

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

IN THE MATTER OF THE COMPANIES' CREDITORS
ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF MASTERMIND GP INC.

Applicants

**FACTUM OF THE APPLICANT
(COMEBACK HEARING RETURNABLE NOVEMBER 30, 2023)**

November 30, 2023

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PART I – OVERVIEW

1. On November 23, 2023, Mastermind GP Inc. (the “**Applicant**”) and Mastermind LP (together with the Applicant, the “**Mastermind Entities**”) were granted protection under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985 c. C-36 (the “**CCAA**” or the “**Act**”) pursuant to an Initial Order (the “**Initial Order**”).
2. The Initial Order, among other things: (a) appointed Alvarez & Marsal Canada Inc. as the Monitor of the Mastermind Entities (the “**Monitor**”), (b) granted a stay of proceedings in favour of the Mastermind Entities until November 30, 2023 (the “**Stay**”); and (c) granted a charge in the amount of \$750,000 to secure the fees and disbursements of counsel to the Mastermind Entities, the Monitor and the Monitor’s counsel (the “**Administration Charge**”); and (d) granted a charge in the amount of \$4,000,000 favour of the directors and officers of the Mastermind Entities (the “**D&O Charge**”).
3. In this motion, the Mastermind Entities seek an Order (the “**Liquidation Sale Approval Order**”), among other things, approving the Consulting Agreement and the Sale Guidelines (each as defined below) and authorizing Mastermind LP to undertake a liquidation sale of inventory and other assets in certain of their stores.
4. The Mastermind Entities, also seek an Amended and Restated Initial Order (“**ARIO**”), among other things, (a) extending the Stay to January 26, 2024, (b) increasing the Administration Charge and D&O Charge, (c) approving the Forbearance Agreement (as defined below) and related relief, including approving the Pre-Filing Payments Order and the DIP Charge (each as defined below), and (d) approving a key employee retention plan (the “**KERP**”) and related charge (the “**KERP Charge**”) as security for payments under the KERP and sealing the KERP.

PART II – SUMMARY OF FACTS

5. The facts underlying this Motion are more fully set out in the Affidavit #2 of Lucio Milanovich sworn November 29, 2023 (the “**Second Affidavit**”).¹

A. The Liquidation Sale Approval Order

6. The Mastermind Entities are seeking this Court’s approval to conduct a liquidation sale of their inventory, furniture, fixtures and equipment (“**FF&E**”) in certain of Mastermind LP’s stores and other locations to the benefit of their creditors. Specifically, pursuant to the Liquidation Sale Approval Order, the Mastermind Entities are seeking this Court’s approval of: (a) the consulting agreement between Mastermind LP and Gordon Brothers Canada ULC (the “**Consultant**”) dated November 24, 2023 (the “**Consulting Agreement**”)² and liquidation sale contemplated therein, and (b) the proposed sale guidelines attached as Schedule A to the Liquidation Sale Approval Order (the “**Sale Guidelines**”).

(i) The Consultant Was Identified Through a Thorough Process

7. The principal purpose of these CCAA proceedings is to enable the Mastermind Entities to have the opportunity to pursue a potential sale of some or all of the “Mastermind Toys” business (the “**Potential Transaction**”) and retain the flexibility to liquidate certain stores operated by Mastermind LP, all with the goal of maximizing recoveries for their stakeholders.

8. Accordingly, prior to the Filing Date the Mastermind Entities, with the assistance of A&M Corporate Finance, began soliciting bids from five professional, third party liquidators

¹ Second Affidavit at [para. 1](#), Motion Record of the Applicant (“**MR**”), Tab 2, p. 1. All capitalized terms used but not defined herein have the meanings ascribed to them in the Second Affidavit.

² Second Affidavit at [paras. 10 & 18](#), MR, Tab 2.

(the “**Potential Liquidators**”) to liquidate Mastermind LP’s inventory and FF&E for the benefit of its stakeholders.³

9. Each of the Potential Liquidators entered into non-disclosure agreements with the Mastermind Entities, received access to a data room with relevant information and engaged in discussions with the Mastermind Entities and A&M Corporate Finance.⁴ With the assistance of A&M Corporate Finance, the Mastermind Entities selected the offer submitted by the Consultant, which they considered to be superior based on underlying economics and the Consultant’s experience both in the toy retail industry and in conducting sales of this type.⁵

(ii) The Consulting Agreement

10. On November 24, 2023, Mastermind LP entered into a Consulting Agreement (the “**Consulting Agreement**”) with the Consultant, appending sale guidelines as Exhibit “B” (the “**Sale Guidelines**”).⁶

11. Pursuant to the terms of the Consulting Agreement, the Consultant will serve as the exclusive liquidator for the purpose of selling (the “**Sale**”) (i) the inventory located in certain retail stores and the distribution centre operated in connection with Mastermind LP’s business (the “**Merchandise**”), and (ii) the FF&E located in such retail stores, Mastermind LP’s corporate office and the distribution centre.⁷ Given the process undertaken by the Mastermind Entities and A&M Corporate Finance prior to the Filing Date to select a liquidator, the

³ Second Affidavit at [para. 14](#), MR, Tab 2; Monitor’s Report at [para. 4.2](#).

⁴ Second Affidavit at [para. 15](#), MR, Tab 2.

⁵ Second Affidavit at [para. 15](#) & [17](#), MR, Tab 2.

⁶ Second Affidavit at [paras. 18](#) & [26](#), MR, Tab 2.

⁷ Second Affidavit at [para. 19](#), MR, Tab 2.

Consulting Agreement represents the best available offer for the sale of Mastermind LP's Merchandise and FF&E.⁸

12. The Consulting Agreement expressly requires approval of this Court.⁹ If approved, the Consulting Agreement provides that the Sale will run for approximately an eight-week term, commencing on December 1, 2023 and ending no later than January 31, 2024, although the Mastermind Entities and the Consultant expect the Sale will be completed by January 14, 2024.¹⁰

13. The Consulting Agreement affords Mastermind LP the flexibility to pursue the Potential Sale.¹¹ Initially, the Mastermind Entities intend to conduct the Sale at 18 stores. If the Mastermind Entities are unable to settle the terms of a Potential Transaction, they will expand the Sale to include all of their stores.¹² Alternatively, if the Mastermind Entities are successful in settling the terms of a Potential Transaction, the Consulting Agreement requires the Consultant and the Mastermind Entities to work cooperatively and in good faith to modify the steps and transactions contemplated under the Consulting Agreement.¹³

B. Amended and Restated Initial Order

14. As was foreshadowed during the Initial Order proceedings, the Mastermind Entities are seeking additional relief pursuant to an ARIO. The Mastermind Entities' stakeholders have

⁸ Second Affidavit at [para. 37](#), MR, Tab 2.

⁹ Second Affidavit, [Exhibit "D"](#), Consulting Agreement, [ss. 3\(a\)](#) & [12\(c\)\(ii\)](#), MR, Tab 2D.

¹⁰ Second Affidavit at [para. 20](#), MR, Tab 2.

¹¹ Second Affidavit at [para. 10](#), MR, Tab 2.

¹² Second Affidavit at [para. 22](#), MR, Tab 2.

¹³ Second Affidavit at [para. 27](#), MR, Tab 2; Second Affidavit, [Exhibit "D"](#), Consulting Agreement, [s. 11](#), MR, Tab 2D.

been notified of these CCAA proceedings, including this Comeback Hearing, and have been provided with the opportunity to participate.¹⁴

(i) Extension of the Stay of Proceedings

15. In the Initial Order, this Court granted a stay of proceedings (the “**Stay**”) until and including November 30, 2023.¹⁵ The Mastermind Entities propose to extend the Stay to January 26, 2024. The Monitor and CIBC are both supportive of the proposed Stay extension.¹⁶

16. The extension of the Stay is necessary and appropriate in the circumstances to give the Mastermind Entities the breathing room they need to: (a) engage in constructive discussions with their landlords and other stakeholders; (b) effect the Sale without the threat of uncoordinated enforcement actions from Mastermind LP’s many creditors; and (c) continue efforts to pursue a Potential Transaction.

(ii) The Key Employee Retention Plan and KERP Charge

17. The Mastermind Entities seek this Court’s approval of a KERP. The KERP is intended to provide a retention incentive in the aggregate amount of \$285,250 for six Mastermind LP employees who will be crucial in facilitating the Sale and pursuing a Potential Transaction during these CCAA proceedings.¹⁷ The Mastermind Entities will also establish a separate incentive pool of \$200,000 to retain certain store-level managerial employees during these

¹⁴ Second Affidavit at [paras. 30 & 42](#), MR, Tab 2.

¹⁵ Second Affidavit at [para. 41](#), [Exhibit “B”](#), Initial Order, MR, Tab 2B.

¹⁶ Second Affidavit at [paras. 41 & 44](#), MR, Tab 2.

¹⁷ Second Affidavit at [paras. 60-61](#), MR, Tab 2; Second Affidavit, [Exhibit “O”](#), KERP Summary Chart, MR, Tab 2O.

CCAA proceedings. There is no overlap between the recipients of the KERP and the intended recipients of the Incentive Pool.

18. Given the importance of these funds for retaining Mastermind LP's key personnel, the Applicant seeks a KERP Charge up to the amount of \$286,000 to secure the amounts payable under the KERP.¹⁸ Moreover, because the KERP contains individually identifiable information about these employees, including their salaries, the Mastermind Entities are seeking a sealing order with respect to the KERP. The Monitor supports the KERP, the KERP Charge and sealing of the KERP.¹⁹

(iii) Extension and Increase of the Administration Charge

19. The Initial Order approved the Administration Charge of \$750,000.²⁰ To reflect the additional professional expenses that will be incurred by the Mastermind Entities' counsel, the Monitor and counsel to the Monitor, the Applicant seeks to increase the Administration Charge to \$1,000,000. The quantum of this amount was determined by the Mastermind Entities in conjunction with the Monitor.²¹

(iv) Extension and Increase of the D&O Charge

20. The Initial Order approved the D&O Charge in the amount of \$4,000,000 to cover those indemnification obligations and liabilities the directors and officers could face in the period from the Filing Date until the Comeback Hearing.²² The Mastermind Entities anticipate

¹⁸ Second Affidavit at [para. 60](#), MR, Tab 2; Second Affidavit, Exhibit "A", Initial Affidavit at [para. 138](#), MR, Tab 2A.

¹⁹ Second Affidavit at [paras. 60-61](#), MR, Tab 2.

²⁰ Second Affidavit, Exhibit "B", Initial Order, at [para. 32](#), MR, Tab 2B.

²¹ Second Affidavit at [para. 47](#), MR, Tab 2.

²² Second Affidavit, Exhibit "B", Initial Order, [para. 22](#), MR, Tab 2B, p. 13; Second Affidavit at [para. 42](#), MR, Tab 2.

that their directors and officers could face additional potential liabilities during the extended Stay period particularly in relation to the implementation of the Sale, which may involve termination of certain employees.²³ The Mastermind Entities' current directors' and officers' insurance policies contain certain limitations, and adequate additional indemnification insurance is unavailable at a reasonable cost.²⁴ Accordingly, with the concurrence of the Monitor, the Applicant seeks to increase the D&O Charge to \$5,000,000 to account for these additional potential liabilities.²⁵

(v) Approval of the Forbearance Agreement & DIP Charge

21. Mastermind LP's primary and senior secured creditor is the Canadian Imperial Bank of Commerce ("**CIBC**") pursuant to a credit agreement dated October 14, 2014 with Mastermind LP, as borrower, and Mastermind GP, as guarantor (the "**Credit Agreement**"), under which CIBC has committed a combined \$36,250,000 credit facility (the "**Credit Facilities**").

22. The Mastermind Entities are seeking this Court's approval to enter into a forbearance agreement (the "**Forbearance Agreement**") that sets out the terms upon which CIBC will continue to make the Credit Facilities available to Mastermind LP during these CCAA proceedings.²⁶

²³ Second Affidavit at [para. 48](#), MR, Tab 2.

²⁴ Second Affidavit at [para. 49](#), MR, Tab 2.

²⁵ Second Affidavit at [para. 49](#), MR, Tab 2.

²⁶ Second Affidavit at [paras. 51-52](#), MR, Tab 2.

23. The key terms and conditions of the proposed Forbearance Agreement are detailed in paragraphs 53-58 of the Second Affidavit. These key terms and conditions include the requirement that the Mastermind Entities obtain the following relief as part of the ARIO:

- (a) authorization for the Mastermind Entities to use proceeds obtained after the Filing Date (other than borrowings under the Credit Facilities) to pay Mastermind LP's pre-filing indebtedness²⁷ under the Credit Facilities (the "**Pre-Filing Payments Order**"). The Forbearance Agreement expressly provides, however, that any borrowings under the Credit Facilities after the Filing Date shall not be used to pay pre-filing indebtedness under the Credit Facilities²⁸ and the ARIO reflects that restriction.²⁹
- (b) a charge (the "**DIP Charge**") in favour of CIBC over the assets of the Mastermind Entities *up to* the maximum amount of availability under the Credit Facilities of \$36,250,000, plus interest, fees and expenses. The DIP Charge will only secure the amounts that are actually borrowed under the Credit Facilities after the granting of the ARIO and will, with the support of the Monitor, rank behind the Administration Charge and the D&O Charge, and rank ahead of the KERP Charge.³⁰

24. The approval of the Forbearance Agreement and continued availability of the Credit Facilities is urgently required. The Mastermind Entities are in default of their obligations under

²⁷ As at November 27, 2023, the Mastermind Entities are indebted to CIBC in the amount of approximately \$11.6 million under the Revolving Loan Facility and \$6.25 million under the BCAP Loan.

²⁸ Second Affidavit at [para. 55](#), MR, Tab 2.

²⁹ Amended and Restated Initial Order at [para. 22](#), MR, Tab 5.

³⁰ Second Affidavit at [paras. 57-58](#), MR, Tab 2.

the Credit Agreement and related security, and CIBC has advised the Mastermind Entities that they will exercise their enforcement remedies in the absence of the Forbearance Agreement. Moreover, Mastermind LP is expected to run out of cash in the short term, and it has an upcoming payroll obligation of \$1,000,000 that is due on November 30, 2023 and rent due on all its stores on December 1, 2023. If the Mastermind Entities do not have the ability to access the Credit Facilities, Mastermind LP will not be able to meet these obligations.³¹

PART III – ISSUES AND THE LAW

25. The principal issues on this Motion are whether this Court should:

- (a) grant the Liquidation Sale Approval Order; and
- (b) grant the ARIO, including the following relief: (i) extending the Stay to January 26, 2024; (ii) approving the KERP and KERP Charge; (iii) ordering that the KERP documents remain sealed; (iv) increasing the amount of the Administration Charge to \$1,000,000 and the D&O Charge to \$5,000,000; and; (vi) approving the Forbearance Agreement and related relief, including the Pre-filing Payments Order and the DIP Charge.

A. This Court Should Grant the Liquidation Sale Approval Order

(i) This Court has the Jurisdiction to Approve the Sale

26. This Court has authority under section 36 of the CCAA to grant the Liquidation Sale Approval Order and approve the transactions underlying the Consulting Agreement and Sale Guidelines. Section 36 of the CCAA expressly grants the Court the jurisdiction to authorize a sale or disposition of assets outside the ordinary course of business, and it is well established that a court may do so without the need for a plan of arrangement or other corporate approval

³¹ Second Affidavit at [para. 59](#), MR, Tab 2.

requirements.³² As the Supreme Court of Canada has recognized, liquidations serve a valid purpose under the CCAA, and courts have utilized the authority under section 36 to effect liquidation orders on numerous occasions.³³

27. Section 36(2) of the CCAA requires the Applicant to give notice to the secured creditors who are likely to be affected by the proposed sale. The Mastermind Entities' only secured creditors—CIBC and the Birch Hill Lenders—are in support of the proposed Sale.³⁴

28. Section 36(3) sets out a list of factors this Court must consider in determining whether to grant the Liquidation Sale Approval Order:

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

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

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

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

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

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.³⁵

³² CCAA at s. 36(1); *Nortel Networks Corp., Re*, 2009 CarswellOnt 4467 (Ont. S.C.J. [Commercial List]) at [paras. 35-40](#), BOA, Tab 16; *Target Canada Co., Re*, 2015 ONSC 846 [Commercial List] at [para. 3](#), BOA, Tab 27; *Clothing for Modern Times Ltd., Re*, 2011 ONSC 7522 [Commercial List] at [para. 12](#), BOA, Tab 7; *Nelson Education Ltd., Re*, 2015 ONSC 5557 [Commercial List] at [para. 32](#), BOA, Tab 14.

³³ 9354-9186 *Québec Inc. v. Callidus Capital Corp.*, 2020 SCC 10 at [para. 45](#), BOA, Tab 1. See also *Target Canada Co.*, 2015 ONSC 846 [Commercial List] at [paras. 2-5](#), BOA, Tab 27; *Sears Canada Inc.(Re)*, 2017 ONSC 6235 [Commercial List] at [paras. 5-7](#), BOA, Tab 20.

³⁴ Second Affidavit at [para. 10](#), MR, Tab 2; First Report of the Monitor dated November 29, 2023 at [para. 4.5](#) ["**Monitor Report**"].

³⁵ CCAA, s. 36(3). Additional factors, such as those to be considered when the proposed sale is to a related person under section 36(4), do not apply in the present case.

29. As this Court has made clear, the foregoing factors—many of which are overlapping—are neither exhaustive nor a “formulaic check-list that must be followed in every sale transaction under the CCAA”.³⁶ Nevertheless, considering these factors as a whole, the Mastermind Entities submit that in all circumstances the Liquidation Sale Approval Order should be granted.

(ii) The Consulting Agreement and the Sale Satisfy the Requirements in Section 36(3) of the CCAA

30. The Consulting Agreement and the Sale meet the above criteria for approval established by section 36(3) of the CCAA, each of which are reviewed in turn.

(a) *The process leading to the proposed sale or disposition was reasonable in the circumstances*

31. The Mastermind Entities worked with A&M Corporate Finance to solicit bids from five Potential Liquidators who were identified as having requisite experience in retail liquidations.³⁷ Each of those Potential Liquidators executed non-disclosure agreements and engaged in negotiations with the Mastermind Entities about a potential liquidation sale. After conducting an assessment, in consultation with the Monitor, Mastermind LP ultimately entered into the Consulting Agreement with the Consultant who has extensive experience conducting retail liquidations in Canada.³⁸

(b) *The Monitor has indicated its support of the Sale*

32. The Monitor was consulted in the process as the Mastermind Entities negotiated the Consulting Agreement and Sale Guidelines and supports the Sale, including the proposed

³⁶ *Target Canada Co. (Re)*, 2015 ONSC 2066 [Commercial List] at [para. 14](#), BOA, Tab 25.

³⁷ Second Affidavit at [paras. 14-15](#), MR, Tab 2.

³⁸ Second Affidavit at [para. 15](#), MR, Tab 2.

timeline of the Sale.³⁹ This Court should uphold the business judgment of the Monitor as it has done in other cases.⁴⁰

(c) *Stakeholders were Adequately Consulted*

33. The Mastermind Entities have consulted with key stakeholders, including their secured creditors, all of whom support the Sale.⁴¹ In addition, the Mastermind Entities have notified or attempted to notify all of their landlords about the Sale, shared a draft form of Liquidation Sale Approval Order and the Sale Guidelines with those landlords, and engaged in discussions with counsel to certain landlords to address any concerns or comments on the draft Liquidation Sale Approval Order.⁴²

(d) *The Effects of the Sale on Creditors*

34. The liquidation process was designed by the Mastermind Entities, with input from the Monitor, to maximize the value realized from the Sale during the holiday shopping season for the benefit of the Mastermind Entities' creditors.⁴³ At the same time, the Consulting Agreement specifically provides Mastermind LP with the flexibility to continue pursuing a Potential Transaction or to increase the number of stores subject to the Sale if the terms of the Potential Transaction are not settled.

(e) *The Consideration Payable*

35. The consideration payable by Mastermind LP under the Consulting Agreement was determined, in consultation with the Monitor, to be the most favourable for the Mastermind

³⁹ Second Affidavit at [paras. 36 & 39](#), MR, Tab 2; Monitor Report at [para. 4.8](#).

⁴⁰ *Stelco Inc., Re*, 2005 CarswellOnt 1188 [Commercial List] at [paras. 65-68](#), BOA, Tab 28; *Grant Forest Products (Re)*, 2009 CarswellOnt 4699 at [para. 18](#), BOA, Tab 13.

⁴¹ Second Affidavit at [para. 10](#), MR, Tab 2.

⁴² Second Affidavit at [paras. 30-34](#), MR, Tab 2.

⁴³ Second Affidavit at [paras. 36 & 38](#), MR, Tab 2; Exhibit "A", Initial Affidavit at [para. 12](#), MR, Tab 2A.

Entities compared to proposals received from other third party liquidators.⁴⁴ Moreover, the Consulting Agreement contains several favourable financial terms, including a maximum expense budget for the Consultant to control costs, and a fee payable by the Consultant to Mastermind LP for the sale of any additional goods procured by the Consultant to be sold alongside the Merchandise during the Sale.⁴⁵

36. This Court has previously found that where a proposed sale approval order and liquidation agreements are consistent with the liquidation arrangements for other large retail liquidations, that is a factor militating in favour of approval.⁴⁶ The Liquidation Sale Approval Order, Consulting Agreement and Sale Guidelines are substantially similar to those used in BBB Inc. and Nordstrom and approved by this Court under Section 36.⁴⁷

B. This Court Should Grant the ARIO

(i) This Court Should Extend the Stay to January 26, 2024

37. Section 11.02(2) of the CCAA provides this Court with the express authority to extend a stay for any period necessary, provided the Court is satisfied that: (a) circumstances exist that make the order appropriate, and (b) the applicant has acted, and is acting, in good faith and with due diligence. Each of these criteria is met in this case.

⁴⁴ Second Affidavit at [para. 17](#), MR, Tab 2.

⁴⁵ Second Affidavit at [paras. 24-26](#), MR, Tab 2.

⁴⁶ *Sears Canada Inc. (Re)*, 2017 ONSC 6235 [Commercial List] at [para. 7](#), BOA, Tab 20.

⁴⁷ *Bed Bath & Beyond Canada Ltd.*, 2023 ONSC 1230 at [para. 17](#) [Commercial List], BOA, Tab 3; *Nordstrom Canada Retail Inc.*, 2023 ONSC 1814 at [para. 13](#), BOA, Tab 15; Second Affidavit, [Exhibit "E"](#), Blackline of Liquidation Sale Approval Order Sought by Mastermind Entities to Sale Approval Order in Bed Bath & Beyond Insolvency Proceedings, MR, Tab 2E; Second Affidavit, [Exhibit "F"](#), Blackline of Liquidation Sale Approval Order Sought by Mastermind Entities to Sale Approval Order in Nordstrom Insolvency Proceedings, MR, Tab 2F.

38. An extension of the Stay is essential to the success of the Mastermind Entities' strategy for maximizing recoveries for their creditors through the Sale while continuing negotiations with potential purchasers in respect of the Potential Transaction. The length of the proposed Stay aligns with the term of the Sale, which is expected to be completed by January 14, 2024.⁴⁸

39. In addition, the Mastermind Entities have acted, and continue to act, in good faith and with due diligence in these CCAA proceedings. The Mastermind Entities have given notice of these proceedings to their stakeholders, including landlords, secured creditors, employees and vendors.⁴⁹ The Mastermind Entities intend to continue engaging in discussions with all stakeholders as these proceedings progress.

(ii) This Court Should Approve the KERP

40. The Mastermind Entities seek a KERP for those employees of Mastermind LP who are crucial to these CCAA proceedings. The approval of a KERP is a matter of discretion.⁵⁰ This Court has approved similar plans on numerous occasions—including those analogous to these proceedings⁵¹—where those plans included employees who were “important for the stability of the business”,⁵² difficult to replace⁵³ and have extensive or specialized knowledge of the debtor's business.⁵⁴ Each of the Mastermind LP employees included in the KERP has

⁴⁸ Second Affidavit at [para. 41](#), MR, Tab 2; Exhibit “D”, Consulting Agreement at [para 2\(a\)](#), MR, Tab 2D.

⁴⁹ Second Affidavit at [para. 42](#), MR, Tab 2.

⁵⁰ CCAA at s. 11; *Canwest Global Communications Corp.* (Re), [2009] O.J. No. 4286 (Commercial List) at [para. 49](#), BOA, Tab 5.

⁵¹ *Target Canada Co. (Re)*, 2015 ONSC 303 [Commercial List] at [para. 59](#), BOA, Tab 26; *Bed Bath & Beyond Canada Ltd. (Re)*, 2023 ONSC 1230 [Commercial List] at [para. 12](#), BOA, Tab 3.

⁵² *Cinram International Inc., Re*, 2012 ONSC 3767 [Commercial List] at [para. 91](#), BOA, Tab 6; *Target Canada Co., Re*, 2015 ONSC 303 [Commercial List] at [para. 57](#), BOA, Tab 28.

⁵³ *Grant Forest Products Inc., Re*, 2009 CarswellOnt 4699 at [para. 12](#), BOA, Tab 13; *Timminco Ltd., Re*, 2012 ONSC 506 [Commercial List] at [paras. 28 & 75](#), BOA, Tab 28.

⁵⁴ *Cinram International Inc., Re*, 2012 ONSC 3767 [Commercial List] at [para. 91](#), BOA, Tab 6; *Essar Steel Algoma Inc., Re*, 2015 ONSC 7656 [Commercial List] at [para. 11\(i\)](#), BOA, Tab 11.

critical industry and factual knowledge of the operations that will be integral to the success and stability of the Sale or facilitating a Potential Transaction.⁵⁵ Collectively, these employees' extensive knowledge of the Mastermind LP business renders them practically irreplaceable.

(iii) This Court Should Grant the KERP Charge

41. An essential component of the KERP is Mastermind LP's ability to pay its key employees a retention bonus in the aggregate total amount of \$285,250, which is conditional upon those employees' continued employment.⁵⁶ Accordingly, the Mastermind Entities seek Court-approval of a KERP Charge on its assets in favour of its key employees in an amount not exceeding \$286,000.⁵⁷

42. While the CCAA is silent with respect to the granting of KERP charges, in *Re Grant Forest Products Inc.*, this Court considered the following factors:

- (a) whether the Monitor supports the KERP agreement and charge (to which great weight was attributed);⁵⁸
- (b) whether the employees to whom the KERP applies would consider other employment options if the KERP agreement was not secured by the KERP charge;
- (c) whether the continued employment of the employees to whom the KERP applies is important for the stability of the business and to enhance the effectiveness of the marketing process;
- (d) whether the KERP charge was approved by the board of directors, including

⁵⁵ Second Affidavit, Exhibit "A", Initial Affidavit at [para. 136](#), MR, Tab 2A.; Second Affidavit [para. 63](#), MR, Tab 2.

⁵⁶ Second Affidavit at [para. 61](#), MR, Tab 2.

⁵⁷ Second Affidavit [paras. 60-61](#), MR, Tab 2.

⁵⁸ *Cinram International Inc., Re*, 2012 ONSC 3767 [Commercial List] at [para. 91](#), BOA, Tab 6; *Grant Forest Products Inc., Re*, 2009 CarswellOnt 4699 [Commercial List] at [para. 11](#), BOA, Tab 13.

the independent directors, as the business judgment of the board should not be ignored;

- (e) whether the KERP charge is supported or consented to by secured creditors of the debtor; and
- (f) whether the payments under the KERP are payable upon the completion of the restructuring process.⁵⁹

43. Where the foregoing factors are present, this Court has approved KERPs with incentive payments representing anywhere from 25% to 100% of the KERP participant's annual salary.⁶⁰ This is because, as this Court recently held in *Tacora Resources*, it is the "company and its advisors" who are "best suited to determine ... the appropriate parameters for calculating the KERP payments".⁶¹ The directors of the Mastermind Entities have diligently reviewed and approved the quantum of the financial incentives under the KERP, which range from 25% to 85% of the KERP participant's salary. Consequently, this Court owes deference to the business judgment of the directors of the Mastermind Entities.⁶²

44. The Mastermind Entities submit that the KERP Charge is appropriate and necessary, given that:

- (a) the Monitor supports the KERP Charge;⁶³
- (b) absent approval by this Court of the KERP Charge, it is highly likely that some

⁵⁹ *Cinram International Inc., Re*, 2012 ONSC 3767 [Commercial List] at [para. 93](#), BOA, Tab 6 citing *Grant Forest Products Inc., Re*, 2009 CarswellOnt 4699 [Commercial List] at [paras. 8-12](#), BOA, Tab 13.

⁶⁰ *Essar Steel Algoma Inc., Re*, 2015 ONSC 7656 [Commercial List] at [paras. 6 & 11\(i\)](#), BOA, Tab 11; *Aralez Pharmaceuticals Inc.*, 2018 ONSC 6980 [Commercial List] at [paras. 13, 45 & 55-56](#), BOA, Tab 2; *Brainhunter Inc., Re*, 2009 CarswellOnt 7627 (Ont. S.C.J. [Commercial List]) at [paras. 24-27](#), BOA, Tab 4.

⁶¹ *Tacora Resources Inc. (Re)*, 2023 ONSC 6126 [Commercial List] at [para. 150](#), BOA, Tab 24.

⁶² *Grant Forest Products Inc., Re*, 2009 CarswellOnt 4699 [Commercial List] at [para. 18](#), BOA Tab 13; *Stelco Inc., Re*, 2005 CarswellOnt 1188 [Commercial List] at [paras. 65-68](#), BOA, Tab 23.

⁶³ Second Affidavit at [para. 60](#), MR, Tab 2.

or all of the Mastermind LP's key employees will resign and look for alternative employment;⁶⁴

- (c) the parties contemplated for inclusion in the KERP have critical industry and factual knowledge of the business operations that is crucial to the stability of the business and the success of the proposed Sale and Potential Transaction;⁶⁵
- (d) it would be detrimental to the Sale if Mastermind LP were required to find replacements for the key employees, and doing so may hinder the Mastermind Entities' abilities to negotiate and conclude the Potential Transaction; and
- (e) the Mastermind Entities' secured creditors, CIBC and the Birch Hill Lenders, have been provided with notice of the KERP Charge that the Mastermind Entities will be seeking and support the KERP Charge.

C. This Court Should Grant a Sealing Order in Relation to the KERP

45. The Mastermind Entities seek a sealing order with respect to the KERP (the "**KERP Summary**").⁶⁶ Section 137(2) of the *Courts of Justice Act* provides this Court with discretion to order that any document filed in a civil proceeding, including in the insolvency context, be treated as confidential, sealed, and not part of the public record.⁶⁷

46. Canadian courts have repeatedly recognized the important public interests that CCAA proceedings serve and that the CCAA functions as a "supporting framework for the resolution of corporate insolvencies in the public interest".⁶⁸ The protection of the Mastermind Entities'

⁶⁴ Second Affidavit, Exhibit "A", Initial Affidavit at [para. 136](#), MR, Tab 2A.

⁶⁵ Second Affidavit at [para. 63](#), MR, Tab 2.

⁶⁶ Second Affidavit, [Exhibit "O"](#), KERP Summary Chart, MR, Tab 2O.

⁶⁷ *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 137(2); *Danier Leather Inc.*, Re, 2016 ONSC 1044 [Commercial List] at [paras. 82-83](#), BOA, Tab 10.

⁶⁸ *Re Nortel Networks*, [2009] O.J. No. 3169 (Ont. S.C.J. [Commercial List] at [para. 29](#), BOA, Tab 28; 9354-9186 Québec Inc. v. Callidus Capital Corp., 2020 SCC 10 at [para. 42](#), BOA, Tab 1; *Re Danier Leather Inc.*,

commercially sensitive information and the confidential and personal information of its key employees are prime examples of such public interests.

47. When considering whether to grant a sealing order, courts frequently apply the *Sierra Club* test, as re-framed by the Supreme Court of Canada in *Sherman Estate v Donovan*.⁶⁹ The details of the KERP easily satisfy that test since: (i) the disclosure of this information poses a serious risk to an important public interest; (ii) the order sought is necessary to prevent this serious risk (and reasonable alternative measures will not prevent it); and (iii) as a matter of proportionality, the benefits of the order outweigh its negative effects.⁷⁰

48. First, details of KERPs have frequently been the subject of sealing orders in CCAA proceedings where the Court has found that KERPs involve “matters of a private, personal nature”⁷¹ and “confidential and personal information”.⁷² It is appropriate to seal the details of KERPs that could reveal “individually identifiable information and compensation information” on the basis that the “protection of sensitive personnel and compensation information the disclosure of which would cause harm to the individuals and to the [debtor] is an important commercial interest that should be protected”.⁷³ The Mastermind Entities’ KERP contains confidential and personal information pertaining to its employees, including: (a) identifiable individual information; and (b) commercially sensitive compensation information.

2016 ONSC 1044 [Commercial List] at [paras. 82-84](#), BOA, Tab 10; *Ontario Securities Commission v. Bridging Finance*, 2021 ONSC 4347 [Commercial List] at [paras. 23-27](#), BOA, Tab 18.

⁶⁹ *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 at [paras. 53-57](#), BOA, Tab 22; *Sherman Estate v. Donovan*, 2021 SCC 25 at [para. 38](#), BOA, Tab 21.

⁷⁰ *Sherman Estate v. Donovan*, 2021 SCC 25 at [para. 38](#), BOA, Tab 21.

⁷¹ *Re Danier Leather Inc.*, 2016 ONSC 1044 [Commercial List] at [para. 83](#), BOA, Tab 10.

⁷² *Ontario Securities Commission v. Bridging Finance*, 2021 ONSC 4347 [Commercial List] at [paras. 23-27](#), BOA, Tab 18.

⁷³ *Re Canwest Global Communications Corp.*, 2009 CarswellOnt 6184 (Ont. S.C.J. [Commercial List]) at [paras. 49-52](#), BOA, Tab 5.

49. Second, the disclosure of the identity of the individuals receiving the KERP payments would be detrimental to the Mastermind Entities' liquidation strategy as it may result in other employees demanding similar payments. The Mastermind Entities will rely heavily on Mastermind LP's network of staff to effect the Sale and those same key employees are critical to the ongoing negotiations of the Potential Transaction. Consequently, the sealing order is essential for maintaining employee morale and thus maintaining the stability of the business.

50. Third, the benefits of a sealing order far outweigh any deleterious effects. The information that the Mastermind Entities seek to protect would do nothing to assist its stakeholders. Conversely, public disclosure of this information would directly harm Mastermind LP's employees and breach their privacy interests. Further, the compensation details within the KERP are commercially sensitive and, if made public, could damage Mastermind LP's future viability as a going concern.

(i) This Court Should Increase the Administration Charge and the D&O Charge

51. Sections 11.51 and 11.52 of the CCAA expressly give this Court the power to grant the D&O Charge and Administration Charge, respectively, over the property of the Mastermind Entities. Further, under this Court's authority to make the charges "in an amount that the court considers appropriate", this Court has the power to increase these charges.⁷⁴ The amounts of the charges this Court granted in the Initial Order were designed to cover the period between the Filing Date and the Comeback Hearing. In the circumstances, an increase to each of the Administration Charge and the D&O Charge to the amounts of \$1,000,000 and

⁷⁴ CCAA, s. 11.

\$5,000,000, respectively, are appropriate to reflect the additional costs and liabilities facing the Mastermind Entities subsequent to this Comeback Hearing.⁷⁵

(ii) The Forbearance Agreement is Necessary and Appropriate

52. This Court has broad discretion under Section 11 of the CCAA to make any order that is “appropriate in the circumstances”, subject only to the restrictions set out in the Act.⁷⁶ Pursuant to this power, this Court has the authority to approve the Forbearance Agreement, which is appropriate and necessary in the circumstances to ensure the Mastermind Entities continue to have access to their credit facilities and much-needed liquidity during the CCAA proceedings. Courts have previously relied on their jurisdiction under section 11 of the CCAA in approving forbearance agreements setting out continued lending terms similar to the proposed Forbearance Agreement.⁷⁷

53. For instance, in *North American Tungsten*, the British Columbia Supreme Court held that there is nothing in the CCAA that prohibits a court from approving a forbearance agreement. In coming to this conclusion, the Court placed great emphasis on the fact that the applicant would not be able to find other interim financing on more favourable terms and that without such financing, the applicant would have no choice but to immediately cease operations.⁷⁸

54. Here, the Mastermind Entities’ circumstances are the same. The Forbearance Agreement sets out the terms and conditions upon which CIBC has agreed to continue to

⁷⁵ Second Affidavit at [para. 48](#), MR, Tab 2.

⁷⁶ CCAA, s. 11.

⁷⁷ *North American Tungsten Corp. (Re)*, [2015 BCSC 1376](#), BOA, Tab 17 and *Clothing for Modern Times Ltd., Re*, 2012 CarswellOnt 21276 (Ont. S.C.J. [Commercial List]) at [para. 4](#), BOA, Tab 8 (this Court approved an applicant’s request to repay its loans in full in accordance with a forbearance agreement entered into subsequent to an initial CCAA hearing).

⁷⁸ *North American Tungsten Corp. (Re)*, [2015 BCSC 1376](#) at [para. 35](#), BOA, Tab 17.

make the Credit Facilities available to Mastermind LP during these CCAA proceedings. It is a condition of the Forbearance Agreement that it is approved by this Court and certain ancillary relief contemplated therein is approved, including the Prefiling Payments Order and the granting of the DIP Charge (each discussed below). CIBC has indicated to the Mastermind Entities that, unless the parties agree upon a forbearance agreement, it will have no choice but to enforce its rights.⁷⁹ Such an action would be devastating to the Mastermind Entities who need to continue to access their Credit Facilities to meet their upcoming obligations, ensure the progression of the Potential Transaction, and implement the Sale.

(iii) The Prefiling Payments Order

55. The Pre-Filing Payments Order will authorize the Mastermind Entities to use proceeds obtained after the Filing Date to pay obligations incurred by Mastermind LP under the Credit Facilities prior to the Filing Date (the “**Pre-Filing Payments Order**”). This Court has the authority to approve this request under the broad discretion granted to it under Section 11 of the CCAA to make any order that is “appropriate in the circumstances”.⁸⁰

56. As part of the Initial Order, the Mastermind Entities were given the authority to continue to use their central cash management system currently in place (the “**Cash Management System**”). As detailed in the Second Affidavit, the Cash Management System consists of two deposit accounts, which are swept by CIBC daily; and two disbursement accounts, which are funded from the Credit Facilities. If the Pre-Filing Payments Order is approved, CIBC will continue to sweep the deposit accounts and apply the proceeds in those accounts to the pre-Filing amounts owing under the Credit Facilities.

⁷⁹ Second Affidavit, Exhibit “A”, Initial Affidavit at [para. 131](#), MR Tab 2A.
⁸⁰ CCAA, s. 11.

57. This Court, on multiple occasions, has accepted the use of similar facility arrangements structured to allow debtors to use their post-filing operating receipts to reduce the balance of a pre-existing, revolving credit facility in accordance with the debtor's existing practice if it does not offend Section 11.2 of the CCAA.⁸¹ Accordingly, the sweeping must have no impact on the relative pre-filing positions of secured creditors over the assets of the Mastermind Entities, and Mastermind LP must only use post-filing cash receipts to pay down the Credit Facilities.⁸²

58. The Mastermind Entities have two secured creditors—the Birch Hill Lenders and CIBC—whose relative priorities are fixed by a subordination agreement, under which the Birch Hill Lenders have subordinated their security interest in favour of CIBC.⁸³ Accordingly, among these creditors, preserving the *status quo* by issuing the Pre-Filing Payments Order could not impact their relative pre-Filing priority positions.

59. It is an explicit term of the Forbearance Agreement and the proposed ARIO that no funds advanced under the Credit Agreement on or after the date of the ARIO shall be used to pay any pre-Filing obligations of the Mastermind Entities under the Credit Agreement or Forbearance Agreement.⁸⁴ This is easily monitored because the Mastermind Entities currently have four⁸⁵ separate accounts—two disbursement accounts from which the Credit Facilities are advanced, and two deposit accounts, which hold proceeds.⁸⁶ It is only the

⁸¹ *Re: Performance Sports Group Ltd.*, 2016 ONSC 6800 [Commercial List] at [para. 22](#), BOA, Tab 19; *Comark Inc. (Re)*, 2015 ONSC 2010 [Commercial List] at [paras. 40-41](#), BOA, Tab 9; *Gesco Industries Inc. (Re)*, 2023 ONSC 3050 [Commercial List] at [paras. 29-31](#), BOA Tab 12.

⁸² *Gesco Industries Inc. (Re)*, 2023 ONSC 3050 [Commercial List] at [paras. 29-31](#), BOA, Tab 12.

⁸³ Second Affidavit, Exhibit "A", Initial Affidavit at [para. 66](#), MR, Tab 2A, p. 26; Initial Affidavit at Subordination and Postponement Agreement at [2.01\(1\)](#).

⁸⁴ Amended and Restated Initial Order at [para. 23](#), MR, Tab 5; Second Affidavit, Exhibit "M", Forbearance Agreement at [para. 4.1\(d\)\(iv\)](#), MR, Tab 2M.

⁸⁵ Second Affidavit at [para. 54](#), MR, Tab 2.

⁸⁶ Second Affidavit at [para. 54](#), MR, Tab 2.

deposit accounts that CIBC sweeps and applies to the Credit Facilities in the ordinary course. Therefore, it is clear that granting the Pre-Filing Payments Order accords with the policy objectives underlying Section 11.2 of the CCAA.

(iv) This Court Should Approve the DIP Charge

60. The Mastermind Entities seek a charge in favour of CIBC in an amount up to \$36,250,000, plus interest, fees and expenses (the “**DIP Charge**”) as security for any amounts advanced under the Credit Facilities from and after the date of the ARIO. The Mastermind Entities request that the DIP Charge rank after the Administration Charge and the D&O Charge but above the KERP Charge in relative priority.

61. Section 11.2(1) of the CCAA provides this Court with the express statutory authority to approve the DIP Charge and to set its priority.⁸⁷

62. Section 11.2(4) of the CCAA sets out a number of factors to guide this Court when deciding whether to approve a DIP Charge. They are:

- (a) the period during which the company is expected to be subject to proceedings under this Act;
- (b) how the company's business and financial affairs are to be managed during the proceedings;
- (c) whether the company's management has the confidence of its major creditors;
- (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

⁸⁷

CCAA, s. 11.2.

- (e) the nature and value of the company's property;
- (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
- (g) the monitor's report on the cash-flows of the debtor.

63. The Mastermind Entities submit that the DIP Charge meets the foregoing requirements. The Monitor supports the granting of the DIP Charge, as does the Mastermind Entities' only other secured creditor, the Birch Hill Lenders. Further, the DIP Charge is a material condition of the Forbearance Agreement and the Mastermind Entities' access to continued financing, without which the Mastermind Entities cannot continue operations.⁸⁸ In conjunction with CIBC, the Mastermind Entities have restricted the quantum of the Charge to an amount that is reasonably necessary to meet their needs while pursuing options to preserve the value of the business.⁸⁹ While the DIP Charge is up to the maximum amount of \$36,250,000 (plus interest, fees and expense), the DIP Charge will only secure the amounts that are actually borrowed under the Credit Facilities after the granting of the ARIO, which the Monitor estimates will not exceed \$12 million.⁹⁰ Finally, the DIP Charge will not secure any pre-filing obligations.⁹¹

⁸⁸ Second Affidavit, Exhibit "M", Forbearance Agreement at [para. 7.1](#) & [4.1\(d\)\(iv\)](#), MR, Tab 2M.

⁸⁹ Second Affidavit at [para. 59](#), MR, Tab 2.

⁹⁰ Monitor Report at [para. 5.18](#).

⁹¹ Second Affidavit at [para. 55](#), MR, Tab 2.

PART IV – ORDER SOUGHT

64. For all the foregoing reasons, the Applicant requests Orders substantially in the form of (i) the Sale Liquidation Approval Order included at Tab 6 of the Motion Record, and (ii) the ARIO included at Tab 5 of the Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 30th day of November, 2023.



DAVIES WARD PHILLIPS & VINEBERG LLP

Counsel for the Applicant

SCHEDULE A LIST OF AUTHORITIES

Case Law

1. *Aralez Pharmaceuticals Inc.*, 2018 ONSC 6980 [Commercial List].
2. *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10.
3. *Brainhunter Inc., Re*, 2009 CarswellOnt 7627 [Commercial List].
4. *Bed Bath & Beyond Canada Ltd. (Re)*, 2023 ONSC 1230 [Commercial List].
5. *Cinram International Inc., Re*, 2012 ONSC 3767 [Commercial List].
6. *Clothing for Modern Times Ltd., Re*, 2011 ONSC 7522 [Commercial List].
7. *Clothing for Modern Times Ltd., Re*, 2012 CarswellOnt 21276 (Ont. S.C.J. [Commercial List]).
8. *Comark Inc., Re*, 2015 ONSC 2010 [Commercial List].
9. *Danier Leather Inc., Re*, 2016 ONSC 1044 [Commercial List].
10. *Essar Steel Algoma Inc., Re*, 2015 ONSC 7656 [Commercial List].
11. *Gesco Industries Inc. (Re)*, 2023 ONSC 3050 [Commercial List].
12. *Grant Forest Products Inc., Re*, 2009 CarswellOnt 4699 (Ont. S.C.J. [Commercial List]).
13. *Nelson Education Ltd., Re*, 2015 ONSC 5557 [Commercial List].
14. *Nortel Networks Corp., Re*, 2009 CarswellOnt 4467 [Commercial List].
15. *North American Tungsten Corp. (Re)*, 2015 BCSC 1376.
16. *Ontario Securities Commission v. Bridging Finance*, 2021 ONSC 4347 [Commercial List].
17. *Re Canwest Global Communications Corp.*, 2009 CarswellOnt 6184 (Ont. S.C.J. [Commercial List]).
18. *Re Ivaco Inc.*, [2004] O.J. No. 2483 (Ont. S.C.J. [Commercial List]).
19. *Re: Performance Sports Group Ltd.*, 2016 ONSC 6800 [Commercial List].
20. *Sears Canada Inc. (Re)*, 2017 ONSC 6235 [Commercial List].

21. *Sherman Estate v. Donovan*, 2021 SCC 25.
22. *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41.
23. *Stelco Inc., Re*, 2005 CarswellOnt 1188 [Commercial List].
24. *Tacora Resources Inc. (Re)*, 2023 ONSC 6126 [Commercial List].
25. *Target Canada Co. (Re)*, 2015 ONSC 2066 [Commercial List].
26. *Target Canada Co. (Re)*, 2015 ONSC 303 [Commercial List].
27. *Target Canada Co., Re*, 2015 ONSC 846 [Commercial List].
28. *Timminco Ltd., Re*, 2012 ONSC 506 [Commercial List].

Legislation

29. *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36
30. *Courts of Justice Act*, R.S.O. 1990, c. C.43.

**SCHEDULE B
TEXT OF STATUTES, REGULATIONS & BY-LAWS**

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

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.

...

11.02

11.02(1) Stays, etc. — initial application

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.

11.02(2) Stays, etc. — other than initial application

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

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

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

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

11.02(3) Burden of proof on application

The court shall not make the order unless

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

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

11.02(4) Restriction

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

...

36.

36(1) Restriction on disposition of business assets

A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the

court may authorize the sale or disposition even if shareholder approval was not obtained.

36(2) Notice to creditors

A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

36(3) Factors to be considered

In deciding whether to grant the authorization, the court is to consider, among other things,

- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (b) whether the monitor approved the process leading to the proposed sale or disposition;
- (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
- (d) the extent to which the creditors were consulted;
- (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
- (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

36(4) Additional factors — related persons

If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

- (a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and
- (b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

36(5) Related persons

For the purpose of subsection (4), a person who is related to the company includes

- (a) a director or officer of the company;
- (b) a person who has or has had, directly or indirectly, control in fact of the company; and
- (c) a person who is related to a person described in paragraph (a) or (b).

36(6) Assets may be disposed of free and clear

The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

36(7) Restriction — employers

The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(5)(a) and (6)(a) if the court had sanctioned the compromise or arrangement.

36(8) Restriction — intellectual property

If, on the day on which an order is made under this Act in respect of the company, the company is a party to an agreement that grants to another party a right to use intellectual property that is included in a sale or disposition authorized under subsection (6), that sale or disposition does not affect that other party's right to use the intellectual property — including the other party's right to enforce an exclusive use — during the term of the agreement, including any period for which the other party extends the agreement as of right, as long as the other party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

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

137(1) Documents public

On payment of the prescribed fee, a person is entitled to see any document filed in a civil proceeding in a court, unless an Act or an order of the court provides otherwise.

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.

137(3) Court lists public

On payment of the prescribed fee, a person is entitled to see any list maintained by a court of civil proceedings commenced or judgments entered.

137(4) Copies

On payment of the prescribed fee, a person is entitled to a copy of any document the person is entitled to see.

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF MASTERMIND GP INC
Applicants

Court File No. CV-23-00710259-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

PROCEEDING COMMENCED AT
TORONTO

**FACTUM OF THE APPLICANT
(COMEBACK HEARING RETURNABLE
NOVEMBER 30, 2023)**

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