 194 for approval. The court determined that on such an application, the court should consider:

> (e) whether the executor had the power to do what he was proposing to do;
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> (f) whether he acted in good faith; and,
>
> (g) whether he acted fairly as among beneficiaries.[28]

42. Similarly, in *U.S. Steel Canada Inc. (Re)* (2014)[29], the trustees of certain employee life and health trust applied for guidance on a change to Stelco's original plan of compromise under the

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[27] *McKay Estate v. Love*, [1991] O.J. No. 1972 (Ont. C.J.).
[28] *Ibid* at paras. 4 and 10 to 14.
[29] *U.S. Steel Canada Inc. (Re)* (5 June 2018), Toronto CV-14-10695-00CL (ONSC).

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36. Under the original plan, the employee life and health trust was to receive specified funding amounts that re-started the payment of post-employment benefits to retirees. Following CCAA restructuring in June 2017, the expectation of the trustees was that their principal responsibility would be to receive the pre-determined contributions towards post-employment benefits that would be made pursuant to the CCAA plan, and to design a benefits plan that would be sustainable with those contributions.

43. However, in 2018, the trustees were made aware that Stelco wished to materially alter how the trusts were funded. Stelco wished to monetize real estate assets that were otherwise to form the backbone of cash flow for the trusts. By selling the real estate assets now, Stelco proposed a more stable cash flow stream for the trusts. Simplistically, it would provide for an annuity stream of payments as opposed to one based on the market value of the real estate that could fluctuate. As a result, the trustees – who had only been expected to administer the trust – were required to conduct significant due diligence for a substantial and complex financial transaction.

44. In that case, as in this one, the trustees consulted with stakeholders and a financial advisor and concluded that it was in the interests of the beneficiaries to complete the proposed transaction. Specifically, the trustees:

(a) obtained legal advice from counsel as to the proposed transaction;

(b) obtained and review financial advice from a financial advisor commenting on the risks and benefits of the transaction;

(c) consulted with not-trustee stakeholders who also supported the transaction; and

(d) considered and weighed the potential negative effects of not entering into the transaction.

45. In light of these facts, the Honourable Mr. Justice Wilton-Siegel granted the order sought by the trustees under section 60 of the *Trustee Act*, deeming the trustees to have discharged their fiduciary duties in completing that transaction.

46. The fact situation facing the current Trustees fits almost exactly the same pattern as those in *U.S. Steel Canada Inc. (Re)* (2014). They had been funding the receivership proceedings by way of subordinated receivership certificates when a material change was proposed: to take an assignment of the secured creditor who was no longer willing to finance the investigatory and recovery efforts of the court-appointed Receiver. In response to this request to invest in secured debt, they:

(a) obtained legal advice from counsel as to the proposed transaction;

(b) obtained and review financial advice from a financial advisor (EY) commenting on the risks and benefits of the transaction;

(c) consulted with non-trustee stakeholders who also supported the transaction (the other syndicate investors in Two Shore's debt); and

(d) considered and weighed the potential negative effects of not entering into the transaction, which would effectively terminate the receivership proceedings and mean a loss of the initial investment of the various funds in PMI.

47. After a review of these factors, the Trustees believe that investing in the Two Shores debt fits with their fiduciary obligations.

48. Seeking court protection for the investment in Two Shore's debt is also a prudent course of action for trustees dealing with unorthodox issues. An example can be seen in *InnVest Real Estate Investment Trust, Re*. That case involved transactions related to a complex combination of trusts and a corporation where the trustees had previously split off some of the trust holdings as a result of changes in the tax regime. A year later, after additional changes to the tax regime occurred, the trustees were attempting to reverse the split off.[30] The trustees applied to the court under section 60 of the *Trustee Act* to determine whether they had complied with their fiduciary duty in the steps they took to approve the transaction that would reverse the split off. Brown, J. (as he then was) determined that, given the exceptional circumstances and complexity of the transaction, it was an appropriate use of section 60 to issue the requested order:

> 14. On reflection I concur with Hoy J. that an inquiry into the fairness and reasonableness of ***the trust-related steps*** in the proposed plan of arrangement falls within the Court's jurisdiction under section 60(1) of the *Trustee Act*. The hesitation I expressed at the hearing related to the danger of the Court opening its door to applications by trustees for orders approving that which arguably they possess the power to do in any event. However, on a review of the evidence filed, I appreciate that the present case is exceptional in its nature, given the overall complexity of the proposed transaction.[31] [emphasis added]

49. The Ontario Court of Appeal has also held that the *Trustee Act* is not a complete code. The Court retains inherent jurisdiction to issue orders with respect to trusts where it is just or equitable to do so[32] :

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[30] *InnVest Real Estate Investment Trust, Re*, 2011 ONSC 7693.
[31] *Ibid* at para. 14.
[32] *Evans v. Gonder*, 2010 ONCA 172 at paras. 21, 34 and 41 (C.A.).

> 41. ***The Trustee Act is not a complete code. It does not provide for a comprehensive system for the administration of trusts.*** In 1984, the Ontario Law Reform Commission released a seminal report on reforming the law of trusts as part of a comprehensive review of the law of property: see Ontario Law Reform Commission, *Report on the Law of Trusts* (Toronto: O.L.R.C. Rep., 1984). In their report, the Commission considered, and rejected the notion of a codification of the law of trustees, preferring a statute that supplemented and clarified the judge-made law of trusts: see *Report on the Law of Trusts*, at pp. 12-15. [emphasis added]

Application of the Current Facts

50. All the factors set out in *McKay Estate*, and *U.S. Steel Canada Inc. (Re)* (2014) are readily met in this case. It is appropriate that the Court issue the requested order for the Trustees.

i. The Trustees Have the Authority to Invest Further

51. The Trustees have already invested trust property to fund the receivership, as evidenced by the receivership certificate. The investment in Two Shore's debt is the further exercise of their power to fund the ongoing receivership.

ii. The Trustees Have Acted in Good Faith

52. The Trustees recognize they have a fiduciary obligation under the common law, which includes both a duty to act honestly and in good faith. This fiduciary duty has been described as follows:

> All fiduciaries are required to act honestly and in good faith and to use their powers properly and only for the purposes for which they were granted. They are precluded from making unauthorized profits, from delegating their responsibilities, and from having conflicting interests or duties. In short, a fiduciary cannot act in a self-interested fashion unless authorized to do so.[33]

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[33] A.H. Oosterhoff, Robert Chambers & Mitchell McInnes, *Oosterhoff on Trusts: Text, Commentary and Materials*, 10th ed (Toronto: Thomson Canada Limited, 2024) at 134.

53. As detailed in the steps taken by the Trustees listed in paragraph 35 above, the Trustees have acted in good faith in responding to and evaluating the Proposed Assignment Transaction, and by performing a detailed evaluation of the terms of the transaction and obtaining extensive professional advice. They submit that they have fulfilled their fiduciary obligations.

iii. The Trustees have Acted Fairly Among all Beneficiaries

54. The steps followed and actions taken by the Trustees with respect to the Proposed Assignment Transaction are for the benefit of all the beneficiaries of the trusts. There is no individual or group of beneficiaries who are being disadvantaged or receiving more favourable treatment. All the beneficiaries are being treated fairly.

The Relief Aligns with the Protections for Other Restructuring Parties

55. Generally, the relief sought is consistent with the protections the Court provides to restructuring professionals and representatives of creditor groups in these and other insolvency proceedings (such as retirees, employees, shareholders, class action members, and other specific creditor groups) to facilitate the conduct of those proceedings. The Trustees wish to invest in Two Shore's debt in order to facilitate the continued funding of these receivership proceedings for the benefit of the trusts and other stakeholders. The Trustees should be entitled to protection for their role in facilitating the Proposed Assignment Transaction.

B. The EY Report and the Funding Agreement Should be Sealed

56. The Trustees request an order sealing the confidential appendices to the Affidavit of David Small sworn February 28, 2025 (the "**Small Affidavit**") pending further order of this court. The confidential appendices are the Funding Agreement and the EY Report which contain,

respectively, the cash amounts that each KM Represented Fund will contribute to the Proposed Assignment Transaction, and recovery analyses conducted by the funds' financial advisor.

57. The *Courts of Justice Act* grants this court the discretion to order that any document filed in a civil proceeding be treated as confidential and sealed and not form part of the public record.[34]

58. The test to determine if a sealing order should be granted is set out in *Sierra Club* as recast in *Sherman Estate*:

(a) court openness poses a serious risk to an important public interest;

(b) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and

(c) as a matter of proportionality, the benefits of the order outweigh its negative effects.[35]

59. The courts in *Sierra Club* and *Sherman Estate* explicitly recognized that commercial interests such as preserving confidential information or avoiding a breach of a confidentiality agreement are an "important public interest" for purposes of this test.[36]

60. The confidential appendices contains highly sensitive commercial information including the estimates of value and recovery by EY, which, if made public, may detrimentally affect the

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[34] *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 137(2).
[35] *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 (CanLII), at para. 53 [*Sierra Club*]; and *Sherman Estate v. Donovan*, 2021 SCC 25 at paras. 38 and 43 [*Sherman Estate*]
[36] *Sierra Club* at para. 55; and *Sherman Estate* at paras. 41-43.

conduct of litigation commenced by the Receiver to identify and re-capture assets for the benefit of the estate.

61. Canadian courts have regularly granted sealing orders in the interest of protecting recoveries for creditors in insolvency proceedings. In *Sumitomo Canada Limited v Minto Metals Corp*., the Supreme Court of Yukon agreed to seal a liquidation plan "because of the harm to obtaining value from [debtor's] assets created by revealing the liquidation value estimated":

> [134] Originally, the Receiver requested the entire confidential supplementary fourth report containing the details of the liquidation plan be sealed because of the harm to obtaining value from Minto Metals' assets created by revealing the liquidation value estimated by the Receiver. Their position was revised at the hearing to request only the last two pages of the confidential report be sealed. Those pages contained the financial information; the balance of the report set out the proposed process, which had been disclosed to the parties and the Court in the Liquidator's earlier report and did not contain confidentially sensitive economic information.
>
> [135] Applying the three-step test for a restriction on court openness set out in *Sherman Estate v Donovan*, 2021 SCC 25 at para. 38, in this case the Receiver has satisfied the test for sealing the last two pages by establishing: 1) public disclosure of the value and pricing of the Minto Metals assets to be marketed for sale could result in reduced recoveries and a detrimental impact on creditors; 2) there is no reasonable alternative to a time limited sealing order of the part of the report containing the asset value and pricing information; and 3) the benefits of maximizing recoveries for the creditors by sealing that information outweigh any negative effects on the open-court principle.[37]

62. Similarly, in *Arrangement relatif à Fortress Global Enterprises*, the Superior Court of Quebec refused to publicly divulge information in insolvency proceedings when doing so would negatively impact future realization on assets:

> [58] Canadian courts, as a general practice, consider that all aspects of a bidding or sales process should be kept confidential. The sealing of this information protects the integrity of the process and ensures that, while the process is running its course, all potential bidders are treated equitably,

[37] *Sumitomo Canada Limited v Minto Metals Corp.*, 2024 YKSC 28 at paras. 134-135.

> and no one obtains an unfair advantage. Courts have considered that publicly divulging such information would negatively impact on future realizations on the assets and the parties' efforts to maximize value for stakeholders. The commercial interests of the monitor, bidders, creditors and other stakeholders to promote a fair sales and solicitation process in restructuring, insolvency or liquidation matters constitutes an important public interest.[38]

63. Reports containing financial advice have been sealed by courts in Ontario. In *Laurentian University*, Chief Justice Morawetz sealed an appendix containing a proposal from Cushman & Wakefield, whom Laurentian was retaining as a real estate advisor to provide advice on a plan for Laurentian's real estate portfolio. The court at the hearing raised a concern that the hourly rates of Cushman & Wakefield professionals who were to work on the project were part of the sealing request. To address that concern, Laurentian removed the sealing request for the hourly rates, but left the rest of the Appendix in place for sealing. With that adjustment, the court sealed the appendix and referenced *Sherman Estate*.[39]

64. Like the EY Report, the Funding Agreement should also be sealed. The Agreement contains sensitive commercial information, including the amount each KM Represented Fund will contribute to the Proposed Assignment Transaction.

65. There is no other reasonable alternative to preventing this information from becoming publicly available, and the sealing request may be removed upon further order of the court. All other material terms of the Proposed Assignment Transaction and the Funding Agreement are disclosed in the Small Affidavit. Therefore, the salutary effects of maintaining the confidential

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[38] *Arrangement relatif à Fortress Global Enterprises*, 2023 QCCS 1353 at para. 58.
[39] *Laurentian University of Sudbury*, 2021 ONSC 4769 at para. 12.

nature of the Confidential Appendices until further order of this court greatly outweighs the deleterious effects.

PART V - ORDER REQUESTED

66. In light of all of the above, the Trustees request an order substantially in the form of the draft order in the motion record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of March, 2025.

ANDREW HATNAY

ROBERT DRAKE

ABIR SHAMIM

SCHEDULE "A"

- ELLEMENT FUNDS

Electrical Industry of Ottawa Health & Benefit Trust Fund
Electrical Industry of Ottawa Pension Trust Fund
United Brotherhood of Carpenters and Joiners of America Local Union 2041 Acoustic & Drywall Health & Welfare Trust Fund
United Brotherhood of Carpenters and Joiners of America Local Union 2041 Pension Trust Fund
Quinte St. Lawrence Electrical Workers Pension Trust Fund
United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada ("U.A.") Local 71 Health & Welfare Trust Fund
U.A. Local 71 Pension Trust Fund
U.A. Local 71 Ottawa General Fund
U.A. Local 71 Stabilization Fund

- CONSORTIUM OF UNION SPONSORED TRUST FUNDS

Construction & Specialized Workers' Union Local 1258 Pension Trust Fund
Construction & Specialized Workers' Union Local 1258 Health and Welfare Trust Fund
Construction & Specialized Workers' Union Local 1258 Training Trust Fund
International Brotherhood of Electrical Workers ("IBEW") Local Union 2038 Pension Trust Fund
IBEW Local Union 2038 Health and Welfare Trust Fund
IBEW Local Union 2085 Pension Trust Fund
IBEW Local Union 2085 Health and Welfare Trust Fund
IBEW Local Union 529 Pension Trust Fund
Iron Workers (Manitoba) Local Union 728 Central Pension Trust Fund
Iron Workers (Saskatchewan) Local Union 771 Central Pension Trust Fund
Iron Workers (Saskatchewan) Local Union 771 Central Welfare Trust Fund
Local Union 739 Health and Welfare Trust Fund
Manitoba Municipal Employees Group Insurance Fund
Manitoba Municipal Employees Disability Income Trust Fund
Manitoba Multiple Trades Pension Trust Fund
Millwrights Local Union 1443 Health and Welfare Trust Fund
Operating Engineers of Manitoba Local 987 Pension Trust Fund
Prairie Arctic Regional Council Pension Trust Fund
Sheet Metal Workers Local Union 296 Pension Trust Fund
The Link: Youth and Family Supports Pension Plan
U.A. Local Union 254 Pension Trust Fund
Saskatchewan United Food and Commercial Workers Dental Plan
Westfair Foods Ltd./United Food and Commercial Workers Local 1400 Benefit Trust Fund
Ideal Roofing Company Limited Pension Plan
PSAC Nominee Corporation
Trustees of the PSAC Insurance Trust
LiUNA Local 183 Members' Benefit Fund

SCHEDULE "B"

LIST OF AUTHORITIES

1. *Arrangement Relatif à Fortress Global Enterprises*, 2023 QCCS 1353
2. *Bunker v. Veall*, 2023 ONCA 501
3. *Evans v. Gonder*, 2010 ONCA 172
4. *InnVest Real Estate Investment Trust, Re*, 2011 ONSC 7693
5. *Laurentian University of Sudbury*, 2021 ONSC 4769
6. *McKay Estate v. Love*, [1991] O.J. No. 1972 (Ont. C.J.)
7. *Sherman Estate v. Donovan*, 2021 SCC 25
8. *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41
9. *Sumitomo Canada Limited v Minto Metals Corp.*, 2024 YKSC 28
10. *U.S. Steel Canada Inc. (Re)* (5 June 2018), Toronto CV-14-10695-00CL (ONSC)

SECONDARY SOURCES

11. A.H. Oosterhoff, Robert Chambers & Mitchell McInnes, *Oosterhoff on Trusts: Text, Commentary and Materials*, 10th ed (Toronto: Thomson Canada Limited, 2024).

SCHEDULE "C"

RELEVANT STATUTES

1. ***Trustee Act,*** **R.S.O. 1990, c. T.23**

67. Applications to Court for Advice

68. Trustee, etc., may apply for advice in management of trust property

69. 60 (1) A trustee, guardian or personal representative may, without the institution of an action, apply to the Superior Court of Justice for the opinion, advice or direction of the court on any question respecting the management or administration of the trust property or the assets of a ward or a testator or intestate.

70. Indemnity of trustee, etc., acting as advised

71. (2) The trustee, guardian or personal representative acting upon the opinion, advice or direction given shall be deemed, so far as regards that person's responsibility, to have discharged that person's duty as such trustee, guardian or personal representative, in the subject-matter of the application, unless that person has been guilty of some fraud, willful concealment or misrepresentation in obtaining such opinion, advice or direction.

2. ***Courts of Justice Act,*** **R.S.O. 1990, c. C.43**

Sealing documents

137(2) 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.

3. ***Rules of Civil Procedure,*** **R.R.O. 1990, Reg. 194**

Applications – By Notice of Application or Application for Certificate

Application under Rules

14.05(3) A proceeding may be brought by application where these rules authorize the commencement of a proceeding by application or where the relief claimed is,

…

(f) the approval of an arrangement or compromise or the approval of a purchase, sale, mortgage, lease or variation trust.

TWO SHORES CAPITAL CORP.	**v.**	**PRODUCTIVITY MEDIA INC. et al.**
Applicant		Respondents

Court File No.: CV-24-00730869-00CL

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

FACTUM OF THE ELLEMENT FUNDS
(Motion for Directions under s. 60 of the *Trustee Act,* returnable March 6, 2025)

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