Court File No.: CV-19-631523-00CL

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 CLOVER LEAF HOLDINGS COMPANY, CONNORS BROS. CLOVER LEAF SEAFOODS COMPANY, K.C.R. FISHERIES LTD., 6162410 CANADA LIMITED, CONNORS BROS. HOLDING COMPANY AND CONNOR BROS. SEAFOODS COMPANY

Applicants

FACTUM OF THE APPLICANTS
(CCAA Application)

November 24, 2019

BENNETT JONES LLP
3400 One First Canadian Place
P.O. Box 130
Toronto, ON M5X 1A4

Kevin Zych (LSO #33129T)
Email: zychk@bennettjones.com

Sean Zweig (LSO #57307I)
Email: zweigs@bennettjones.com

Mike Shakra (LSO # 64604K)
Email: shakram@bennettjones.com

Tel: (416) 863-1200
Fax: (416) 863-1716

Lawyers for the Applicants

FACTUM OF THE APPLICANTS

PART I: INTRODUCTION

1. Clover Leaf Holdings Company, Connors Bros. Clover Leaf Seafoods Company, K.C.R. Fisheries Ltd., 6162410 Canada Limited, Connors. Bros. Holding Company and Connor Bros. Seafoods Company (the "**Applicants**") seek relief pursuant to an amended and restated initial order (the "**Amended and Restated Initial Order**") under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**").

2. On November 22, 2019, the Applicants obtained an initial order (the "**Initial Order**") which granted a stay of proceedings in favour of the Applicants and their directors and officers (the "**Stay of Proceedings**") and appointed Alvarez & Marsal Canada Inc. as the monitor (the "**Monitor**"). As described herein, the Applicants are now seeking further relief under the CCAA to supplement the limited relief obtained under the Initial Order.

3. The Applicants, which carry on business in Canada and internationally through distributors in the Caribbean, specialize in the production and sale of shelf-stable seafood products and employ approximately 650 workers in Canada. Head office functions of the Applicants are largely performed from their offices in Markham, Ontario. The U.S. affiliates of the Applicants are referred to herein as "**Bumble Bee**" (and together with the Applicants, the "**Bumble Bee Group**"). Bumble Bee has filed for protection under Chapter 11 due to a number of financial pressures, including significant legal actions against Bumble Bee in the U.S. The financial pressures facing Bumble Bee have led to an overall deterioration of the Bumble Bee Group's business given their interconnected, cross-guaranteed and cross-collateralized financing arrangements.

4. While the Applicants and Bumble Bee are largely separate from an operational perspective in terms of their customers and suppliers, there are key areas upon which the Applicants are dependent on Bumble Bee and its continued operations. Given the interconnected existing financing, despite the fact that the Applicants are profitable and cash flow positive, Bumble Bee's financial difficulties have inevitably had adverse consequences for the Applicants.

5. The Applicants are therefore seeking relief in order to effect a comprehensive and coordinated restructuring concerning the Applicants (in Canada) and Bumble Bee (in the U.S.), including an asset sale of each of their respective businesses (the "**Sale Transaction**"). This outcome is the result of

extensive consideration of options and consultation with the Bumble Bee Group's secured lenders and follows significant efforts to attempt to restructure outside of insolvency proceedings.

6. The Applicants believe that this CCAA proceeding is in the best interests of all of their stakeholders and will result in their business being conveyed on a going concern basis and with minimal disruption. The breathing room afforded by the CCAA and Chapter 11 proceedings, and the other relief sought, will allow the Applicants to continue operations in the ordinary course, maintaining the stability of their business and operations, and preserving the value of the Applicants' business, while the value-maximizing Sale Transaction is implemented.

7. Although the Applicants are party to a stalking horse asset purchase agreement, the Applicants are not seeking any relief in connection with it, or the Sale Transaction generally, at this stage. The Applicants will return to Court for that relief at a later date, and are instead only seeking the limited relief required at this time

PART II: FACTS[1]

A. The Applicants

8. The Applicants are all incorporated in Canada. While certain of the Applicants have registered head offices in other Provinces, the central management and control of the Applicants' business are carried on at the Applicants' offices in Markham, Ontario.

B. The U.S. Proceedings

9. On November 21, 2019, certain of the Applicants' U.S. affiliates (collectively, the "**U.S. Debtors**"),[2] filed voluntary petitions (the "**Chapter 11 Proceedings**") for relief pursuant to title 11 of the United States Code,[3] in the United States Bankruptcy Court for the District of Delaware.[4]

10. The "first day hearings" of the U.S. Debtors took place on November 22, 2019 whereby the U.S. Debtors were granted relief similar to that sought by the Applicants herein. However, as there are separate CCAA and Chapter 11 proceedings in place for entirely distinct groups of companies

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[1] The facts underlying this Application are more fully set out in the affidavit of Gary Ware sworn November 21, 2019, [First Ware Affidavit] and the Affidavit of Gary Ware sworn November 24, 2019, at para 5 [Second Ware Affidavit]. All capitalized terms used but not defined herein have the meanings ascribed to them in the Second Ware Affidavit.
[2] The U.S. Debtors are Bumble Bee Parent, Inc.; Bumble Bee Holdings, Inc.; Bumble Bee Foods, LLC; Anova Food, LLC; and Bumble Bee Capital Corp.
[3] 11 U.S.C. §§ 101-1330, as amended.
[4] Second Ware Affidavit, *supra* note 1 at para 7.

(i.e. no Bumble Bee Group company has filed in both jurisdictions), each Court is acting as the sole and exclusive authority with respect to the entities before it and will be considering the relief sought in accordance with its own laws and procedures – even though the effectiveness of many relevant agreements (including the DIP financing described herein) is conditioned on approval from both Courts.

C. Business and Operations

11. A corporate structure chart of the Bumble Bee Group has been included in the Second Ware Affidavit.[5] The Bumble Bee Group is one of North America's best-known consumer packaged seafood companies, compromised of a number of iconic brands in both Canada and the U.S., and with leadership positions in virtually every segment of the Canadian and U.S. shelf-stable seafood market.[6]

12. The Applicants currently employ approximately 650 people in Canada, with approximately 600 in New Brunswick (primarily in connection with sardine fishing and processing at the Blacks Harbour facility), 47 in Ontario (primarily performing head office and marketing functions), 2 in Quebec and 1 in Alberta.[7] One of the Applicants is party to a labour agreement concerning employees located in New Brunswick, and the Applicants sponsor three registered pension plans.[8] The Applicants also sponsor an omnibus group benefits plan policy.[9] No relief sought on this application purports to impact the labour agreement, or any of the Applicants' plans and policies. While the Sale Transaction is not before the Court for consideration, it contemplates the buyer assuming all such obligations.

13. From an operational perspective, the Applicants' business and that of the U.S. Debtors are largely separate in terms of their customers and suppliers. However, there are key areas upon which the Applicants are dependent upon the continued and uninterrupted operation of the U.S. Debtors, including (i) critical IT support services, (ii) sourcing and procurement of canned finished goods, including tuna, salmon, smoked oysters, smoked mussels, shrimp, crab and sardines (primarily from vendors in Asia), (iii) insurance services, and (iv) quality control programs.[10] These intercompany

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[5] *Ibid* at para 16. See also, First Ware Affidavit, *supra* note 1 at Exhibit B.
[6] *Ibid* at paras 17, 20.
[7] *Ibid* at para 37.
[8] *Ibid* at paras 38-41.
[9] *Ibid* at paras 42.
[10] *Ibid* at para 46.

services are provided to the Applicants on a cost-plus or management fee basis, depending on the service.[11]

D. Assets and Liabilities

14. As at October 26, 2019, the Applicants had assets with a book value of approximately CAD$492.7 million and had total liabilities with a book value of approximately CAD$398.5 million, the majority of which is comprised of secured third party debt (CAD$227.3 million) and intercompany loans payable (CAD$130.9 million).[12] However, the Applicants' secured third party debt is significantly higher than that amount, as the Applicants are also joint and severally liable as guarantors of all obligations under the ABL Facility and the Term Loan Facility (as defined and described below).[13]

1. The ABL Facility

15. Bumble Bee Foods LLC (the "**U.S. Borrower**") is the borrower under an amended and restated credit agreement dated as of August 18, 2017 with Connors Bros. Clover Leaf Seafoods Company as the initial Canadian borrower (the "**ABL Credit Agreement**").[14] The ABL Credit Agreement provides for an asset-based revolving credit facility with aggregate commitments of up to USD$200 million, with the U.S. Borrower able to draw up to USD$160 million and Connors Bros. Clover Leaf Seafoods Company, as Canadian borrower, able to draw up to USD$40 million.[15] The amounts outstanding as of October 26, 2019, are, respectively, USD$134.7 million and USD$36.8 million. The ABL Facility matures on August 18, 2022.[16]

16. All borrowings under the ABL Credit Agreement are guaranteed by the Applicants (other than the two which are dormant) and the U.S. Debtors, and are secured on a first-priority basis by certain current assets of the Bumble Bee Group (the "**ABL Priority Collateral**"), and on a second-priority basis by security interests in all other assets (with certain exclusions) of the borrowers and guarantors (the "**Term Loan Priority Collateral**").[17]

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[11] *Ibid* at para 47.
[12] *Ibid* at para 50.
[13] *Ibid* at para 54.
[14] *Ibid* at para 55.
[15] *Ibid* at para 56.
[16] *Ibid* at para 59.
[17] *Ibid* at paras 58.

2. Term Loan Facility

17. The U.S. Borrower and Connors Bros. Clover Leaf Seafoods Company are also borrowers under a credit agreement, dated as of August 15, 2017 (the "**Term Loan Agreement**"), which provides for the issuance of term loans in the aggregate initial principal amount of USD$650 million.[18] Approximately USD$506.5 million is issued to the U.S. Borrower and approximately USD$143.5 million is issued to Connors Bros. Clover Leaf Seafoods Company. As of October 26, 2019, the amounts outstanding are, respectively, USD$505.9 million and USD$143.3 million.[19]

18. The Term Loan Facility is guaranteed by the Applicants (other than the two which are dormant) and the U.S. Debtors, and secured on a first-priority basis by all of the Term Loan Priority Collateral, and on a second-priority basis in the ABL Priority Collateral.[20] The Term Loan Facility matures on August 15, 2023.[21]

E. Financial Pressures Leading to the CCAA Filing

19. Despite the Applicants being cash flow positive and profitable, the balance sheet of the Bumble Bee Group as a whole remains problematic and the Applicants have been directly impacted by the financial difficulties of the U.S. Debtors.[22] The Bumble Bee Group as a whole is facing financial pressures as a result of the U.S. litigation, the Canadian litigation, certain U.S. operational issues and a default under the Term Loan Facility. Each of these issues is discussed briefly below.

1. The U.S. Litigation

20. In 2015, the United States Department of Justice commenced a review into anticompetitive conduct, which lead to Bumble Bee entering into a plea agreement in 2017 pursuant to which it agreed to pay a USD$25 million fine payable over five years, USD$17 million of which is outstanding.[23] The Applicants were not part of the review and are not liable in connection with the plea agreement. Shortly following the review becoming public, fifty putative class action claims were commenced

[18] *Ibid* at para 61.
[19] *Ibid*.
[20] *Ibid* at para 64.
[21] *Ibid* at para 65.
[22] *Ibid* at para 77.
[23] *Ibid* at paras 78-80.

against certain members of the Bumble Bee Group in the U.S.[24] On July 30, 2019, three class actions were certified.[25] The Applicants are not defendants in those actions.

2. Canadian Litigation

21. On October 24, 2017, a class action was commenced in the Ontario Superior Court of Justice against various entities in the Bumble Bee Group, including certain of the Applicants, with respect to alleged anti-competitive conduct seeking general damages of CAD$250 million and punitive damages of CAD$25 million.[26] A second Canadian claim, substantially similar in nature and seeking similar damages, was commenced on October 23, 2018.[27] There have been no substantive procedural developments in such litigation since they were issued; the defendants have not filed statements of defence.[28]

3. U.S. Operational Issues

22. Bumble Bee has faced operational and cash flow pressures from a number of factors, including price increases for its primary tuna products and the impact of U.S-China trade tensions.[29]

4. Term Loan Default

23. The Bumble Bee Group's overall EBITDA has declined by approximately 20% from 2015 to 2018.[30] The negative trend in the Bumble Bee Group's EBITDA contributed to its inability to maintain the maximum net leverage coverage covenant required under the Term Loan Agreement. This ultimately resulted in a default under the Term Loan Agreement in March 2019, which is currently subject to a waiver.[31]

F. Pre-Filing Restructuring Efforts

24. Prior to filing for protection under the CCAA and in the U.S., the Bumble Bee Group engaged in a number of different restructuring efforts, including:

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[24] *Ibid* at para 82.
[25] *Ibid* at para 83.
[26] *Ibid* at para 85.
[27] *Ibid* at para 86.
[28] *Ibid* at para 87.
[29] *Ibid* at 88-90.
[30] *Ibid* at para 91.
[31] *Ibid*.

(a) In or around December 2018, a sale of the Applicants' business in Canada was explored, as well as a potential recapitalization of the Bumble Bee Group's global business, with interested parties contacted and indications of interest received.[32] It was ultimately determined that it would not be feasible to implement a global recapitalization in the absence of settling the U.S. Litigation.[33] The sale process was then terminated.

(b) The Bumble Bee Group entered into an amendment of its credit facilities, culminating in a Restructuring Support Agreement on July 10, 2019, which outlines the support of a restructuring of the Bumble Bee Group, in connection with obtaining junior financing and settling litigation claims.[34] Despite significant efforts, the Bumble Bee Group was unable to raise junior financing and settle the U.S. Litigation with a sufficient threshold of plaintiffs.[35]

(c) In September 2019, a further sale process was commenced to solicit interest in a sale of the Bumble Bee Group's U.S. and Canadian businesses, together or individually. 190 potentially interested parties were contacted, and approximately 65 executed non-disclosure agreements to receive the confidential information memorandum.[36]

25. This latter sales process culminated in the Applicants and Bumble Bee executing an asset purchase agreement dated November 21, 2019, with certain affiliates of FCF Co., Ltd ("**FCF**"), a global fisheries enterprise based in Taiwan to acquire their respective businesses on a going concern basis.[37] While the Applicants are not seeking any relief today in respect of such transaction or the solicitation of higher and better bids, it is one of the catalysts for these proceedings and the relief sought.

26. In accordance with the terms of the Restructuring Support Agreement, the Bumble Bee Group's existing secured lenders agreed to provide it with DIP financing.[38] Prior to finalizing such DIP financing, the Bumble Bee Group solicited interest from 11 third-party lenders.[39] These efforts

[32] *Ibid* at paras 95-99.
[33] *Ibid* at para 100.
[34] *Ibid* at para 101-103.
[35] *Ibid* at paras 104-106.
[36] *Ibid* at paras 112-113.
[37] *Ibid* at paras 116-117.
[38] *Ibid* at para 120.
[39] *Ibid* at para 121.

resulted in only one DIP financing proposal from a lender that was unwilling to provide financing on a junior basis, and the Bumble Bee Group's existing lenders were unwilling to consent to the priming of their existing loans by a new lender. Third-party financing was not considered a feasible alternative in the circumstances. [40]

27. A marketing process was also undertaken seeking proposals to replace the ABL Facility, however this would have delayed and jeopardized any potential sale.[41]

G. Need for CCAA Relief

28. Using the CCAA to effect the Sale Transaction (which is a requirement of FCF) will allow the Applicants to preserve the value of their business, preserve their workforce and customers, and maintain continuity of their supplier relationships. Without continued CCAA protection, and continued support from Bumble Bee and the current lenders under the ABL Credit Agreement and the Term Loan Agreement, the stability and value of the Applicants' business could quickly deteriorate.[42]

29. The Applicants are seeking very specific relief intended to facilitate the coordinated restructuring with the U.S. Debtors in order to complete the Sale Transaction, which will allow Bumble Bee to continue to provide the Applicants with critically important services to operate their business without disruption, ensure the Applicants' continued access to liquidity, and preserve the rights of the Applicants against Bumble Bee arising from any pre or post-filing support.[43]

30. Prior to seeking CCAA protection, as described above, the Bumble Bee Group thoroughly canvassed alternative options and engaged in various pre-filing restructuring and marketing efforts. The commencement of these CCAA Proceedings is the result of extensive consultation with the secured creditors of the Bumble Bee Group (who are projected to suffer a shortfall should the proposed Sale Transaction be completed without any superior bids). Due to the intertwined financing structure and other interdependent factors, and the financial pressures facing the Bumble Bee Group as a whole, the significant financial challenges of Bumble Bee have had a significant impact on the Applicants. Entering into the CCAA Proceedings to effect the coordinated restructuring and Sale

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[40] *Ibid* at 122.
[41] *Ibid* at 123.
[42] *Ibid* at paras 127-128.
[43] *Ibid* at para 9.

Transaction is the best path forward for the Bumble Bee Group, maximizing the value of the entire business, but in a way that minimizes the disruption to the Applicants' business and stakeholders, ultimately preserving and maximizing the value of the Applicants.

PART III: ISSUES

31. The issues to be considered on this application are whether:

(a) the Court should extend the Stay of Proceedings granted on November 22, 2019;

(b) any of the relief sought on this application is inconsistent with the amendments to the CCAA which came into effect on November 1, 2019;

(c) the Court should approve the Proposed DIP Financing (as defined below) and grant the DIP Charge;

(d) the Administration Charge and Directors' Charge should be granted;

(e) the Court should approve the KEIP and grant the KEIP Charge, and corresponding sealing order;

(f) the Court should authorize the Applicants to pay their ordinary course pre-filing debts as provided for in the DIP Budget and the proposed Amended and Restated Initial Order; and

(g) the Intercompany Charge should be granted.

A. The Stay of Proceedings

32. As determined on the application for the Initial Order, the Applicants are insolvent and companies to which the CCAA applies.[44] Certain of the Applicants are borrowers and guarantors under the Term Loan Facility, which is currently in default (and subject to a waiver) and has total outstanding obligations of USD$649.2 million, for which the Applicants (other than the dormant entities) are either borrowers or guarantors.[45] In addition, the dormant Applicants are reliant upon the active Applicants and have no business, operations, assets or funding of their own. Without continued protection under the CCAA and the continued support from its current lenders (as well as the fact that FCF requires the implementation of the Sale Transaction through the CCAA), the stability and value of the Applicants' business could quickly deteriorate and the Applicants would have insufficient liquidity required to fund their operations going forward.[46]

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[44] Initial Order, dated November 22, 2019, at para 2.
[45] *Ibid* at paras 54, 65, 66, 91.
[46] *Ibid* at paras 125-128.

33. In order to extend the Stay of Proceedings, this Court must be satisfied that circumstances exist that make the order appropriate and the Applicants have acted, and are acting, in good faith and with due diligence.[47] A stay of proceedings is appropriate to provide the debtor with breathing room while it seeks to restore solvency and emerge from the CCAA on a going concern basis.[48]

34. The Applicants are concerned about the potential termination of contracts by key suppliers and the inability to require suppliers to provide future services and products in accordance with existing contractual arrangements.[49] In addition, it would be detrimental to the Applicants' ability to implement the Sale Transaction and destructive to the overall value of its business if existing proceedings were allowed to continue, new proceedings were commenced or rights and remedies were exercised against the Applicants in the short window available to execute the Sale Transaction.[50] As such, the Applicants believe the extension of the Stay of Proceedings is appropriate in the circumstances.

35. Since the granting of the Initial Order, the Applicants have continued to work towards implementing the Sale Transaction under the CCAA with due diligence and in the best interests of their stakeholders, and have acted and continue to act in good faith.[51] The Monitor supports the requested extension of the Stay of Proceedings.[52]

B. The Relief Sought is Consistent with the CCAA

36. On November 1, 2019, the CCAA was amended to include section 11.001:

> 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.

37. The stated purpose of the applicable amendment is "enhancing retirement security by making the insolvency process fairer, more transparent and more accessible" by, among other things, limiting

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[47] *Companies' Creditors Arrangement Act,* RSC 1985, c. C-36, s 11.02(3) [CCAA].
[48] *Century Services Inc v Attorney General (Canada)*, 2010 SCC 60 at para 14, Applicants' Book of Authorities at Tab 1; *Target Canada Co,* 2015 ONSC 303 at para 8, Applicants' Book of Authorities at Tab 2.
[49] Second Ware Affidavit, *supra* note 1 at para 131.
[50] *Ibid*.
[51] *Ibid* at para 175**.**
[52] Pre-Filing Report of the Proposed Monitor Alvarez & Marsal Canada Inc, at para 7.2 [Monitor's Report].

"the decisions that can be taken at the outset of a CCAA proceeding to measures necessary to avoid the immediate liquidation of an insolvent company, thereby improving participation of all players".[53]

38. This amendment is consistent with existing jurisprudence which states that terms in initial orders should be kept to terms "as are reasonably necessary for the continued operation of the debtor company during a brief but realistic period of time".[54]

39. The Applicants believe that all relief sought on this application is in accordance with the limitation in section 11.001 and consistent with the purpose of the CCAA as remedial legislation, intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy.[55]

40. The Applicants have limited the relief sought on this application to that which is reasonably necessary in the circumstances for the continued operations of their business. Further relief, including approval of the Sale Transaction and related bidding procedures, will not be sought until a later date.

C. The Proposed DIP Financing Should be Approved

1. Overview of the Proposed DIP Financing

41. In accordance with the Restructuring Support Agreement, the Bumble Bee Group's existing secured lenders have agreed to provide it with DIP financing needed to implement the Sale Transaction (the "**Proposed DIP Financing**").[56] The Proposed DIP Financing is also needed to provide stability and continue ongoing operations in the face of the financial pressures and liquidity challenges facing the Bumble Bee Group. It is a condition precedent to the Proposed DIP Financing that the Amended and Restated Initial Order be in form and substance satisfactory to the secured lenders, including in respect of the DIP Charge.[57]

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[53] Canada, Innovation, Science and Economic Development Canada, *Insolvency reforms to come into force*, News Release, (Ottawa: Media Relations) 2019 at 2; Canada, Marketplace Framework Policy Branch, *Order Fixing November 1, 2019 as the Day on Which Certain Provisions of the two Acts Come into Force: SI/2019-90*, Canada Gazette, Part II, Volume 153, Number 18 [*Order Fixing*].

[54] *Royal Oak Mines Inc*, [1999] OJ No 709 at paras 21-24 [*Royal Oak*], Applicants' Book of Authorities at Tab 3; *Miniso International Hong Kong Limited v Migu Investments Inc,* 2019 BCSC 1234 at paras 77-80 [*Miniso*], Applicants' Book of Authorities at Tab 4.

[55] *Re Lehndorff General Partners Ltd*, (1993), 17 C.B.R. (3d) 24 at para 5 (Ont. Sup. Ct. J. [CommercialList]), Applicants' Book of Authorities at Tab 5; *Cinram International Inc, Re,* 2012 ONSC 3767 at para 58 [*Cinram*], Applicants' Book of Authorities at Tab 6.

[56] Second Ware Affidavit, *supra* note 1 at paras 136-137.

[57] *Ibid* at para 147.

42. The Proposed DIP Financing is comprised of the DIP ABL Facility in the aggregate amount of USD$200 million and the DIP Term Facility in the amount of USD$80 million.[58] The Proposed DIP Financing is largely reflective of the pre-filing lending arrangements in that they are secured obligations of both of the Applicants and the U.S. Debtors. Each of the Applicants are guarantors of the full amount owing under the DIP ABL Facility and the DIP Term Facility, and Connors Bros. Clover Leaf Seafoods Company is a borrower under the DIP ABL Facility.[59]

43. The ABL DIP Facility is a "take-out" DIP which is intended to repay amounts owing under the pre-petition ABL Facility in full.

44. Based on the cash flows prepared by management (and reviewed by the Monitor), it is contemplated that, given the Applicants remain cash flow positive, the Applicants are expected to provide credit support to the U.S. Debtors during these proceedings but will still have sufficient cash flow to fund ongoing operations and expenses.[60]

45. The Amended and Restated Initial Order contains a number of provisions designed to protect the interests of the Applicants, and minimize any potential prejudice from the Proposed DIP Financing. In particular, the rights and causes of action of the DIP Credit Parties, including with respect to set-off, subrogation or contribution, against one another are preserved in the event that the assets of the Applicants and the U.S. Debtors are sufficient to repay their common secured creditors in full.[61]

2. New Subsection 11.2(5) of the CCAA

46. On November 1, 2019, a new subsection 11.2(5) was added to the CCAA regarding DIP financing sought at an initial application or during the period referred to in an initial order:

> 11.2(5) When an application is made under subsection (1) at the same time as an initial application referred to in subsection 11.02(1) or during the period referred to in an order made under that subsection, no order shall be made under subsection (1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.[62]

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[58] *Ibid* at paras 138, 142.
[59] *Ibid* at paras 140, 144.
[60] *Ibid* at para 151.
[61] Amended and Restated Initial Order, dated November 25, 2019, at para 47 [Amended and Restated Order].
[62] CCAA, *supra* note 47, s 11.2(5).

47. Consistent with section 11.001 discussed above, and the stated purposes of the amendments, this new subsection limits the approval of DIP financing to what "is reasonably necessary for the continued operations of the debtor company in the ordinary course of business" to ensure that decisions taken at the outset of a CCAA proceeding are limited "to measures necessary to avoid the immediate liquidation of an insolvent company".[63]

48. Subsection 11.2(5) is also consistent with the existing jurisprudence on interim financing; courts have consistently held that DIP financing should be granted in order to "keep the lights on", and be limited to terms that are "reasonably necessary" for the continued operation of the debtor company.[64] This new amendment was recently considered by a British Columbia Court, which endorsed the view that the amendment "is not inconsistent with the current approach of Canadian courts when exercising its discretion under s. 11.2 of the *CCAA*" and is "echoed in Justice Farley's comments in *Royal Oak Mines…*" (excerpted in the prior sentence).[65]

49. Subsection 11.2(5) does not limit the jurisdiction of the court in hearing an application for interim financing at the initial order stage of the proceeding. Rather, on an initial application or during the period referred to in an initial order, the court is required to be satisfied, after considering all of the facts and circumstances in the case before it, that the interim financing sought to be approved is "reasonably necessary" for continued operations in such circumstances. What is "reasonably necessary" in each case is inevitably a question of fact based on the circumstances before the court.[66]

50. Therefore, what is "reasonably necessary" for a debtor company which operates solely in one Province with traditional financing (and which has not investigated or assessed its restructuring options or enjoys the support of the primary stakeholders affected by the restructuring) may be very different than what is "reasonably necessary" in a case (such as here) involving a global enterprise with intertwined financing, suppliers and customers throughout the world, supervised by two independent Courts, which has conducted a thorough investigation of its restructuring alternatives and enjoys the support of its two primary (and common) secured creditor groups (who will be most

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[63] *Ibid*; *Order Fixing*, *supra* note 53.
[64] *Royal Oak, supra* note 54 at para 24, Applicants' Book of Authorities at Tab 3; *Bondfield Construction Company*, *Re*, 2019 ONSC 2310 at para 18 [*Bondfield*], Applicants' Book of Authorities at Tab 7.
[65] *Miniso, supra* note 54 at para 80, Applicants' Book of Authorities at Tab 4.
[66] *8440522 Canada Inc, Re,* 2013 ONSC 6167 at para 30, Applicants' Book of Authorities at Tab 8.

impacted by the commencement of CCAA proceeding), and which contemplates continued ordinary course payments to all employees and trade creditors.

51. In line with the prior case law holding that DIP financing should be restricted to what is "reasonably necessary" to meet the debtor's needs, courts have approved DIP financing where it would provide stability to the debtor's business, ensure liquidity, prevent customers from going elsewhere, and ensure the day-to-day operations of the debtor's business.[67] In a recent decision from British Columbia expressly considering the requirements of the new subsection 11.2(5) in approving DIP financing, the Court found the new provision was satisfied as the interim financing was "necessary to permit the [applicant] to maintain the value of the enterprise while they pursue a restructuring".[68]

52. Here too, the Proposed DIP Financing is reasonably necessary to allow the Applicants to maintain their ongoing business, ensure liquidity and preserve their enterprise value while the Sale Transaction is being pursued and implemented. No liquidation is being contemplated and the Proposed DIP Financing will be used to honour all commitments to employees, customers, and trade creditors. The requirement in the new subsection 11.2(5) is satisfied.

3. The Proposed DIP Financing Satisfies the Criteria in Subsections 11.2(1) and (4)

53. Subsection 11.2(1) expressly provides the Court with the statutory jurisdiction to grant a DIP financing charge "on notice to the secured creditors who are likely to be affected by the security or charge – in an amount that the court considers appropriate…having regard to [the debtors'] cash-flow statement. The security or charge may not secure an obligation that exists before the order is made."

54. The first question is whether the Proposed DIP Financing falls within the jurisdiction of the Court pursuant to subsection 11.2(1). Previous cases have found that DIP financing that uses receipts from operations post-filing to repay pre-filing amounts (often referred to as a "creeping roll-up") is in accordance with the Court's jurisdiction in subsection 11.2(1). Those cases have given subsection 11.2(1) a narrow interpretation, focusing on whether the DIP facility is consistent with the pre-filing *status quo,* such that it upholds the relative pre-stay priority position of each secured creditor.[69]

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[67] *Ibid* at paras 30-31, Applicants' Book of Authorities at Tab 8; *Bondfield, supra* note 64 at paras 18-20, Applicants' Book of Authorities at Tab 7.

[68] *Miniso, supra* note 54 at paras 86, 88, Applicants' Book of Authorities at Tab 4.

[69] *Re Cow Harbour Construction Ltd* (April 28, 2010), Alta QB, 1003-05560 at 31-32, Applicants' Book of Authorities at Tab 9; *Comark Inc, (Re),* 2015 ONSC 2010 at paras 40-41, Applicants' Book of Authorities at Tab 10; *Performance Sports Group Ltd,* 2016 ONSC 6800 at para 22 [*Performance Sports*], Applicants' Book of Authorities at Tab 11.

55. The only case that the Applicants are aware of that has expressly considered a "takeout DIP", akin to the one before this Court, is *Re Toys "R" Us (Canada) Ltd.*, in which this Court authorized the debtor companies to use certain proceeds from a new money DIP facility, secured by a Court-ordered DIP charge, to repay in full the debtors' pre-filing secured lenders. Of note, such Order was granted as part of the initial order in such proceedings. The reasoning and approval of the DIP facility and charge is equally applicable to this case:

> [Section 11.2] makes it clear however, that security cannot be granted for pre-filing claims. Here, while it is proposed for DIP funding to be used to pay out pre-filing lenders (a "takeout DIP") all of the loans that will be secured are fresh advances by the DIP lenders. Moreover, the Monitor has obtained an independent legal opinion that the pre-filing ABL security is valid and prior to all claims that will be primed by the court-ordered DIP security. The DIP funds are replacing existing secured collateral. The court-ordered charge is not being used to improve the security of the pre-filing ABL lenders or to fill any gaps in their security coverage. **In my view therefore, the takeout DIP is not prohibited by s. 11.2**.[70]

56. As in *Toys "R" Us,* the Monitor in this case has obtained an independent security opinion, the DIP funds are replacing existing secured collateral, and the DIP Charge will not improve the security of the pre-filing lenders or secure any pre-filing obligation.[71] The one distinguishing factor in *Toys "R" Us* is that the DIP financing was provided by new third-party lenders, rather than the company's existing secured lenders as in this case. However, this fact had no impact on the Court's jurisdiction to grant the DIP financing under subsection 11.2(1), and is instead a factor to be considered when determining whether to exercise the Court's discretion, as discussed below.

57. In addition, in accordance with subsection 11.2(1), notice has been provided to the secured creditors proposed to be primed by the Proposed DIP Financing, and the Amended and Restated Initial Order expressly states that the proposed DIP Charge does not secure any pre-filing obligations of the Applicants.[72] The Applicants therefore submit that this Court has the jurisdiction under subsection 11.2(1) to approve the Proposed DIP Financing and associated DIP Charge. The question then becomes whether the Court should exercise its discretion to do so. Subsection 11.2(4) sets out the

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[70] *Toys "R" Us (Canada) Ltd,* 2017 ONSC 5571 at para 10 [emphasis added] [*Toys "R" Us*], Applicants' Book of Authorities at Tab 12; Amended and Restated Order, *supra* note 61 at paras 9, 13, 36-40.

[71] Amended and Restated Order, *ibid*; Second Ware Affidavit, *supra* note 1 at paras 138-146; Monitor's Report, *supra* note 52 at paras 4.26-4.27, 6.1-6.4, 10.5, 13.10-13.13.

[72] CCAA, *supra* note 47, s 11.2(1); Amended and Restated Order, *ibid* at paras 9, 13, 36-40; *Performance Sports, supra* note 69 at para 22, Applicants' Book of Authorities at Tab 11; *Toys "R" Us*, *supra* note 70 at para 10, Applicants' Book of Authorities at Tab 12.

following non-exhaustive factors to be considered by the Court in deciding whether to grant a DIP financing charge:

> 11.2(4) *Factors to be considered*. – In deciding whether to make an order, the court is to consider, among other things,
>
> (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;
>
> (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 referred to in paragraph 23(1)(b), if any.[73]

58. Unlike the ABL DIP Facility, the Applicants are not borrowers under the DIP Term Facility but are proposed to be guarantors of the DIP Term Facility. Case law has established the following factors are relevant in determining the appropriateness of authorizing a guarantee in connection with a DIP facility:

> (a) the need for additional financing by the Canadian debtor to support a going concern restructuring;
>
> (b) the benefit of the breathing space afforded by CCAA protection;
>
> (c) the availability (or lack thereof) of any financing alternatives, including the availability of alternative terms to those proposed by the DIP lender;
>
> (d) the practicality of establishing a stand-alone solution for the Canadian debtors;
>
> (e) the contingent nature of the liability of the proposed guarantee and the likelihood that it will be called on;
>
> (f) any potential prejudice to the creditors of the entity if the request is approved, including whether unsecured creditors are put in any worse position by the provision of a cross-guarantee of a foreign affiliate than as existed prior to the filing, apart from the impact of the super-priority status of new advances to the debtor under the DIP financing;
>
> (g) the benefits that may accrue to the stakeholders if the request is approved and the prejudice to those stakeholders if the request is denied; and

[73] CCAA, *ibid* s 11.2(4); *Canwest Publishing Inc, Re,* 2010 ONSC 222 at para 42 [*Canwest Publishing*], Applicants' Book of Authorities at Tab 13.

> (h) a balancing of the benefits accruing to stakeholders generally against any potential prejudice to creditors.[74]

59. The following factors support approval of the Proposed DIP Financing and the granting of the DIP Charge, many of which incorporate the considerations enumerated in subsection 11.2(4) listed above and the factors in the above discussed case law:

(a) the notice requirements are met;

(b) given its present financial circumstances, the Bumble Bee Group as a whole cannot obtain alternative financing outside of the Chapter 11 and CCAA proceedings;

(c) in light of the cross-collateralization and cross-guarantees, and the financial support provided to the Applicants by Bumble Bee, the Applicants' liquidity is dependent on the secured lenders providing the Proposed DIP Financing;

(d) the Proposed DIP Financing is necessary to maintain the ongoing business and operations of the Bumble Bee Group, including the Applicants;

(e) while the Proposed DIP Financing is being provided by the Applicants' existing secured lenders, rather than new third-party lenders, 11 third-party lenders were solicited with no viable proposal, which demonstrates that the Proposed DIP Financing represents the best available DIP financing option in the circumstances;

(f) the Proposed DIP Financing will preserve the value and going concern operations of the Applicants' business, which is in the best interests of the Applicants and their stakeholders;

(g) the DIP lenders are the existing secured lenders so are familiar with the business and operations, reducing administrative costs that would otherwise arise with a new third-party DIP facility;

(h) there is no change from the pre-filing *status quo* in terms of the ranking of the security (the Applicants were obligors under the ABL Facility and are obligors under the DIP ABL Facility, and were obligors under the Term Facility and are obligors under the DIP Term Facility);

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[74] *Indalex Ltd, Re* (2009), 52 CBR (5th) 61 at para 8, Applicants' Book of Authorities at Tab 14.

(i) as described above, protections have been included in the Amended and Restated Initial Order to significantly minimize any prejudice to the Applicants and their stakeholders;

(j) the amount of the Proposed DIP Financing is appropriate having regard to the Applicants' cash-flow statement;

(k) the Monitor's report indicates the Applicants will have sufficient liquidity to operate their business in the ordinary course; and

(l) the Monitor has obtained an independent security opinion.[75]

60. The Proposed DIP Financing is the only DIP facility available to the Bumble Bee Group at this time notwithstanding the efforts to secure alternative financing, and the DIP Charge is required to secure such financing. The Applicants submit that approval of the Proposed DIP Financing and the DIP Charge is appropriate in the circumstances, consistent with the terms of the CCAA, reasonably necessary in order to enable the continued operation of the Applicants' business in the ordinary course, and in the best interests of the Applicants and their stakeholders - including, as noted herein, the trade creditors and customers of the Applicants who are intended to be paid in the ordinary course from the Proposed DIP Financing.

D. Entitlement to Make Certain Pre-Filing Payments

61. To preserve normal course business operations, the Applicants are seeking authorization in the proposed Amended and Restated Initial Order to continue to pay their suppliers of goods and services, honour rebate, discount and refund programs with their customers and pay employees in the ordinary course consistent with existing compensation arrangements (all of which are required to maintain value, goodwill and key customer relationships).[76]

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[75] Second Ware Affidavit, *supra* note 1 at paras 59, 65, 106, 120-123, 127-128, 135-146, 151; Amended and Restated Order, *supra* note 61 at paras 9, 36-40, 47; Monitor's Report, *supra* note 52 at paras 4.26-4.27, 6.1-6.4, 9.1-9.7.

[76] Amended and Restated Order, *ibid* at para 9; Second Ware Affidavit, *ibid* at para 159; Monitor's Report, *ibid* at para 11.1-11.2.

62. The court has the broad jurisdiction to permit the payment of pre-filing obligations in a CCAA proceeding.[77] In granting debtors the authority to pay certain pre-filing obligations, courts have considered a number of factors, including:

(a) whether the goods and services were integral to the business of the applicants;

(b) the applicants' need for the uninterrupted supply of the goods or services;

(c) the fact that no payments would be made without the consent of the Monitor;

(d) the Monitor's support and willingness to work with the applicants to ensure that payments in respect of pre-filing liabilities were appropriate;

(e) whether the applicants had sufficient inventory of the goods on hand to meet their needs; and

(f) the effect on the debtors' ongoing operations and ability to restructure if they were unable to make pre-filing payments.[78]

63. Pre-filing payments to employees and customer rebate programs have been approved with the recognition that such claims must be paid to protect the goodwill of the business in the interests of all creditors.[79]

64. It is critical to the operation of their business that the Applicants are able to preserve key relationships. Any disruption in the services proposed to be paid could jeopardize the value of the Applicants' business and the viability of the Sale Transaction. The authority in the proposed Amended and Restated Initial Order to pay pre-filing obligations is appropriately tailored and responsive to the needs of the Applicants and is specifically provided for in the Applicants' cash flows and in the DIP Budget. In particular, the payments are limited to those necessary to preserve critical relationships with employees, suppliers and customers, to ensure the stability and continued operation of the Applicants' business, and will only be made with the consent of the Monitor.[80] The relief sought here is consistent with orders in other CCAA cases.[81]

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[77] *Canwest Global Global Communications Corp, Re* (2009), 181 ACWS (3d) 853, at paras 41, 43 [*Canwest Global*], Applicants' Book of Authorities at Tab 15; *Performance Sports, supra* note 69 at paras 24-25, Applicants' Book of Authorities at Tab 11; *Cinram*, *supra* note 55 at para 67, Applicants' Book of Authorities at Tab 6; *Eddie Bauer of Canada Inc, Re* (2009), 179 ACWS (3d) 47 at para 22, Applicants' Book of Authorities at Tab 16.

[78] *JTI-Macdonald Corp,* 2019 ONSC 1625 at para 24, Applicants' Book of Authorities at Tab 17; *Cinram*, *ibid* at para 68, Applicants' Book of Authorities at Tab 6.

[79] *Toys "R" Us, supra* note 70 at para 8, Applicant's Book of Authorities at Tab 12.

[80] Monitor's Report, *supra* note 52 at para 11.2; Amended and Restated Order, *supra* note 61 at para 9.

[81] *Cinram, supra* note 55 at paras 23-24, 66, 70, Applicants' Book of Authorities at Tab 6; *Performance Sports, supra* note 69 at paras 22-25, Applicants' Book of Authorities at Tab 11; *Toys "R" Us, ibid*; Applicants' Book of

65. As the entitlement to make pre-filing payments is relief granted under section 11, the Applicants also considered the requirement in the new section 11.001 as to whether the relief is "reasonably necessary for the continued operations of the debtor company in the ordinary course of business". The Applicants believe that the payments contemplated above are reasonably necessary to their continued operations in order to ensure that there is no disruption in services provided to the Applicants and no deterioration in supplier, customer and employee relationships. Without such payments being made, the continued operations of the Applicants could be threatened.

E. THE KEIP AND KEIP CHARGE SHOULD BE APPROVED

66. In *Re Aralez Pharmaceuticals Inc.,* Justice Dunphy reviewed the factors for approving a key employee retention or incentive plan as set out in *Grant Forest Products Inc., Re* and subsequent cases,[82] and provided a new framework, which he indicated swept in all relevant considerations enunciated in the prior case law:

> (a) Arm's length safeguards: The court can justifiably repose significant confidence in the objectivity of the business judgment of parties with a legitimate interest in the matter who are independent of or at arm's length from the beneficiaries of the program….
>
> (b) Necessity: Incentive programs, be they in the form of KERP or KEIP or some variant are by no means an automatic or matter of course evolution in an insolvency file. They need to be justified on a case-by-case basis on the basis of necessity...
>
> (c) Reasonableness of Design: Incentive programs are meant to align the interests of the beneficiaries with those of the stakeholders and not to reward counter-productive behavior nor provide an incentive to insiders to disrupt the process at the least opportune moment. The targets and incentives created must be reasonably related to the goals pursued…[83]

67. The above considerations are satisfied in this case:

(a) the KEIP was developed in consultation with AlixPartners, Bennett Jones LLP and with the involvement of the Monitor. The Monitor is supportive of the KEIP. The secured creditors also support the charge;

Authorities at Tab 12; Second Ware Affidavit, *supra* note 1 at para 159; Amended and Restated Order, *supra* note 61 at para 9.

[82] *Grant Forest Products Inc, Re* (2009), 179 ACWS (3d) 517 at paras 8-23 [*Grant Forest*], Applicants' Book of Authorities at Tab 18; *Canwest Global, supra* note 77 at para 52, Applicants' Book of Authorities at Tab 15; *Cinram, supra* note 55 at para 91, Applicants' Book of Authorities at Tab 6.

[83] *Aralez Pharmaceuticals Inc, (Re),* 2018 ONSC 6980 at para 30, Applicants' Book of Authorities at Tab 19.

(b) the KEIP is reasonably necessary to retain the key employees, who are necessary to guide the Applicants through the CCAA Proceedings and the Sale Transaction;

(c) the KEIP is entirely incentive-based and will only be earned if certain conditions are met; and

(d) the amount of the KEIP, and corresponding KEIP Charge, is reasonable in the circumstances.[84]

68. As the approval of the KEIP and corresponding KEIP Charge is relief granted under section 11, the Applicants also considered the requirement in the new section 11.001 as to whether the relief is "reasonably necessary for the continued operations of the debtor company in the ordinary course of business". Without the retention of its key employees, the continued operations of the Applicants are threatened. In order to preserve ongoing operations and value, the Applicants believe that the KEIP is reasonably necessary to retain the Applicants' key employees.[85] The terms and scope of the KEIP have been limited to what is reasonably necessary at this time; the amount of the KEIP subject to the KEIP Charge is $2.6 million. Consistent with other cases, the approval of a KEIP and the corresponding KEIP Charge at an early stage is appropriate in these circumstances.[86]

69. The Applicants also request that the Court grant the relief requested in the Amended and Restated Initial Order to seal the KEIP pursuant to its jurisdiction under subsection 137(2) of the *Courts of Justice Act*,[87] as it contains the personal information of key employees, including their salaries. Courts should exercise their discretion to grant sealing orders where the order is necessary to prevent a serious risk to an important interest, including a commercial interest; and the salutary effects of the order outweigh its deleterious effects.[88]

70. Sealing orders are routinely granted in CCAA cases involving a KEIP.[89] In this case, consistent with those cases, the Applicants believe this Court should exercise its jurisdiction to grant

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[84] Second Ware Affidavit, *supra* note 1 at paras 154-155; Monitor's Report, *supra* note 52 at paras 12.1-12.5, 13.8-13.9.
[85] Second Ware Affidavit, *ibid*.
[86] *Grant Forest, supra* note 82 at paras 11-24, Applicants' Book of Authorities at Tab 18; *Canwest Global*, *supra* note 77 at paras 49-52, Applicants' Book of Authorities at Tab 15; *Cinram, supra* note 55 at paras 27, 93, Applicants' Book of Authorities at Tab 6.
[87] *Ontario Courts of Justice Act,* RSO 1990, c. C. 43, s 137(2).
[88] *Sierra Club of Canada v Canada (Minister of Finance),* 2002 SCC 41 at para 53, Applicants' Book of Authorities at Tab 20.
[89] *Essar Steel Algoma Inc, Re,* 2015 ONSC 7656 at para 22, Applicants' Book of Authorities at Tab 21; *Canwest Global, supra* note 77 at paras 51-52, Applicants' Book of Authorities at Tab 15.

the sealing order within the Amended and Restated Initial Order as the KEIP contains sensitive personal and compensation information such that the sealing order is necessary to protect the individuals' privacy and the Applicants' commercial interest and, in light of the fact that the total amount of the KEIP has been disclosed, the salutary effects of the order outweigh any deleterious effects of protecting the individuals' privacy.

F. THE INTERCOMPANY CHARGE SHOULD BE GRANTED

71. In order to protect entities of the Bumble Bee Group for obligations incurred on behalf of other entities of the Bumble Bee Group, the Applicants are seeking an Intercompany Charge on payments made or obligations incurred to the benefit of another member of the Bumble Bee Group.[90] A reciprocal charge was obtained in the Chapter 11 Proceedings to protect advances made by the Applicants to the Chapter 11 Debtors.

72. Intercompany charges have been granted in other cases where: the Monitor is supportive of the charge; the charge preserves the *status quo* between entities; the charge will protect the interests of creditors as against the individual entities; and the charge ranks behind all other court-ordered charges granted.[91] These factors are all present here as well.[92]

73. As the intercompany charge is relief granted under section 11, the Applicants also considered the requirement in the new section 11.001 as to whether the relief is "reasonably necessary for the continued operations of the debtor company in the ordinary course of business".

74. The Intercompany Charge is intended to preserve the *status quo* by allowing the Applicants to continue their operations in the ordinary course of business while providing their individual creditors with the necessary protection for any claims they may have. Without the Charge, certain members of the Bumble Bee Group may incur obligations in the ordinary course that could adversely affect the creditors of another member of the Bumble Bee Group.[93] As such, the Applicants believe that the relief is reasonably necessary for their continued operations in the ordinary course of business.

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[90] Second Ware Affidavit*, supra* note 1 at paras 169-170; Amended and Restated Order, *supra* note 61 at para 46.
[91] *Walter Energy Canada Holdings Inc, Re,* 2016 BCSC 107 at paras 65-67, Applicants' Book of Authorities at Tab 22; *Performance Sports, supra* note 69 at para 34, Applicants' Book of Authorities at Tab 11.
[92] Second Ware Affidavit, *supra* note 1 at paras 169-171; Amended and Restated Order, *supra* note 61 at paras 46, 49, 50, 52.
[93] Monitor's Report, *supra* note 52 at para 13.14.

G. OTHER CHARGES ARE APPROPRIATE AND SHOULD BE APPROVED

1. Administration Charge

75. The Applicants are seeking an Administration Charge in the amount of CAD$1.25 million to secure the professional fees and disbursements of the Monitor, the Monitor's counsel and the Applicants' Canadian counsel, incurred prior to, on, or subsequent to the date of the Initial Order, incurred at their standard rates and charges.[94]

76. Section 11.52 of the CCAA expressly provides the court with the jurisdiction to grant an administration charge. The following list of non-exhaustive factors are to be considered when granting an administration charge:

(a) the size and complexity of the business being restructured;

(b) the proposed role of the beneficiaries of the charge;

(c) whether there is unwarranted duplication of roles;

(d) whether the quantum of the proposed charge appears to be fair and reasonable;

(e) the position of the secured creditors likely to be affected by the charge; and

(f) the position of the Monitor.[95]

77. The Applicants submit that it is appropriate for this Court to exercise its jurisdiction and grant the Administration Charge, given that:

(a) the business of the Bumble Bee Group is large and complex, given its global business and intertwined financing;

(b) the beneficiaries of the Administration Charge have, and will continue to, contribute to these CCAA proceedings and assist the Applicants with their business;

(c) each proposed beneficiary of the Administration Charge is performing distinct functions and there is no duplication of roles;

(d) the quantum of the proposed charge is reasonable having regard to administration charges granted in other CCAA proceedings;

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[94] Amended and Restated Order, *supra* note 61 at para 35.
[95] *Canwest Publishing*, *supra* note 73 at para 54, Applicants' Book of Authorities at Tab 13.

(e) the secured creditors support the Administration Charge; and

(f) the Monitor is supportive of the Administration Charge.[96]

2. Directors' Charge

78. The Applicants are seeking a Directors' Charge in the amount of CAD$2.3 million to secure the indemnity of their directors and officers for liabilities they may incur during the CCAA Proceedings, including potential obligations relating to wages and source deductions, vacation pay, severance and termination amounts, other employee-related obligations, sales taxes and other potential obligations.[97]

79. Section 11.51 of the CCAA affords the Court the jurisdiction to grant the Directors' Charge; the court may not make the order if "the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost" and the "court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct".[98]

80. "The purpose of such a charge is to keep the directors and officers in place during the restructuring by providing them with protections against liabilities they could incur during the restructuring".[99]

81. The Applicants submit it is appropriate in these circumstances for this Court to exercise its jurisdiction and grant the Directors' Charge, given that:

(a) the directors and officers may be subject to potential liabilities in connection with the CCAA Proceedings and have expressed their desire for certainty with respect to potential personal liability if they continue in their current capacities;

(b) the Applicants' liability insurance policies provide insufficient coverage;

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[96] *JTI-Macdonald Corp,* (March 8, 2019) Toronto, 19-CV-615862-00CL (Initial Order) at para 40, Applicants' Book of Authorities at Tab 23; *Target Canada Co*, (January 15, 2014) Toronto, CV-15-10832-00CL (Initial Order) at para 54, Applicants' Book of Authorities at Tab 24; *Toys "R" Us (Canada) Ltd*, (September 19, 2017) Toronto, CV-17-005892960-00CL (Initial Order) at para 32, Applicants' Book of Authorities at Tab 25; Second Ware Affidavit, *supra* note 1 at para 160; Monitor's Report, *supra* note 52 at paras 13.3-13.4.

[97] Second Ware Affidavit*, ibid* at para 164.

[98] CCAA, *supra* note 47, s 11.51(3)-(4).

[99] *Canwest Global*, *supra* note 77 at paras 46-48, Applicants' Book of Authorities, Tab 15.

(c) the Directors' Charge applies only to the extent that the directors and officers do not have coverage under another directors and officers' insurance policy;

(d) the Directors' Charge would only cover obligations and liabilities that the directors and officers may incur after the commencement of the CCAA Proceedings and does not cover wilful misconduct or gross negligence;

(e) the Applicants will require the active and committed involvement of the directors and officers, and their continued participation is necessary to effect the Sale Transaction and a successful CCAA Proceeding;

(f) the amount of the Directors' Charge has been calculated based on the estimated potential exposure of the directors and officers and is appropriate given the size, nature and employment levels of the Applicants; and

(g) the calculation of the Directors' Charge has been reviewed with the Monitor and the Monitor is supportive of the Directors' Charge.[100]

PART IV: RELIEF REQUESTED

82. The Applicants submit that they meet all of the qualifications required to obtain the requested relief and request that this Court grant the proposed form of Amended and Restated Initial Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

November 25, 2019

Bennett Jones LLP

[100] Second Ware Affidavit, *supra* note 1 at paras 161-164; Amended and Restated Order, *supra* note 61 at paras 25-26, 49, 50, 52; Monitor's Report, *supra* note 52 at paras 13.5-13.7.

SCHEDULE A – LIST OF AUTHORITIES

Cases Cited

1. *Aralez Pharmaceuticals Inc, (Re)*, 2018 ONSC 6980
2. *Bondfield Construction Company, Re*, 2019 ONSC 2310
3. *Canwest Global Communications Corp, Re* (2009), 181 ACWS (3d) 853
4. *Canwest Publishing Inc, Re*, 2010 ONSC 222
5. *Century Services Inc v Attorney General (Canada)*, 2010 SCC 60
6. *Cinram International Inc, Re*, 2012 ONSC 3767
7. *Comark Inc, (Re)*, 2015 ONSC 2010
8. *Eddie Bauer of Canada Inc, Re* (2009), 179 ACWS (3d) 47
9. *Essar Steel Algoma Inc, Re*, 2015 ONSC 7656
10. *Grant Forest Products Inc*, *Re* (2009), 179 ACWS (3d) 517
11. *Indalex Ltd, Re* (2009), 52 CBR (5th) 61
12. *JTI-Macdonald Corp,* 2019 ONSC 1625
13. *JTI-Macdonald Corp*, (March 8, 2019) Toronto, 19-CV-615862-00CL (Initial Order)
14. *Miniso International Hong Kong Limited v Migu Investments Inc*, 2019 BCSC 1234
15. *Performance Sports Group Ltd*, 2016 ONSC 6800
16. *Re Cow Harbour Construction Ltd* (April 28, 2010), Alta QB, 1003-05560
17. *Re Lehndorff General Partners Ltd*, (1993), 17 C.B.R. (3d) 24 at para 5 (Ont. Sup. Ct. J. [CommercialList])
18. *Royal Oak Mines Inc*, [1999] OJ No 709
19. *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41
20. *Target Canada C*o, 2015 ONSC 303
21. *Target Canada Co*, (January 15, 2014) Toronto, CV-15-10832-00CL (Initial Order)
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SCHEDULE B – STATUTES RELIED ON

***Companies' Creditors Arrangement Act*, RSC 1985, c C-36**

Section 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.

Section 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.

Section 11.02

Stays, etc. – initial application
(1) 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.

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

Burden of proof on application
(3) 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.

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

Section 11.2

Interim financing
(1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

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

Priority — other orders
(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

Factors to be considered
(4) In deciding whether to make an order, the court is to consider, among other things,

(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;

(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 referred to in paragraph 23(1)(b), if any.

Additional factor — initial application
(5) When an application is made under subsection (1) at the same time as an initial application referred to in subsection 11.02(1) or during the period referred to in an order made under that subsection, no order shall be made under subsection (1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

Section 11.51

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

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

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

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

Section 11.52

Court may order security or charge to cover certain costs

(1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

> (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
>
> (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
>
> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

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

***Courts of Justice Act*, RSO 1990, c. C. 43**

Section 137

Documents public
(1) 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.

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

Court lists public
(3) 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.

Copies
(4) 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 AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CLOVER LEAF HOLDINGS COMPANY, CONNORS BROS. CLOVER LEAF SEAFOODS COMPANY, K.C.R. FISHERIES LTD., 6162410 CANADA LIMITED, CONNORS BROS. HOLDINGS COMPANY and CONNORS BROS. SEAFOODS COMPANY

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(COMMERCIAL LIST)

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FACTUM OF THE APPLICANTS

BENNETT JONES LLP
One First Canadian Place
Suite 3400, P.O. Box 130
Toronto, Ontario
M5X 1A4

Kevin Zych (LSO# 33129T)
Sean Zweig (LSO# 57307I)
Mike Shakra (LSO# 64604K)

Tel: 416-863-1200
Fax: 416-863-1716

Lawyers for the Applicants