

**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.

Applicant

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(MOTION RETURNABLE JANUARY 12, 2024)**

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TABLE OF CONTENTS

PART I – OVERVIEW	2
PART II – THE FACTS	4
A. The Need for the Assignment Order	4
(i) The Material Agreements and the Parties' Efforts to Assign.....	4
B. The Need for the Ancillary Order	6
(i) Enhanced Powers for the Monitor are Required.....	6
(ii) Relief is Required for Terminated Employees	7
(iii) Distribution to CIBC	10
(iv) Extending the Stay Period.....	10
PART III – ISSUES	10
PART IV – LAW AND ARGUMENT.....	11
A. This Court Should Assign the Material Agreements to the Purchaser Pursuant to Section 11.3 of the CCAA	11
B. This Court Should Grant the Relief in the Ancillary Order	15
(i) This Court Should Authorize the Expansion of the Monitor's Powers	15
(ii) This Court Should Grant a Declaration Under the <i>WEPP Act</i>	18
(iii) This Court Should Authorize the Distribution.....	19
C. This Court Should Extend the Stay Period.....	21
PART V – ORDER SOUGHT	23

PART I – OVERVIEW

1. Mastermind LP is a limited partnership formed under the laws of Ontario and is the operating entity of the “Mastermind Toys” business.
2. On November 23, 2023 (the “**Filing Date**”), Mastermind LP and its general partner, Mastermind GP Inc. (together, the “**Mastermind Entities**”), were granted protection from their creditors under the *Companies’ Creditors Arrangement Act* (“**CCAA**”) and Alvarez & Marsal Canada Inc. was appointed as the monitor (the “**Monitor**”).
3. The Mastermind Entities commenced these CCAA proceedings to obtain the protection needed to pursue a potential sale of some or all of Mastermind LP’s business as a going concern while retaining the flexibility to liquidate certain of their assets, all with the goal of maximizing recoveries for their stakeholders.
4. On November 30, 2023, this Court extended and granted further protections pursuant to an Amended and Restated Initial Order (“**ARIO**”). Pursuant to the ARIO, among other things, this Court approved the Forbearance Agreement and granted the DIP Charge (each as defined in the ARIO) in favour of Canadian Imperial Bank of Commerce (“**CIBC**”).
5. This Court also made an order on November 30, 2023, among other things, authorizing Mastermind LP to commence a liquidation sale at 18 store locations (the “**Liquidation Sale**”).
6. The Mastermind Entities subsequently entered into a transaction (the “**Transaction**”) to sell certain assets of Mastermind LP pursuant to an asset purchase

agreement (the “**APA**”) dated as of December 1, 2023 between Mastermind LP, as seller, and Unity Acquisitions Inc. (“**Unity**”), as purchaser. On December 13, 2023, the Court granted an Approval and Vesting Order, which, *inter alia*, approved the APA.

7. The Transaction is scheduled to close on January 15, 2024 (the “**Closing Date**”). Prior to the Closing Date and in accordance with the terms of the APA, Unity will assign its rights and obligations under the APA to Mastermind Toys Inc. (the “**Purchaser**”), an entity created to continue the Mastermind Toys business. The Purchaser is a wholly-owned subsidiary of Unity.¹

8. This factum is filed in support of the Mastermind Entities’ motion for, *inter alia*: (a) an order assigning the rights of the Mastermind Entities under the Material Agreements (as defined below) to the Purchaser pursuant to section 11.3 of the CCAA (the “**Assignment Order**”); and (b) an ancillary order (the “**Ancillary Order**”), among other things:

- (i) expanding the Monitor’s powers to perform certain duties and obligations of the Mastermind Entities;
- (ii) declaring that pursuant to sections 5(1)(b)(iv) and 5(5) of the *WEPP Act* (as defined below), Mastermind LP meets the criteria prescribed by section 3.2 of the *WEPP Regulations* (as defined below);

¹ Affidavit #4 of Lucio Milanovich sworn on January 5, 2024 (“**Fourth Affidavit**”) at para. 10, Motion Record of the Applicant (“**MR**”), Tab 2, p. 23; APA (redacted in part), s. 11.5, Exhibit G to the Fourth Affidavit, MR, Tab 2G, p. 260.

- (iii) authorizing Mastermind LP to distribute amounts to CIBC in full satisfaction of amounts owing to CIBC under the CIBC Credit Agreement (as defined in the APA) and Forbearance Agreement; and
- (iv) extending the Stay Period, as defined in the ARIO, from January 26, 2024 to April 30, 2024.

PART II – THE FACTS

9. The facts underling this motion are more fully set out in Affidavit #4 of Lucio Milanovich, sworn on January 5, 2024 in support of this motion (the “**Fourth Affidavit**”).²

A. The Need for the Assignment Order

(i) The Material Agreements and the Parties’ Efforts to Assign

10. The Purchaser has identified 49 real estate leases and 44 other contracts that it will assume pursuant to the APA (the “**Material Leases**” and “**Material Contracts**”, respectively, and collectively, the “**Material Agreements**”).³ Unity and the Purchaser view the Material Agreements as material to the continued operation of the Mastermind Toys business beyond closing of the Transaction.⁴ Consequently, it is essential that the Material Agreements be assigned to the Purchaser. Several of the Material Agreements

² Capitalized terms used but not defined in this factum have the meaning given to them in the Fourth Affidavit, MR, Tab 2, p. 20.

³ Fourth Affidavit at paras. 17 and 20, MR, Tab 2, pp. 25-26.

⁴ Fourth Affidavit at para. 17, MR, Tab 2, p. 25. Financial Covenant Letter, Appendix A to the Third Report of The Monitor Alvarez & Marsal Canada Inc. dated January 8, 2024 (“**Third Report**”).

require consent to assignment from their respective counterparties (“**Third Party Consents**”).⁵

11. The Material Agreements are integral to the continuation of the Mastermind Toys business as a going concern.⁶ As a result, it is a condition of closing of the Transaction that Mastermind LP obtains, in respect of at least 85% of the Material Leases, all requisite Third Party Consents or a court order under section 11.3 of the CCAA.⁷ In addition, Mastermind LP is required under the APA to obtain a court order under section 11.3 of the CCAA assigning all of the Material Agreements to the Purchaser if any Third Party Consents cannot be obtained.⁸

12. Accordingly, the Mastermind Entities have worked diligently and in good faith to obtain all requisite Third Party Consents.⁹ Nevertheless, some consents remain outstanding, and some Material Agreements are silent with respect to whether they are assignable. Consequently, out of an abundance of caution, the Mastermind Entities are seeking for all of the Material Agreements to be subject to the Assignment Order, including those for which Third Party Consents have been obtained.¹⁰

13. The Mastermind Entities have used best efforts to serve each counterparty with the motion record relating to this motion.¹¹

⁵ Fourth Affidavit at para. 21, MR, Tab 2, pp. 26-27.

⁶ Fourth Affidavit at paras. 17 & 27, MR, Tab 2, pp. 25 & 29.

⁷ APA (redacted in part), s. 8.4(f), Exhibit G to the Fourth Affidavit, MR, Tab 2G, p. 255.

⁸ APA (redacted in part), s. 2.4, Exhibit G to the Fourth Affidavit, MR, Tab 2G, pp. 240-241.

⁹ Fourth Affidavit at para. 23, MR, Tab 2, pp. 27-28.

¹⁰ Fourth Affidavit at para. 23, MR, Tab 2, pp. 27-28.

¹¹ Fourth Affidavit at para. 24, MR, Tab 2, p. 28.

14. Pursuant to the APA and as required by the CCAA,¹² the Purchaser has agreed to pay all monetary defaults in relation to the Material Agreements, other than those arising by reason of the Mastermind Entities' insolvency, the commencement of these CCAA proceedings or the Mastermind Entities' failure to perform a non-monetary obligation (the "**Cure Costs**").¹³

B. The Need for the Ancillary Order

(i) Enhanced Powers for the Monitor are Required

15. The Mastermind Entities' directors and officers will resign from their positions on the day after the Closing Date.¹⁴ Consequently, after January 15, 2024, there will be no directors or officers to make decisions in respect of the Mastermind Entities.

16. A number of actions need to be taken post-closing in respect of the Mastermind Entities. For example, the Mastermind Entities have certain obligations under the APA, including to perform transition services.¹⁵ In addition, it is expected that the Transaction will result in excess proceeds (the "**Excess Proceeds**"). A portion of the Excess Proceeds will be distributed to CIBC (as more particularly described below), but the Monitor intends to distribute the balance to the creditors of the Mastermind Entities by conducting a claims process (the "**Claims Process**").¹⁶ Following the closing of the Transaction, the

¹² *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("**CCAA**") at s. 11.3(4).

¹³ Section 1.1 of the APA defines "Cure Costs" as "in respect of any Assumed Contract, Assumed Real Property Lease, Purchased IP or Assumed Authorization, all amounts (if any) that must be paid by Buyer pursuant to section 11.3(4) of the CCAA." See Fourth Affidavit at para. 25, MR, Tab 2, p. 28; APA (redacted in part), ss. 1.1 & 2.3(a)(iii), Exhibit G to the Fourth Affidavit, MR, Tab 2G, pp. 228 & 240.

¹⁴ Fourth Affidavit at para. 31, MR, Tab 2, p. 30.

¹⁵ Fourth Affidavit at para. 32(c), MR, Tab 2, pp. 31-32; APA (redacted in part), s. 7.7, Exhibit G to the Fourth Affidavit, MR, Tab 2G, pp. 252-253.

¹⁶ Third Report at s. 4.3.

Mastermind Entities' remaining business will also need to be wound down, and these CCAA proceedings will need to be terminated.¹⁷

17. None of the steps described above is possible without the Mastermind Entities' directors or officers, unless the Ancillary Order is granted to enable the Monitor to exercise any powers that may be properly exercised by the Mastermind Entities' boards of directors and to take any and all actions on behalf of the Mastermind Entities that may be required post-closing. These powers include granting the Monitor the authority to take actions and execute agreements on the Mastermind Entities' behalf, to appoint representatives, to access Mastermind LP's books and records and to engage with and settle with any creditor or stakeholder of the Mastermind Entities.¹⁸ The Ancillary Order contemplates that the Monitor's expanded powers will take effect immediately after closing of the Transaction.¹⁹

18. The Monitor and the Purchaser are supportive of the Monitor being granted such expanded powers.²⁰

(ii) Relief is Required for Terminated Employees

19. As of the Filing Date, Mastermind LP employed approximately 800 employees. In addition, Mastermind LP employed approximately 160 temporary employees to assist with the holiday shopping season, the majority of whom ceased employment in

¹⁷ Fourth Affidavit at para. 32(c), MR, Tab 2, pp. 31-32.

¹⁸ Fourth Affidavit at para. 32, MR, Tab 2, pp. 31-33.

¹⁹ Specifically, the powers contemplated by the Ancillary Order will be effective upon delivery of the Monitor's Certificate confirming that the Transaction has closed. See Draft Ancillary Order, s. 3, MR, Tab 4, p. 358.

²⁰ Third Report at s. 6.3; Fourth Affidavit at para. 34, MR, Tab 2, p. 33.

accordance with the terms of their employment agreements.²¹ Effective as of January 14, 2024, all of Mastermind LP's employees will be terminated (though many will be offered employment by the Purchaser).²²

20. There are four categories of employee terminations (collectively, the "**Terminated Employees**"):

- (a) 28 head office employees who were terminated following the Filing Date, with terminations effective as of dates varying between December 7, 2023 and January 12, 2024;²³
- (b) 188 employees who are employed at 18 of Mastermind LP's stores (the "**Liquidating Stores**") where the Liquidation Sale has been taking place since December 1, 2023. The Purchaser has not acquired the Liquidating Stores, which will all be closed on or before January 14, 2024. All 188 employees at the Liquidating Stores have been provided with notices of termination that are effective as of January 14, 2024;²⁴
- (c) approximately 40 Temporary Employees who were retained beyond the expiration of their employment agreements due to the varying turnover levels of staff in certain stores, including unanticipated early departures by regular employees. These Temporary Employees were provided with

²¹ Fourth Affidavit at para. 36, MR, Tab 2, pp. 33-34.

²² Fourth Affidavit at para. 37, MR, Tab 2, p. 34.

²³ Fourth Affidavit at para. 37(a), MR, Tab 2, p. 34.

²⁴ Fourth Affidavit at paras. 9 & 37(b), MR, Tab 2, pp. 23 & 34; Liquidation Sale Approval Order dated November 30, 2023, Exhibit F to the Fourth Affidavit, MR, Tab 2F, pp. 203-219.

individual termination notices with an effective date of January 14, 2024;²⁵
and

- (d) 16 employees who will not be offered employment with the Purchaser and have been or will be terminated effective as of dates ranging from January 2, 2024 to January 14, 2024.²⁶

21. Mastermind LP's remaining 619 employees will be terminated effective immediately before the Closing Date, all of whom will be offered employment by the Purchaser (the "**Continuing Employees**").²⁷ The Continuing Employees who accept the offer of employment will become employees of the Purchaser as of the Closing Date.²⁸

22. Although all wages and accrued vacation pay have been or will be paid to the Terminated Employees, there are severance and termination payment amounts owing to some of the Terminated Employees.²⁹ The Mastermind Entities are therefore seeking a declaration under the *WEPP Act* (as defined below), which allows eligible former employees of a debtor company to collect certain benefits, including termination and severance pay. The Monitor supports this request and intends to assist eligible Terminated Employees in applying for such *WEPP Act* benefits.³⁰

²⁵ Fourth Affidavit at para. 37(c), MR, Tab 2, p. 34.

²⁶ Fourth Affidavit at para. 37(d), MR, Tab 2, p. 35.

²⁷ Fourth Affidavit at para. 38, MR, Tab 2, p. 35.

²⁸ Fourth Affidavit at para. 38, MR, Tab 2, p. 35.

²⁹ Fourth Affidavit at para. 39, MR, Tab 2, p. 35; See also Third Report at s. 4.8.

³⁰ Fourth Affidavit at para. 39, MR, Tab 2, p. 35; Third Report at s. 6.11.

(iii) Distribution to CIBC

23. Following closing of the Transaction, Mastermind LP will be in possession of cash on hand and the Excess Proceeds. A portion of these funds is payable to CIBC in accordance with the APA to satisfy the obligations owing to CIBC under the CIBC Credit Agreement and Forbearance Agreement (the “**Distribution**”).³¹ The Mastermind Entities are seeking this Court’s authorization pursuant to the Ancillary Order to permit the Distribution to be made to CIBC immediately following the closing of the Transaction.³²

(iv) Extending the Stay Period

24. The ARIO provides that the Stay Period expires on January 26, 2024. The Mastermind Entities are seeking a further extension of the Stay Period until April 30, 2024 to allow time to perform all post-closing obligations under the APA and for the wind-down of the Mastermind Entities, as further detailed below.³³

PART III – ISSUES

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

- (a) grant the Assignment Order, assigning the rights and obligations of the Mastermind Entities under the Material Agreements to the Purchaser pursuant to section 11.3 of the CCAA;
- (b) grant the following relief in the Ancillary Order:

³¹ APA (redacted in part), s. 3.4(c), Exhibit G to the Fourth Affidavit, MR, Tab 2G, pp. 243-244; Third Report at ss. 6.14-6.15.

³² Draft Ancillary Order, s. 11, MR, Tab 4, p. 364.

³³ Fourth Affidavit at para. 42, MR, Tab 2, p. 36.

- (i) authorizing and empowering the Monitor to exercise any powers that may be properly exercised by any board of directors of the Mastermind Entities, including by performing certain duties and obligations of the Mastermind Entities, including, *inter alia*, to wind down the Mastermind Entities, facilitate the Claims Process and terminate these CCAA proceedings;
- (ii) making a declaration that pursuant to sections 5(1)(b)(iv) and 5(5) of the *Wage Earner Protection Program Act*, S.C. 2005, c. 47, s 1 (the “**WEPP Act**”), Mastermind LP meets the criteria prescribed by section 3.2 of the *Wage Earner Protection Program Regulations*, SOR/2008-222 (the “**WEPP Regulations**”) such that former employees of Mastermind LP are eligible to receive payments under the *WEPP Act*;
- (iii) authorizing the Distribution to CIBC; and
- (iv) extending the Stay Period from January 26, 2024 to April 30, 2024.

PART IV – LAW AND ARGUMENT

A. This Court Should Assign the Material Agreements to the Purchaser Pursuant to Section 11.3 of the CCAA

26. Section 11.3 of the CCAA provides this Court with the express authority to make an order assigning a debtor company’s rights and obligations under an agreement.³⁴

³⁴ CCAA at s. 11.3.

Section 11.3(3) sets out a non-exhaustive list of factors for this Court to consider when determining whether it is appropriate to grant such an order:

- (a) whether the Monitor approved the proposed assignment;
- (b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and
- (c) whether it would be appropriate to assign the rights and obligations to that person.³⁵

27. In addition, the Court may not make an assignment order unless it is satisfied that all monetary defaults in relation to the agreement to be assigned, other than those arising by reason only of the debtor company's insolvency, the commencement of CCAA proceedings or the debtor company's failure to perform a non-monetary obligation, will be remedied.³⁶

28. Having regard to the factors set out in section 11.3(3) of the CCAA, this Court should grant the Assignment Order in the circumstances:

29. Section 11.3(3)(a): the Monitor supports the assignment of the Material Agreements to the Purchaser.³⁷ The Monitor endorses the proposed Assignment Order because, *inter alia*, (i) the assignment is an integral component of the Transaction, which will preserve over 600 jobs and 49 landlord relationships; (ii) the Material Agreements are necessary for the Purchaser to operate the Mastermind Toys business; (iii) the Purchaser is able to perform the obligations under the Material Agreements and pay the Cure Costs;

³⁵ CCAA at s. 11.3(3).

³⁶ CCAA at s. 11.3(4).

³⁷ Fourth Affidavit at para. 29, MR, Tab 2, p. 30; Third Report at s. 5.7.

(iv) Mastermind LP's senior secured lender, CIBC, supports the Assignment Order; and
(v) the Mastermind Entities have made best efforts to provide notice to the counterparties to the Material Agreements of the proposed Assignment Order.³⁸

30. Section 11.3(3)(b): The Purchaser is fully capable, ready and willing to perform the obligations under the Material Agreements.³⁹ Pursuant to section 2.3(a)(i) of the APA, the Purchaser has agreed to assume all liabilities under the Material Agreements from and after the Closing Date.⁴⁰ Courts have found comfort in the ability of an assignee to perform the contract where that assignee is a sophisticated financial entity like the Purchaser.⁴¹ In this case, the Purchaser is informed, sophisticated and well-positioned to perform its obligations under the Material Agreements, including to pay the Cure Costs, as further described below.⁴² Moreover, the principals of the Purchaser have a proven track record of success in the retail industry through founding or acquiring a number of retail companies in the past, including Club Monaco and Joe Fresh.⁴³

31. Section 11.3(3)(c): it is appropriate in the circumstances to assign the Material Agreements to the Purchaser. Avoiding the social and economic losses resulting from liquidation of an insolvent company is one of the main policy objectives underlying the CCAA.⁴⁴ Accordingly, the Court has granted assignment orders where they are

³⁸ Third Report at s. 5.7.

³⁹ Third Report at s. 5.6; Financial Covenant Letter, Appendix A to the Third Report.

⁴⁰ APA (redacted in part), s. 2.3(a)(i), Exhibit G to the Fourth Affidavit, MR, Tab 2G, pp. 239-240; Financial Covenant Letter, Appendix A to the Third Report.

⁴¹ *UrtheCast Corp. et al. (Re)*, 2021 BCSC 1819 at para. 50, Book of Authorities of the Applicant ("BOA"), Tab 18.

⁴² APA (redacted in part), s. 6.10, Exhibit G to the Fourth Affidavit, MR, Tab 2G, pp. 249-250.

⁴³ Affidavit #3 of Lucio Milanovich sworn on December 6, 2023 ("**Third Affidavit**") at para. 65, Exhibit C to the Fourth Affidavit, MR, Tab 2C, pp. 141-142.

⁴⁴ *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at para. 70, BOA, Tab 5.

necessary for the continuation of a business as a going concern, including where assignment is critical to closing of a transaction.⁴⁵

32. In the present case, the Transaction and the APA are expressly subject to a closing condition that requires 85% of the Material Leases be assigned, either on consent, or by court order.⁴⁶ Despite their efforts, the Mastermind Entities have not obtained the necessary consents to assign the Material Agreements to the Purchaser.⁴⁷ If this Court does not grant the Assignment Order, the Transaction cannot close, and the Mastermind Entities' numerous stakeholders will be prejudiced. The only alternative to the Transaction would be extending the Liquidation Sale to all of Mastermind LP's retail stores, which would not maximize recoveries for its creditors because the holiday shopping period has concluded.⁴⁸

33. When deciding to grant an order under section 11.3 of the CCAA, the Court will consider whether doing so will maximize the realizable value of the debtor company's business for the benefit of its stakeholders.⁴⁹ As this Court has already explicitly recognized when approving the Transaction,⁵⁰ there is simply no other option available

⁴⁵ *TBS Acquireco Inc. (Re)*, 2013 ONSC 4663 [Commercial List] at para. 25, BOA, Tab 16; *BBB Canada Inc.*, 2023 ONSC 2308 [Commercial List] at paras. 19-20, BOA, Tab 2; *Urbancorp et al. (Re)*, 2020 ONSC 7920 [Commercial List] at para. 54, BOA, Tab 17.

⁴⁶ See APA (redacted in part), s. 8.4(f), Exhibit G to the Fourth Affidavit, MR, Tab 2G, p. 255.

⁴⁷ Fourth Affidavit at para. 23, MR, Tab 2, pp. 27-28.

⁴⁸ Fourth Affidavit at para. 27, MR, Tab 2, p. 29.

⁴⁹ See *Bed Bath & Beyond Canada Ltd. v. Sixth Street Specialty Lending Inc.*, 2023 ONSC 2906 [Commercial List] at para. 12, BOA, Tab 4; *BBB Canada Inc. (Re)*, 2023 ONSC 2308 [Commercial List] at para. 19, BOA, Tab 2.

⁵⁰ *Mastermind GP Inc. (Re)*, Endorsement of Justice Steele dated December 13, 2023 (Court File No. CV-23-00710259-00CL) (Ont. S.C.J. [Commercial List]) at para. 13, BOA, Tab 11.

to the Mastermind Entities to continue the business as a going concern or that would better maximize recoveries for stakeholders.⁵¹

34. Finally, the requirements of section 11.3(4) of the CCAA are satisfied in this case. The Purchaser has agreed, subject to certain exceptions, to assume any monetary defaults under the Material Agreements,⁵² and the draft form of Assignment Order expressly provides that such assignment is subject to the payment by the Purchaser of all amounts required to be paid under s. 11.3 of the CCAA, should any such obligations arise.⁵³ The Purchaser has confirmed that it has the financial wherewithal to pay these amounts: it will have approximately \$5 million in shareholders' equity and access to a \$15 million revolving credit facility as at the closing of the Transaction.⁵⁴

35. The Court should therefore assign the Material Leases and Material Contracts to the Purchaser, as it has done previously in circumstances analogous to these.⁵⁵

B. This Court Should Grant the Relief in the Ancillary Order

(i) This Court Should Authorize the Expansion of the Monitor's Powers

36. As outlined above, the Mastermind Entities seek an Ancillary Order expanding the Monitor's powers in order to enable the Monitor to, *inter alia*, perform Mastermind LP's

⁵¹ Third Affidavit at paras. 41, 63, Exhibit C to the Fourth Affidavit, MR, pp. 132-133, 141; Fourth Affidavit at para. 27, MR, Tab 2, p. 29.

⁵² APA (redacted in part), s. 2.3(a)(iii), Exhibit G to the Fourth Affidavit, MR, Tab 2G, pp. 239-240. The exceptions are those set out in section 11.3(4) of the CCAA: any monetary defaults arising by reason of (i) the Mastermind Entities' insolvency, (ii) the commencement of these CCAA proceedings or (iii) the Mastermind Entities' failure to perform a non-monetary obligation.

⁵³ Draft Assignment Order, s. 7, MR, Tab 3, p. 327.

⁵⁴ Financial Covenant Letter, Appendix A to the Third Report.

⁵⁵ *BBB Canada Inc.*, 2023 ONSC 2308 [Commercial List] at paras. 19-20, BOA, Tab 2.

post-closing obligations under the APA, wind down the Mastermind Entities, facilitate the Claims Process and terminate these CCAA proceedings.

37. This Court has the power to grant a monitor such expanded powers pursuant to sections 11 and 23(1)(k) of the CCAA. Section 11 provides this Court with broad discretion to “make any order that is appropriate in the circumstances.” Section 23(1) sets out a monitor’s duties and functions, and subsection 23(1)(k) provides the Court with the discretion to require a monitor to carry out any other functions in relation to the debtor company that the Court may direct.⁵⁶

38. It is well established that this Court may enhance a monitor’s powers to allow it to function as a “super monitor” under the CCAA where such expansion is necessary to advance the interests of a debtor company in a CCAA proceeding, implement steps required under a transaction, or to wind down the debtor company’s business or the CCAA proceedings.⁵⁷ The Courts have concluded that such expansion of powers will be necessary where, as is the case here, the debtor company is left without a decision maker following the termination or resignation of its board of directors or management.⁵⁸ As the Ontario Court of Appeal held in *Ernst & Young Inc.*, courts should avoid a “rigid definition

⁵⁶ CCAA at s. 23(1)(k).

⁵⁷ *Nortel Networks Corporation et al. (Re)*, 2015 ONSC 2987 [Commercial List] at para. 42, BOA, Tab 15; *Just Energy Group Inc. et al. v. Morgan Stanley Capital Group Inc. et al.*, 2022 ONSC 6354 [Commercial List] at paras. 68-69, BOA, Tab 10; *Harte Gold Corp. (Re)*, 2022 ONSC 653 [Commercial List] at paras. 91-92, BOA, Tab 9; *Mountain Equipment Co-Operative (Re)*, 2020 BCSC 2037 at para. 9, BOA, Tab 13.

⁵⁸ *Nortel Networks Corporation et al. (Re)*, 2015 ONSC 2987 [Commercial List] at para. 42, BOA, Tab 15; *Mountain Equipment Co-Operative (Re)*, 2020 BCSC 2037 at para. 9, BOA, Tab 13.

of a monitor's role" and instead adopt a more flexible approach, tailored to the circumstances.⁵⁹

39. Consistent with the mandate of section 11 of the CCAA, the Ancillary Order expanding the Monitor's powers is necessary and appropriate in the circumstances.⁶⁰ Shortly after closing of the Transaction, all of the directors and officers of the Mastermind Entities will resign.⁶¹ Consequently, as of the Closing Date, Mastermind LP will be unable to deal with important post-closing and transition matters such as winding-down the remaining business of the Mastermind Entities, implementing the Claims Process and terminating these CCAA proceedings.⁶²

40. To date, the Monitor, as an officer of the Court, has exercised its powers in a fair and impartial manner under the supervision of the Court and will continue to do so. In addition, the Monitor and the Mastermind Entities' secured creditor, CIBC, support the Mastermind Entities' request to expand the Monitor's powers.⁶³

41. Further, no stakeholder will be prejudiced by the expansion of the Monitor's powers. To the contrary, the granting of such powers is necessary to deal with all post-closing matters for the benefit of every relevant stakeholder, including through the administration of the Claims Process and distribution of the Excess Proceeds.

⁵⁹ *Ernst & Young Inc. v. Essar Global Fund Limited*, 2017 ONCA 1014 at paras. 105-110 & 126, BOA, Tab 7.

⁶⁰ *Harte Gold Corp. (Re)*, 2022 ONSC 653 [Commercial List] at para. 91, BOA, Tab 9.

⁶¹ Fourth Affidavit at para. 31, MR, Tab 2, p. 30.

⁶² Fourth Affidavit at para. 31, MR, Tab 2, p. 30; Third Report at 6.1.

⁶³ Third Report at s. 6.3; Fourth Affidavit at paras. 33-34, MR, Tab 2, p. 33.

(ii) This Court Should Grant a Declaration Under the *WEPP Act*

42. The *WEPP Act* permits eligible former employees of a company subject to the CCAA to collect certain benefits, such as outstanding wages, including termination and severance pay, if certain criteria are met.⁶⁴ As a preliminary matter, where a company is subject to CCAA proceedings, the Court must determine that the debtor company meets the criteria prescribed by section 3.2 of the *WEPP Regulations*.⁶⁵ In other words, the Court must determine that the debtor company is “the former employer all of whose employees in Canada have been terminated other than any retained to wind down its business operations”.⁶⁶ Accordingly, the Mastermind Entities seek a declaration that Mastermind LP meets the criteria prescribed by section 3.2 of the *WEPP Regulations* such that its employees are eligible to receive payments under the *WEPP Act* following the termination of their employment.

43. It is uncontroversial that Mastermind LP is subject to these CCAA proceedings.⁶⁷ As a result, the only determination the Court must make is whether Mastermind LP is a “former employer” under section 3.2 of the *WEPP Regulations*.

44. As of the Filing Date, Mastermind LP employed approximately 800 employees. Since then, Mastermind LP has terminated or provided termination notice to 232 employees and approximately 40 Temporary Employees. In addition, 619 employees of Mastermind LP will be terminated immediately prior to the Closing Date, all of whom will

⁶⁴ *WEPP Act* at ss. 5(1), 7(1); *WEPP Regulations* at s. 3.

⁶⁵ *WEPP Act* at ss. 5(1)(iv), 5(5); *WEPP Regulations* at s. 3.2.

⁶⁶ *WEPP Regulations* at s. 3.2; *WEPP Act* at s. 5(5).

⁶⁷ Initial Order dated November 23, 2023, s. 3, Exhibit D to the Fourth Affidavit, MR, Tab 2D, p. 149.

be offered employment by the Purchaser. As a result, Mastermind LP will terminate all of its employees effective January 14, 2024.⁶⁸

45. Courts have consistently found debtor companies compliant with section 3.2 of the *WEPP Regulations* in analogous circumstances, including in *Bed Bath and Beyond*,⁶⁹ *Bad Boy Furniture*⁷⁰ and *DCL Corporation*.⁷¹ Consequently, this Court should similarly declare that Mastermind LP meets the requirements in section 3.2 of the *WEPP Regulations* and is a “former employer” under the *WEPP Act*.⁷²

(iii) This Court Should Authorize the Distribution

46. The Mastermind Entities are seeking approval of the Distribution to CIBC to be paid out of any cash on hand and Excess Proceeds available after the closing of the Transaction.⁷³ Section 11 of the CCAA provides this Court with jurisdiction to make any order that it considers appropriate in the circumstances. This jurisdiction includes the power to authorize interim or final distributions to creditors absent a plan of compromise and arrangement.⁷⁴

⁶⁸ Fourth Affidavit at paras. 36-38, MR, Tab 2, pp. 33-35.

⁶⁹ *BBB Canada Ltd. (Re)*, Amended and Restated Initial Order granted February 21, 2023 (Court File No CV-23-00694493-00CL) (Ont. S.C.J. [Commercial List]) at para. 23, BOA, Tab 3.

⁷⁰ *Bad Boy Furniture Warehouse Limited v. KSV Restructuring Inc.*, Endorsement of Justice Wilton-Siegel dated November 17, 2023 (Court File No. BK-23-03008133-0031) (Ont. S.C.J. [Commercial List]) at para. 5, BOA, Tab 1; *Bad Boy Furniture Warehouse Limited v. KSV Restructuring Inc.*, Second Report to Court of KSV Restructuring Inc. as Proposal Trustee of Bad Boy Furniture Warehouse Limited dated November 15, 2023 (excluding Appendices) at 5.0(1)-(2), (5), BOA, Tab 1.

⁷¹ *DCL Corporation (Re)*, 2023 ONSC 4475 [Commercial List] at paras. 13-14, BOA, Tab 6.

⁷² *WEPP Regulations* at s. 3.2; *WEPP Act* at s. 5(5).

⁷³ Draft Ancillary Order, s. 11, MR, Tab 4, p. 364.

⁷⁴ *Nortel Networks Corporation et al. (Re)*, 2014 ONSC 5274 [Commercial List] at paras. 54-58, BOA, Tab 14.

47. The proposed Distribution is appropriate in the circumstances because it will enable Mastermind LP to fulfil its obligations under the APA, the CIBC Credit Agreement and the Forbearance Agreement. It is a term of the APA that the amounts owing to CIBC under the CIBC Credit Agreement are paid in full on the closing of the Transaction.⁷⁵

48. The Monitor's counsel has reviewed the security granted by the Mastermind Entities in favour of CIBC in respect of the CIBC Credit Agreement and has opined, subject to the customary qualifications and assumptions set out therein, that the security held by CIBC constitutes valid security, enforceable in accordance with its terms and perfected by registration in all of the locations⁷⁶ where the Mastermind Entities operated.⁷⁷

49. In addition, CIBC is the senior creditor of the Mastermind Entities with a priority claim to the Excess Proceeds and cash on hand, pursuant to the terms of its security and the DIP Charge.⁷⁸ The only parties that rank ahead of CIBC are the beneficiaries of the Administration Charge and the D&O Charge (each as defined in the ARIO).⁷⁹ Following the Distribution, the Administration Charge and the D&O Charge will attach to the balance of the Excess Proceeds. As a result, there is no prejudice to the beneficiaries of those charges.

⁷⁵ APA (redacted in part), s. 3.4(c), Exhibit G to the Fourth Affidavit, MR, Tab 2G, pp. 243-244; Third Report at ss. 6.14-6.15.

⁷⁶ British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick, Nova Scotia, and Newfoundland and Labrador.

⁷⁷ Third Report at s. 6.16.

⁷⁸ Third Affidavit at para. 53, Exhibit C to the Fourth Affidavit, MR, Tab 2C, p. 138; ARIO, ss. 41 & 44, Exhibit E to the Fourth Affidavit, MR, Tab 2E, pp. 194 & 196.

⁷⁹ ARIO, s. 44, Exhibit E to the Fourth Affidavit, MR, Tab 2E, p. 196.

50. Consequently, the Mastermind Entities request that this Court exercise its jurisdiction under section 11 of the CCAA to permit the Monitor to make the Distribution to CIBC immediately following the closing of the Transaction. This Court has granted similar relief in other CCAA proceedings.⁸⁰

51. The Monitor supports the proposed Distribution to CIBC.⁸¹

C. This Court Should Extend the Stay Period

52. 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.

53. With respect to the first prong of the test under section 11.02, the requested extension of the Stay Period is necessary and appropriate in the circumstances for the following reasons:

- (a) although the Transaction is scheduled to close on January 15, 2024, it has an outside date of January 31, 2024.⁸² The extension of the Stay Period will provide the Mastermind Entities and the Monitor with the time needed to facilitate closing of the Transaction,⁸³ which this Court has agreed is in the

⁸⁰ *Gesco Industries Inc. et al. (Re)*, Endorsement of Justice Steele dated June 22, 2023 (Court File No. CV-23-00699824-00CL) (Ont. S.C.J. [Commercial List]) at paras. 38 & 54, BOA, Tab 8; *MAV Beauty Brands Inc. et al. (Re)*, Endorsement of Justice Cavanagh dated November 4, 2023 [Court File No. CV-23-00709610-00CL] at para. 7, BOA, Tab 12.

⁸¹ Third Report at s. 6.17.

⁸² Fourth Affidavit at para. 41, MR, Tab 2, p. 36; APA (redacted in part), s. 9.1(a)(i), Exhibit G to the Fourth Affidavit, MR, Tab 2G, p. 256.

⁸³ Third Report at s. 6.13.

best interests of the Mastermind Entities' stakeholders and necessary to preserve the Mastermind Toys business;⁸⁴

- (b) the extension of the Stay Period will also allow the Monitor to exercise its expanded powers under the Ancillary Order, including establishing and obtaining this Court's approval of the Claims Process, distribute the Excess Proceeds, winding down the Mastermind Entities and terminating these CCAA proceedings;⁸⁵ and
- (c) the Excess Proceeds will provide sufficient liquidity through the Extended Stay Period.⁸⁶

54. With respect to the second prong of the test, as outlined in detail in the Fourth Affidavit, the Mastermind Entities have acted, and continue to act, in good faith and with due diligence in these CCAA proceedings.⁸⁷ The Mastermind Entities have made best efforts to give notice of these proceedings to their stakeholders, including landlords, secured creditors, employees and vendors.⁸⁸ The Mastermind Entities intend to continue engaging in discussions with all stakeholders as these proceedings progress.

55. Moreover, the Mastermind Entities have worked diligently towards the closing of the Transaction and completion of the Liquidation Sale, all with the goal of maximizing

⁸⁴ *Mastermind GP Inc. (Re)*, Endorsement of Justice Steele dated December 13, 2023 (Court File No. CV-23-00710259-00CL) (Ont. S.C.J. [Commercial List]) at para. 13, BOA, Tab 11.

⁸⁵ Third Report at s. 6.13.

⁸⁶ Third Report at s. 6.13(iii).

⁸⁷ Fourth Affidavit at para. 43, MR, Tab 2, p. 36.


⁸⁸ Fourth Affidavit at paras. 24 & 43, MR, Tab 2, pp. 28 & 36.

value for its stakeholders.⁸⁹ Indeed, as described herein, if the Transaction closes, the Excess Proceeds will be held for the benefit of the Mastermind Entities' estates.⁹⁰

PART V – ORDER SOUGHT

56. For the above reasons, the Mastermind Entities request that this Court grant the Assignment Order and Ancillary Order in the forms requested.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of January, 2024.



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⁸⁹ Third Report at s. 4.1.

⁹⁰ Third Report at s. 4.3.

SCHEDULE A LIST OF AUTHORITIES

Case Law

1. *Bad Boy Furniture Warehouse Limited v. KSV Restructuring Inc.*, Endorsement of Justice Wilton-Siegel dated November 17, 2023 (Court File No. BK-23-03008133-0031) (Ont. S.C.J. [Commercial List]).
2. *BBB Canada Inc. (Re)*, 2023 ONSC 2308 [Commercial List].
3. *BBB Canada Ltd. (Re)*, Amended and Restated Initial Order granted February 21, 2023 (Court File No CV-23-00694493-00CL) [Commercial List].
4. *Bed Bath & Beyond Canada Ltd. v. Sixth Street Specialty Lending Inc.*, 2023 ONSC 2906 [Commercial List].
5. *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60.
6. *DCL Corporation (Re)*, 2023 ONSC 4475 [Commercial List].
7. *Ernst & Young Inc. v. Essar Global Fund Limited*, 2017 ONCA 1014.
8. *Gesco Industries Inc. et al. (Re)*, Endorsement of Justice Steele dated June 22, 2023 (Court File No. CV-23-00699824-00CL) (Ont. S.C.J. [Commercial List]).
9. *Harte Gold Corp. (Re)*, 2022 ONSC 653 [Commercial List].
10. *Just Energy Group Inc. et al. v. Morgan Stanley Capital Group Inc. et al.*, 2022 ONSC 6354 [Commercial List].
11. *Mastermind GP Inc. (Re)*, Endorsement of Justice Steele dated December 13, 2023 (Court File No. CV-23-00710259-00CL) (Ont. S.C.J. [Commercial List]).
12. *MAV Beauty Brands Inc. et al. (Re)*, Endorsement of Justice Cavanagh dated November 4, 2023 [Court File No. CV-23-00709610-00CL].
13. *Mountain Equipment Co-Operative (Re)*, 2020 BCSC 2037.
14. *Nortel Networks Corporation et al. (Re)*, 2014 ONSC 5274 [Commercial List].
15. *Nortel Networks Corporation et al. (Re)*, 2015 ONSC 2987 [Commercial List].
16. *TBS Acquireco Inc. (Re)*, 2013 ONSC 4663 [Commercial List].
17. *Urbancorp et al. (Re)*, 2020 ONSC 7920 [Commercial List].
18. *UrtheCast Corp. et al. (Re)*, 2021 BCSC 1819.

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.

...

11.02(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.

...

11.3

11.3(1) Assignment of agreements

On application by a debtor company and on notice to every party to an agreement and the monitor, the court may make an order assigning the rights and obligations of the company under the agreement to any person who is specified by the court and agrees to the assignment.

11.3(2) Exceptions

Subsection (1) does not apply in respect of rights and obligations that are not assignable by reason of their nature or that arise under

- (a) an agreement entered into on or after the day on which proceedings commence under this Act;
- (b) an eligible financial contract; or
- (c) a collective agreement....

11.3(3) Factors to be considered

In deciding whether to make the order, the court is to consider, among other things,

- (a) whether the monitor approved the proposed assignment;
- (b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and
- (c) whether it would be appropriate to assign the rights and obligations to that person.

11.3(4) Restriction

The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement — other than those arising by reason only of the company's insolvency, the commencement of proceedings under this Act or the company's failure to perform a non-monetary obligation — will be remedied on or before the day fixed by the court.

...

23.

23(1) Duties and functions

The monitor shall

- (a) except as otherwise ordered by the court, when an order is made on the initial application in respect of a debtor company,
 - (i) publish, without delay after the order is made, once a week for two consecutive weeks, or as otherwise directed by the court, in one or more newspapers in Canada specified by the court, a notice containing the prescribed information, and
 - (ii) within five days after the day on which the order is made,

(A) make the order publicly available in the prescribed manner,

(B) send, in the prescribed manner, a notice to every known creditor who has a claim against the company of more than \$1,000 advising them that the order is publicly available, and

(C) prepare a list, showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner;

(b) review the company's cash-flow statement as to its reasonableness and file a report with the court on the monitor's findings;

(c) make, or cause to be made, any appraisal or investigation the monitor considers necessary to determine with reasonable accuracy the state of the company's business and financial affairs and the cause of its financial difficulties or insolvency and file a report with the court on the monitor's findings;

(d) file a report with the court on the state of the company's business and financial affairs — containing the prescribed information, if any —

(i) without delay after ascertaining a material adverse change in the company's projected cash-flow or financial circumstances,

(ii) not later than 45 days, or any longer period that the court may specify, after the day on which each of the company's fiscal quarters ends, and

(iii) at any other time that the court may order;

(iv) [Repealed 2007, c. 36, s. 72(2)]

(d.1) file a report with the court on the state of the company's business and financial affairs — containing the monitor's opinion as to the reasonableness of a decision, if any, to include in a compromise or arrangement a provision that sections 38 and 95 to 101 of the Bankruptcy and Insolvency Act do not apply in respect of the compromise or arrangement and containing the prescribed information, if any — at least seven days before the day on which the meeting of creditors referred to in section 4 or 5 is to be held;

(e) advise the company's creditors of the filing of the report referred to in any of paragraphs (b) to (d.1);

(f) file with the Superintendent of Bankruptcy, in the prescribed manner and at the prescribed time, a copy of the documents specified in the regulations;

(f.1) for the purpose of defraying the expenses of the Superintendent of Bankruptcy incurred in performing his or her functions under this Act, pay the prescribed levy at the prescribed time to the Superintendent for deposit with the Receiver General;

(g) attend court proceedings held under this Act that relate to the company, and meetings of the company's creditors, if the monitor considers that his or her attendance is necessary for the fulfilment of his or her duties or functions;

(h) if the monitor is of the opinion that it would be more beneficial to the company's creditors if proceedings in respect of the company were taken under the Bankruptcy and Insolvency Act, so advise the court without delay after coming to that opinion;

(i) advise the court on the reasonableness and fairness of any compromise or arrangement that is proposed between the company and its creditors;

(j) make the prescribed documents publicly available in the prescribed manner and at the prescribed time and provide the company's creditors with information as to how they may access those documents; and

(k) carry out any other functions in relation to the company that the court may direct.

2. *Wage Earner Protection Program Act, S.C. 2005, c. 47*

5.

5(1) Conditions of eligibility

An individual is eligible to receive a payment if

(a) the individual's employment ended for a reason prescribed by regulation;

(b) one of the following applies:

(i) the former employer is bankrupt,

(ii) the former employer is subject to a receivership,

(iii) the former employer is the subject of a foreign proceeding that is recognized by a court under subsection 270(1) of the Bankruptcy and Insolvency Act and

(A) the court determines under subsection (2) that the foreign proceeding meets the criteria prescribed by regulation, and

(B) a trustee is appointed, or

(iv) the former employer is the subject of proceedings under Division I of Part III of the Bankruptcy and Insolvency Act or under the Companies' Creditors Arrangement Act and a court determines under subsection (5) that the criteria prescribed by regulation are met; and

(c) the individual is owed eligible wages by the former employer.

(d) [Repealed 2009, c. 2, s. 343(2).]

...

5(5) Prescribed criteria — other proceedings

On application by any person, a court may, in proceedings under Division I of Part III of the Bankruptcy and Insolvency Act or under the Companies' Creditors Arrangement Act, determine that the former employer meets the criteria prescribed by regulation.

...

7(1) Amount of payment

The amount that may be paid under this Act to an individual is the amount of eligible wages owing to the individual up to a maximum of an amount equal to seven times the maximum weekly insurable earnings under the Employment Insurance Act.

3. *Wage Earner Protection Program Regulations – SOR/2008-222*

3.

An individual's employment has ended for the purposes of paragraph 5(a) of the Act if it has ended for any of the following reasons:

- (a) the individual resigned or retired;
- (b) the individual's employment has terminated; or
- (c) the term of the individual's employment has expired

...

3.2

For the purposes of subsection 5(5) of the Act, a court may determine whether the former employer is the former employer all of whose employees in Canada have been terminated other than any retained to wind down its business.

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.

Applicant

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

PROCEEDING COMMENCED AT
TORONTO

**FACTUM OF THE APPLICANT
(MOTION RETURNABLE JANUARY 12, 2024)**

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