Court File No. CV-25-738613-00CL

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 1242939 B.C. UNLIMITED LIABILITY COMPANY, 1241423 B.C. LTD., 1330096 B.C. LTD., 1330094 B.C. LTD., 1330092 B.C. UNLIMITED LIABILITY COMPANY, 1329608 B.C. UNLIMITED LIABILITY COMPANY, 2745263 ONTARIO INC., 2745270 ONTARIO INC., SNOSPMIS LIMITED, 2472596 ONTARIO INC., AND 2472598 ONTARIO INC.

(Applicants)

RESPONDING FACTUM OF THE APPLICANTS
(Re: Hilco Motion)
(Returnable August 28/29, 2025)

August 25, 2025

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TO: THE SERVICE LIST

PART I – OVERVIEW[1]

1. Hilco's motion as originally framed, focused on seeking to terminate the Central Walk APA. As reflected in Justice Osborne's endorsement issued July 15, 2025:

> "The principal relief sought by the FILO Agent is the termination of the Central Walk APA to which Ms. Liu's companies are the counterparties. The Applicants advise it is still their intention to bring forward a motion for the approval of that APA, but that has not been scheduled yet."[2]
>
> "This is an important motion in this proceeding. All parties agreed with my observation that, if granted it would be practically dispositive of the motion for approval of the APA, since that would have been terminated and the leases disclaimed. The potential realizable value of that APA is significant, and the issue of whether the leases should be assigned is of critical importance to the affected parties."[3]

2. The motion materials seeking approval of the CW Transaction are now before the Court and returnable August 28-29, 2025. The evidence is clear that Hilco was consulted and signed off on the Central Walk APA in May 2025.[4] The various stakeholders in these proceedings, including the Applicants, Ruby Liu Commercial Investment Corp. (the "**Purchaser**"), Hilco, Pathlight and the Landlords opposing the Applicants' motion seeking approval of the Central Walk APA (the "**Objecting Landlords**"), have all expressed their views on whether the CW Transaction is to be approved. This key and threshold issue now rests with the Court to determine.

3. Hilco's motion has *evolved* since initially served on July 8, 2025, and has been reframed since litigation counsel was replaced on July 21, 2025. Importantly, and with the CW Transaction now before this Court, Hilco acknowledges that "[U]ltimately the FILO Agent takes no position as to whether or not the Central Walk APA is approved by the Court."[5]

4. The issues at the heart of the current iteration of Hilco's motion focus on:

   (a) Control of the CCAA process now and going forward, to permit Hilco's views to be implemented on all future steps in the proceedings;

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[1] Capitalized terms used herein and not otherwise defined have the meanings ascribed to such terms in the Affidavit of Michael Culhane sworn July 13, 2025 (the "**Third Culhane Affidavit**").
[2] Endorsement of Justice Osborne dated July 15, 2025 (the "**July 15 Endorsement**"), at para. 9.
[3] July 15 Endorsement at para. 11.
[4] At that time, the Outside Date under the Central Walk APA was July 30, 2025. Now, Outside Date is the first business day following issuance of the order approving the Central Walk APA and the CW Transaction.
[5] Reply Affidavit of Ian Fredericks sworn August 12, 2025, at para. 35. ("**Reply Fredericks Affidavit**"), Reply Motion Record of the FILO Agent dated August 12, 2025, Tab 1.

(b) Intercreditor disputes as between Hilco and Pathlight – which are governed by a 70-page Intercreditor Agreement governed by New York law; and

(c) Allocation of costs associated with pursuing the CW Transaction as between Hilco and Pathlight.

5. This is essentially an intercreditor dispute between Hilco and Pathlight. Both lenders claim to represent the fulcrum creditor. The question of which lender represents the fulcrum creditor in the CCAA Proceedings drives both Hilco's and Pathlight's views of which party should most influence material monetization decisions going forward and which lender should bear the funding risk of pursuing the CW Transaction. While it is impossible at this time to determine with certainty which lender is the fulcrum creditor, the Applicants, in consultation with their financial advisor, continue to believe that it is more likely than not that Pathlight holds the fulcrum position.

6. Hilco did not, and does not, have the ability to force the termination of the Central Walk APA pursuant to the CCAA. Therefore, Hilco initially sought to have the Court remove the Company's Board of Directors (the "**Board**"), grant additional powers to the Monitor (the Monitor in its capacity with additional powers being an "**Enhanced Powers Monitor**") and direct the Monitor to terminate the Central Walk APA. Even with the issue of the CW Transaction now before the Court for determination, Hilco remains undeterred in seeking to control all future monetization efforts, and as such, its motion to replace the Board and the Company's management with the Enhanced Powers Monitor, continues, despite its changed position with respect to the CW Transaction.

7. Section 11.5 of the CCAA sets forth the test for removal of directors. However, Hilco suggests the removal of directors is not sought at this time.[6] Despite Hilco's attempts to ignore this threshold issue, appointing an Enhanced Powers Monitor does in fact engage the section 11.5 analysis. The Board has acted and continues to act in good faith and exercise its business judgment with due diligence to maximize recovery for all stakeholders. This has been stated by the Monitor at each stay extension motion. No evidence has been submitted that would justify removing the Board.

8. Work remains to be completed by the Company, and the Company's stakeholders would benefit from the continued involvement and historical knowledge of the Board and management

[6] Factum of Hilco dated August 21, 2025 ("**Hilco Factum**"), at para. 24, footnote 48.

throughout the remaining monetization steps, including matters involving the finalizing of the sale of the Royal Charter (the approval of which is currently scheduled to be heard on September 9, 2025), complete various *WEPPA* matters for employees and former employees, employee hardship fund matters, the sale of the Company's art and artifacts, and monetization of the pension surplus.

9. Further, the suggestion of Hilco that it seeks to grant additional powers to the Monitor for purposes of a neutral third party to oversee the remaining steps, should be considered in the context of the ancillary directions Hilco seeks and adversarial nature of Hilco's submissions, as outlined further herein. Pathlight, who the Company believes is the fulcrum creditor, does not support the relief sought by Hilco. No other stakeholders have filed any materials in support of the relief sought by Hilco on this motion.

PART II – THE FACTS

10. The facts with respect to this motion are more fully set out in the Third Culhane Affidavit, the Sixth Report of the Monitor dated July 14, 2025 (the "**Sixth Report**"), and the Eighth Report of the Monitor dated August 20, 2025 (the "**Eighth Report**").

A. Hilco's Undue Influence on the CCAA Proceedings

11. Hilco is a large, sophisticated, advisory and investment firm specializing in asset monetization, restructuring and valuation services across various industries. Hilco wears multiple hats in these CCAA Proceedings through separate corporate vehicles that are all under common control. These roles include serving as: (a) a pre-filing secured lender and agent; (b) a provider and financer of consignment goods (both pre and post filing); (c) a DIP Lender; (d) the appraiser of inventory on behalf of the lenders; and (e) the lead liquidator in the joint venture forming the Liquidation Consultant.[7]

12. Prior to the initial filing, the Applicants reached out to 12 potential lenders for DIP financing. The Company received two financing proposals in amounts sufficient to allow the Company to implement a going concern restructuring strategy, including a proposal from a syndicate of lenders led by Hilco (the "**Restructuring DIP**"). However, on the date the CCAA Proceedings were commenced, the syndicate of lenders refused to advance the Restructuring DIP and the

[7] Third Culhane Affidavit at paras. 6 and 18, Responding Motion Record of the Applicants (Hilco Motion) dated July 13, 2025 ("**Hilco RMR**"), Tab 1.

Applicants entered into an interim DIP Term Sheet for $16 million with Hilco and certain other FILO Lenders, which was approved by the Court in the Initial Order.[8] Following approval of the interim DIP Term Sheet at the CCAA application, the Applicants attempted to negotiate a further DIP facility that would permit the Applicants to pursue a going-concern restructuring. Hilco and the other potential DIP Lenders were not satisfied that the Applicants would be able to pay off the FILO Credit Facility and the DIP financing. Therefore, Hilco and the other DIP Lenders were only willing to advance a total of $23 million of DIP financing (inclusive of the $16 million interim DIP facility) on the condition that the Applicants immediately commence a Liquidation Sale.[9]

13. Prior to and throughout these CCAA Proceedings, Hilco sought to ensure that it and its U.S. and Canadian advisors, actively participated in, oversaw, were consulted, and directed as much as possible, the manner in which these CCAA Proceedings are undertaken. Despite the suggestion in the current submissions that Hilco has received limited information and is on the outside looking into the CCAA Proceedings, the reality (as has been clear in the numerous Court appearances) is that Hilco and its have been *actively* involved in these CCAA Proceedings.

14. In its capacities as FILO Agent, FILO Lender, DIP Lender, proposed Agent under the RFA (that the Court declined to approve), lead Liquidation Consultant, and appraiser, Hilco had significant input into, influence over, and involvement in various matters within the CCAA Proceedings and the monetization processes, including but not limited to:

(a) The terms of, timing and parameters of the various monetization processes, including start and finish dates;

(b) Organizing four of the most prominent North American retail liquidators (Hilco, Gordon Brothers, Tiger, and GA Capital) to submit a joint bid for the liquidation, with the fifth major Liquidator, SB360, joining the syndicate thereafter. These parties represented the only liquidators operating in North America who could have provided the liquidation services required by the Company. As all major liquidators were party to a single bid, the Company was left with limited alternatives or bargaining power on the economics of the arrangements;

[8] Third Culhane Affidavit at para. 21, Hilco RMR Tab 1.
[9] Third Culhane Affidavit at para. 22, Hilco RMR Tab 1.

(c) Significant involvement (as lead Liquidation Consultant and DIP Lender) in the negotiation and/or review of the Liquidation Consulting Agreement, Liquidation Sale Approval Order, and Sale Guidelines; and

(d) As lead Liquidation Consultant, day-to-day control and oversight of the Liquidation Sale, including marketing, discount rates and cadence, supply of inventory into Stores including consignment and augment inventory levels, FF&E sales, pricing and discounting, and condition of the Stores at the conclusion of the Liquidation Sale.[10]

15. Throughout these CCAA Proceedings, Hilco has strongly voiced its views on how the CCAA Proceedings should be conducted, what orders should be sought, and what steps should be taken. When Hilco was unsuccessful in the past, it doubled down on its attempts to direct the process. As an example, during the motion to approve the RFA, Hilco's counsel 'informed' the Court they had instructions to seek the appointment of a Receiver, should the RFA not be approved.[11]

16. Hilco's financial advisor, Richter, was provided with information throughout the course of the CCAA Proceedings, including (a) cashflows (both draft and final versions) and updates on asset monetization processes with opportunities to review them and frequently discuss with the Monitor, including receipt of weekly cash flow variance reporting, and (b) daily updates on sales and FF&E reports as well as a dashboard that summarized the Company's cash position, daily sales, and liquidation to date sales, inventory and gross margin.[12] In addition, Hilco and Richter received regular updates regarding the CCAA Proceedings, including with respect to the SISP and the Lease Monetization Process.[13]

17. The Monitor noted in its Sixth Report:

> "Richter has been provided with weekly cash flow variance reports comparing actual results to the applicable Court-filed cash flow forecast from the beginning of these CCAA Proceedings. The Monitor has had ongoing communications with Richter on the variance reporting each week and has responded to numerous questions and information requests related to same."[14]

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[10] *Ibid* at para. 24, Hilco RMR Tab 1.
[11] July 15 Endorsement at para. 17(k).
[12] *Ibid* at para. 25.
[13] *Ibid* at para. 7.
[14] Sixth Report at para. 5.16.

18. Specifically, as it relates to the CW Transaction, Hilco's views were sought prior to the Company executing the Central Walk APA.[15] A new theory emerged in the cross examination of Mr. Adam Zalev, and repeated in Hilco's factum, that Mr. Fredericks signed off on the CW Transaction in May without the benefit of seeing the agreement or actually knowing the details.[16] This suggestion is remarkable. It would surely come as a surprise to Hilco's investors that Mr. Fredericks and his advisors approved the transaction on behalf of Hilco without having considered all necessary information.

19. Hilco continued its efforts to influence the CW Transaction, as evidenced by, among other things:

(a) Hilco wrote to its fellow secured lenders noting what it described as the *clear* rights articulated in the Intercreditor Agreement and demanded that Pathlight abide by the terms of the Intercreditor Agreement, including by paying rent under the Leases subject to the CW Transaction (the "**CW Leases**"). Presumably, Pathlight disagreed.

> "1.…"Clearly Pathlight had no rights after July 5, 2025 to require rent to be paid with ABL Priority Collateral and Pathlight was aware that ReStore could object to the use of ABL Priority Collateral being applied to rent after July 5, 2025 - that is exactly what is happening now."….
>
> "3. To reiterate, ReStore does not oppose the Central Walk sale in violation of Section 6.3 of the Intercreditor Agreement. ReStore simply objects to the use of its primary collateral continuing to fund the Central Walk sale."[17]

(b) Hilco did not seek a determination from a New York Court or this Court of Hilco's rights under the Intercreditor Agreement relative to Pathlight as it ought to have done. Instead, Hilco returned to pushing the Company to ask Pathlight and Central Walk to fund rent in respect of the CW Leases, with both parties confirming (again) that they were not obligated or prepared to do so.[18]

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[15] Third Culhane Affidavit at para. 53, Hilco RMR Tab 1; Cross-Examination of Adam Zalev on August 14, 2025 ("**Zalev Cross**") at Exhibit 6, Transcripts Brief, Tab A-6.
[16] Hilco Factum at para. 12.
[17] Exhibit 2 to Reply Fredericks Affidavit Reply Motion Record of the FILO Agent dated August 12, 2025, Tab A-2.
[18] Reply Fredericks Affidavit at para. 28, Exhibits 6 and 7 to Reply Fredericks Affidavit, Reply Motion Record of the FILO Agent dated August 12, 2025, Tabs A, A-6 and A-7.

(c) Hilco sought an Enhanced Powers Monitor and then an order to authorize and direct the Enhanced Powers Monitor to cause the Company to terminate the Central Walk APA and disclaim the CW Leases.[19]

20. In Hilco's Amended Motion and Factum, in addition to seeking to replace management with an Enhanced Powers Monitor, Hilco now asks this Court to make a number of pre-emptive orders, before the motion regarding the CW Transaction has been heard, including to take the unprecedented step to override the statutory requirements for a 30-day notice period prior to the disclaimer period of a lease under section 32 of the CCAA, for the purpose of compensating Hilco.[20]

B. Initial Commentary on the Cashflow Forecasts

21. The Hilco Motion and evidence in the Affidavit of Mr. Fredericks sworn July 8, 2025 (the "**First Fredericks Affidavit**") was largely based on the Fifth Draft Cash Flow. The Monitor notes in its Sixth Report that this was "prepared by the Company, with the assistance of the Monitor, and was provided to Richter for *discussion purposes only* … was not finalized and was not intended to be submitted to the Court in its then draft form."[21]

22. Further, "Richter was advised by the Monitor that several disbursement line items continue to be worked on by the Company, with the assistance of the Montor, including ongoing operating expenses, store closure and exit costs (largely FF&E and signage removal costs), and shared service payments."[22]

23. Variances between the Fourth Cash Flow and the Fifth Draft Cash Flow were detailed in a bridge analysis prepared by the Monitor that was provided to and presented to Hilco, Pathlight, and their respective advisors at a meeting held at the office of Bennett Jones LLP on June 26, 2025. In addition, in the weekly cash flow variance reporting provided by the Monitor to Richter, it was repeatedly explained that multiple substantial positive disbursement variances were attributable to timing and were expected to reverse in future weeks.[23] Nonetheless, Hilco and Richter prepared their analysis on the basis of the Fifth Draft Cash Flow, and Hilco filed its motion,

[19] Hilco's Notice of Motion dated July 8, 2025, at para. 1.
[20] Hilco Factum at para. 56.
[21] Sixth Report at paras. 5.13 and 5.14.
[22] Sixth Report at paras. 5.13 and 5.14.
[23] Third Culhane Affidavit at para. 65, Hilco RMR Tab 1.

including the Fifth Draft Cash Flow, despite the Monitor's earlier cautions.

24. The Company's forecast continued to be updated and the fifth updated cash flow forecast (the "**Fifth Cash Flow**") appended to the Seventh Report of the Monitor dated July 29, 2025 (the "**Seventh Report**"), has now been filed with the Court, which include realizations to date from the sale of Leases to YM as well as a portion of the gross proceeds from the Affiliate Lease Assignment Agreement (to the Purchaser).

25. In the Seventh Report, at paragraph 9.2 the Monitor notes that: "Pursuant to paragraph 22 (c) of the Court's endorsement dated March 29, 2025, the Monitor is required to advise the Court if, at any time, actual results vary as compared to the applicable Cash Flow Forecast by 15% or more. Since the filing of the applicable Cash Flow Forecast, the Monitor notes that, on a net cash flow basis, actual cash flow results have not negatively varied from the applicable Cash Flow Forecast."[24] Accordingly, Hilco's accusations of financial mismanagement are false.

C. Shortfalls in Estimated Recoveries are Attributable to Hilco's Decisions in Conducting the Liquidation Sale

26. While Hilco contends that it is suffering substantial prejudice to its financial position in these CCAA Proceedings, a conservative estimate of the fees and other amounts earned by the Liquidation Consultant through liquidator fees from the Liquidation Sale total approximately $16 million. Additionally, Hilco made a profit margin on augmented and consignment goods it provided to the Company (over $87 million of sales). Hilco has also received expense reimbursement payments relating to the sale of approximately $14 million paid to date. The Company estimates Hilco has profited well in excess of $40 million through the Liquidation Sale when taking into account their fees and profit margins on augment and consignment sales, together with expense reimbursements.[25]

27. Representatives of Hilco as Liquidation Consultant were involved on a daily basis in the Liquidation Sale. The Company and Reflect reviewed the status of the Liquidation Sale and communicated on a regular basis with Hilco as Liquidation Consultant in respect of the same. This included the timing for completion of the Liquidation Sale in particular Stores, and the subsequent timing for the disclaimer of Store Leases in circumstances where the Stores were not

[24] Seventh Report at para. 9.2.
[25] Third Culhane Affidavit at para. 37, Hilco RMR Tab 1.

subject to any offers received in the SISP or Lease Monetization Process.[26]

28. The Liquidation Consultant in its sole discretion determined the timing and pricing for FF&E sales, discount cadences, potential sources of bulk sale buyers and other potential purchasers.[27] In practice, the Liquidation Consultant's focus on augmented merchandise ultimately required significant additional support and resources from the Company and prolonged use of FF&E to display goods, which slowed the pace of the FF&E sales.[28]

29. Hilco projected sales attributable to Store FF&E in the Liquidation Sale to be approximately $17 million, however, Store FF&E sales receipts were approximately $10.7 million, resulting in a shortfall relative to Hilco's expectations of approximately $6.3 million (37%). A number of factors and decisions made by the Liquidation Consultant contributed directly to the reduction including: (a) delayed start time and reduced overall timeline for sale of FF&E (from the originally planned 55 days to less than 30 days in total); (b) failure to discount FF&E appropriately and aggressively to ensure sales (despite repeated requests by the Company and its advisors for greater discounting); (c) failure to secure more bulk buyers; and (d) extended use of FF&E to display augmented goods late in the sales process, making it more challenging to sell the FF&E.[29]

30. In addition to the reduced sales receipts from FF&E, the Fourth Cash Flow contemplated that most of the FF&E would be sold, and as such only minimal FF&E removal costs were included. As a direct result of the Liquidation Consultant's underperformance with respect to FF&E sales relative to its own projections, which were reflected in the Fourth Cash Flow, the Company is required to incur significant costs of removing the unsold FF&E, which is now estimated to be $7.9 million and included in the Fifth Draft Cash Flow.[30] This is prior to accounting for the cost to remove FF&E from the stores subject to the CW Leases, in the event the CW Transaction is not approved, which is estimated to exceed $3 million.[31]

31. Hilco directed that all representatives of the Liquidation Consultant vacate all Stores by June 7, 2025, leaving the majority of FF&E clean up work to be completed by the Company.[32] Since the completion of the Liquidation Sale, the Company and Reflect have been coordinating the FF&E removal directly and in consultation with the Landlords. Through these coordinating

[26] Third Culhane Affidavit at paras. 31-32, Hilco RMR Tab 1.
[27] Third Culhane Affidavit at para. 33, Hilco RMR Tab 1.
[28] Third Culhane Affidavit at para. 34, Hilco RMR Tab 1.
[29] Third Culhane Affidavit at para. 41, Hilco RMR Tab 1.
[30] Third Culhane Affidavit at para. 42, Hilco RMR Tab 1.
[31] Affidavit of Franco Perugini sworn July 29, 2025, at para. 103(b), AMR Tab 2.
[32] Third Culhane Affidavit at para. 39, Hilco RMR Tab 1.

efforts, the estimated costs of FF&E removal, as outlined in the Fifth Draft Cash Flow, have since been reduced relative to initial estimates through: (a) obtaining additional quotes from contractors assisting with the removal, and in some cases working directly with Landlords; (b) entering into arrangements with bulk consumers to remove the FF&E at no consideration for or cost to the Company; and (c) ongoing discussions with landlords who in some cases have maintained unsold FF&E for future tenant use or otherwise.[33]

32. During the course of the negotiations of the Sale Guidelines involving the Landlords and Hilco, the concept of removal of external signage was discussed in the context of paragraphs 8 and 9 of the Sale Guidelines. Prior to pausing efforts on post-liquidation sale signage removal (at Hilco's demand), the Company had some success in arranging for removal at a lower cost than reserved in the Fifth Draft Cash Flow, through alternative contractors as well as with the Landlords' involvement.[34]

C. Central Walk APA

33. The Applicants are pursuing the CW Transaction to maximize stakeholder recoveries.[35] Despite Hilco's singular focus, the potential benefit to all stakeholders remains the relevant consideration.[36]

34. The Central Walk APA and the Affiliate Lease Assignment Agreement were the culmination of the Applicants efforts, with the assistance of its advisors and in consultation with the Monitor, in following and adhering to the Lease Monetization Process and the SISP. With respect to the vast majority of the Leases subject to the Central Walk APA, the Applicants did not have any alternative transactions with a higher prospect of completion.[37]

35. The Company entered into the Central Walk APA with the support of the Monitor, Hilco and Pathlight. Hilco was advised that the Company intended to enter into an agreement with Central Walk, pursuant to which 25 Leases would be assigned subject to Landlord consent or Court order. Hilco was also provided with a breakdown of the number of such Leases that are the priority collateral of the FILO Lender and the Pathlight Lenders pursuant to the Intercreditor

[33] Third Culhane Affidavit at para. 45, Hilco RMR Tab 1.
[34] Third Culhane Affidavit at paras. 48 and 50, Hilco RMR Tab 1.
[35] Third Culhane Affidavit at para. 51, Hilco RMR Tab 1.
[36] Confidential Appendix B (Confidential Secured Lender Recovery Analysis) to the Eighth Report.
[37] Third Culhane Affidavit at para. 52, Hilco RMR Tab 1.

Agreement.[38]

36. The Central Walk APA, if completed, is expected to generate significant recoveries from the sale of the 25 CW Leases. In addition, the Company has already received $6 million in connection with the completion of the sale of three Leases to Central Walk pursuant to the Affiliate Lease Assignment Agreement which was approved by this Court on June 23, 2025.[39]

37. Hilco's criticism of the costs associated with pursuing the CW Transaction intentionally ignores the fact that the Company deliberately negotiated to separate the three CW Leases from the 25 Leases subject to the Central Walk APA. Separation of the CW Leases was designed to generate $6 million of proceeds from the three CW Leases to mitigate anticipated costs, including rent, incurred by the Company in advancing the larger Central Walk APA. As noted in the Third Culhane Affidavit, the Company had recognized and identified the potential difficulties or delays which could be faced given that Central Walk may not be viewed as an established retailer by the Landlords.[40]

38. Hilco has raised in its materials, the existence of the July 5, 2025, letter from Stikeman Elliott to the Purchaser, seeking the Purchaser's immediate attention to the CW Transaction so that it could be placed before the Court. As noted in the Eighth Report, Hilco was aware of the letter before it was circulated.[41]

39. As noted by the Court in its endorsement of July 31, 2025 (the "**July 31 Endorsement**"): "[W]hile the FILO Agent and landlords are free to make submissions on the return of the Central Walk APA approval motion as to why that APA ought not to be approved and why the leases ought not be assigned, I observe that Applicants and counterparties to proposed agreements routinely exchange correspondence and may take positions with respect to proposed (but as yet not Court-approved) agreements."[42]

40. Arguments in respect of distribution of proceeds from the Affiliate Lease Assignment Agreement and Central Walk APA transactions, and use of funds while the CW Transaction is pending approval, are intercreditor issues between Hilco and Pathlight. Hilco and Pathlight are both experienced, sophisticated lenders who negotiated a 70-page Intercreditor Agreement to

[38] Third Culhane Affidavit at para. 53, Hilco RMR Tab 1.
[39] Third Culhane Affidavit at para. 54, Hilco RMR Tab 1.
[40] Third Culhane Affidavit at paras. 55-56, Hilco RMR Tab 1.
[41] Eighth Report at para. 3.11.
[42] July 31 Endorsement at para. 26.

govern their relationship particularly with respect to issues such as the foregoing.[43]

D. Hilco is Not the Likely Fulcrum Creditor

41. In addition, the question of which lender is actually incurring the rent costs of maintaining the CW Leases will not be known until it is determined who the fulcrum creditor is. The Fifth Cash Flow and all previous cash flow projections prepared in these CCAA Proceedings are based on highly conservative assumptions for projection purposes and are not net realization or security position analyses.[44]

42. Final net recoveries to the lenders will be affected by future events/transactions that would be reflected in future cash flow forecasts. While there is a range of potential recoveries, the Fifth Cash Flow does not include estimated realization amounts in respect of proceeds from the sale of the Royal Charter, the Art Collection, and any forecast recovery on the Pension surplus. Furthermore, no estimate has yet been included for, among other things, conservative forecasting in respect to future disbursements, holdback adjustments, and other possible adjustments. The foregoing is expected to result in overall positive adjustments to future cash flow forecasts.[45]

43. As indicated above, the Company is also asserting a claim of interest in the pension surplus for the benefit of its creditors. It is possible, and appears likely, that given the quantum of the pension surplus, Hilco and the other FILO Lenders will likely be paid in full.[46] Therefore, it is reasonable to assume that Pathlight is very likely to be the fulcrum secured creditor and are the parties assuming the financial risks and costs associated with the Company advancing the CW Transaction. Pathlight supports the CW Transaction.[47]

E. Hilco's Mischaracterization of Financial Data

44. The two affidavits sworn by Mr. Fredericks attempt to paint a picture of mismanagement through the picking and choosing of selective financial information. Despite being ready to argue the Hilco Motion on July 15, 2025, with the evidence filed at that time, Mr. Fredericks filed a further affidavit four weeks later. The mischaracterizations of the financial data continued in the Reply Fredericks Affidavit.

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[43] Third Culhane Affidavit at para. 57, Hilco RMR Tab 1.
[44] Third Culhane Affidavit at para. 58, Hilco RMR Tab 1.
[45] Third Culhane Affidavit at para. 59, Hilco RMR Tab 1.
[46] Third Culhane Affidavit at para. 60, Hilco RMR Tab 1.
[47] Third Culhane Affidavit at para. 61, Hilco RMR Tab 1.

45. Hilco's factum suggests that Mr. Fredericks' evidence was uncontested.[48] This is incorrect. At that time, the Company was otherwise engaged in responding to eight sets of responding materials from the Objecting Landlords (which included, in some cases, multiple affidavits and expert reports) and preparing for cross-examinations of the affiants with respect to the motion seeking approval of the CW Transaction. As a result, the Company elected to rely on the evidence already filed for the Hilco Motion, as well as the Monitor's Sixth Report, which clearly contradicts and contests Hilco's evidence generally, and its characterization of the financial data.

46. While Hilco suggests that "the Applicants and Monitor quibble with comparing cash flow projections for different time periods"[49], the criticisms of Hilco's financial analysis filed with this Court goes far beyond "quibbling". The Monitor summarizes some of the key errors in its Sixth Report and Eighth Report. A key conclusion reached by the Monitor in its Eighth Report was that "**[T]he Monitor acknowledges that the cash position of the Company has decreased between the Updated Cash Flow Forecast and the Fifth Updated Cash Flow Forecast. However, this comparison, in and of itself, does not illustrate the FILO's Lender's security position. A cash flow forecast is not a security position analysis**."[50]

47. Some key issues identified by the Monitor and the Company in respect of Hilco's financial commentary are as follows:

(a) Hilco continues to make comparisons between cash flows that contain different lengths of time to support its criticism that the Applicants have "spent excessively".[51] Each of these forecasts, by definition, covered different time periods and incorporated different receipts and disbursements. Comparing figures across multiple forecasts without accounting for these differences does not provide an accurate or fair representation of the Company's finances.[52] For example, Hilco asserts that costs have increased over $350 million in the Fifth Cash Flow as compared to the cash flow that was filed back on March 16, 2025 (the "**March Cash Flow**"). This comparison does not account for the fact that the Fifth Cash

[48] Hilco Factum at para. 36.
[49] Hilco Factum at para. 21.
[50] Eighth Report at para. 7.5.
[51] Hilco Factum at para. 20.
[52] Third Culhane Affidavit at para. 62(a), Hilco RMR Tab 1.

Flow covers a 34-week period as compared to the 13-week period in the March Cash Flow. The additional 21 weeks necessarily results in further costs[53];

(b) In presenting certain financial results, Hilco has selectively chosen a time period to avoid capturing proceeds while capturing costs which are directly attributable to the ignored proceeds[54];

(c) Hilco ignores the fact that a majority of the "increased costs" relate to the Liquidation Sale, a process which was controlled by Hilco[55];

(d) Going forward, the Company will be incurring necessary costs either to advance workstreams anticipated to generate future recoveries or to properly administer remaining aspects of the wind-down[56];

(e) The Fifth Cash Flow does not include cash receipts from the sale of the Royal Charter, $4 million of proceeds from the Affiliate Lease Assignment Agreement which is being held by the Monitor, proceeds from the sale of the Art Collection, realization of the Pension surplus, and the potentially significant proceeds resulting from the CW Transaction (if approved), all of which have associated costs included in the Fifth Cash Flow[57]; and

(f) A cash flow forecast is not a guarantee or commitment by the Monitor or the Applicants as to actual receipts or disbursements and by definition is subject to change.

F. Hilco's Factum is Also Based on Flawed Assumptions and Fails to Accurately Outline the Evidence Before the Court in the CW Transaction

48. One of the recurring themes in the Hilco Factum is the suggestion that paragraph 12 of the ARIO should have been utilized as a trigger to force Pathlight to pay rent on the CW Leases, which states:

> "12. THIS COURT ORDERS that the Applicants shall not disclaim or resiliate

[53] Eighth Report at para. 7.6.
[54] Third Culhane Affidavit at para. 62(b), Hilco RMR Tab 1; See the Sixth Report at paras. 5.17, 5.19 and 5.20.
[55] Third Culhane Affidavit at para. 62(c), Hilco RMR Tab 1. Sixth Report at para. 5.24, where the Monitor notes that the Liquidation Consultant's efforts to sell FF&E generated proceeds that were below forecast and resulted in a greater quantity of unsold FF&E that the Company had to address at its own expense.
[56] Sixth Report at para. 5.22.
[57] Appendix "J" to Seventh Report.

> any Lease without the prior written consent of the Pathlight Lenders, which consent shall not be unreasonably withheld, conditioned or delayed; provided that if the Pathlight Lenders do not consent to the disclaimer or resiliation of any Lease, the Pathlight Lenders shall pay to the Applicants the amount of all rental payments due under such Lease after the date on which the disclaimer or resiliation would have become effective and any such payment shall be a Protective Advance (as defined in the Pathlight Credit Agreement), subject to the terms of the Pathlight Credit Facility, as may be amended in accordance with its terms."[58]

49. HBC is seeking to assign the CW Leases – not disclaim them. Had notices of disclaimer under section 32 of the CCAA been issued, as Hilco suggests, any value in respect of the CW Leases would have been lost, with such an action being irreconcilable with the Company having executed the Central Walk APA (the Successful Bid resulting from the Court-approved Lease Monetization Process). The Objecting Landlords agreed with this point in earlier hearings – once a notice of disclaimer was issued, it could only be retracted with the applicable Landlord's consent, which clearly would not have happened in this case.

50. Hilco also misstated the information provided by Mr. Perugini and improperly imputed an economic motive to his affidavit evidence in stating: "[H]e and other HBC executives had by then significant personal interests in the transactions' completion, namely potential continued employment by the Purchaser."[59] This characterization is inaccurate and is not supported by the purported reference to Mr. Perugini's cross-examination. The potential for employment was expressly noted in the Second Perugini Affidavit, where he noted that the decision to proceed with the motion seeking approval of the CW Transaction was made before he was offered employment with the Purchaser. His views were therefore not influenced in any way by the fact that he (and others) were subsequently offered employment with the Purchaser.[60] It is also worth noting that Mr. Perugini is not a member of the Board.

51. Hilco continues to press that it is the fulcrum creditor and/or that only its views of the future monetization efforts are relevant. In support of Hilco's view that it is the fulcrum creditor, and also in respect of the allegation that the Applicants have failed to be forthright and sufficiently transparent about the assets available to the secured creditors, including as it relates to the pension assets[61], Hilco improperly references disclosure issues regarding the current estimated Pension surplus in the Fredericks Reply Affidavit, during cross examinations, and in its factums.

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[58] ARIO at para. 12.
[59] Hilco Factum at para. 16.
[60] Second Perugini Affidavit at paras. 3-4, AMR Tab 2.
[61] Hilco Factum at para. 32.

52. Despite the gratuitous comments, Hilco is fully aware that the details of the Pension surplus and individual investments are not required for the purposes of the issues being dealt with by the Court. The Court will not, on this motion, be determining the Company's potential entitlement to or recovery from the Pension surplus. Such matters are to be properly addressed on a separate process. The allegations also ignore the information that Hilco was already aware of and provided during the course of its involvement with the Company and ignores the fact that a process to address the Pension surplus issues under the supervision of the Court was previously raised with Hilco, Pathlight, and the Monitor.

53. Most disturbing, despite having received Pension related information from the Company in advance of commencing the cross-examinations and having been given the opportunity to speak with counsel for the Company on these matters, Hilco attempts to ignore the information in hand, and asks the Court to draw adverse inferences.[62]

54. Hilco repeatedly references the substantial costs incurred by the Company.[63] However, the Applicants note that a substantial amount of the incremental costs which Hilco criticizes, were paid directly or indirectly to parties associated with Hilco, including the FILO Agent and its advisors, the costs associated the Liquidation Sale spearheaded by Hilco, and professional costs associated with responding to the contested motions brought by Hilco to date.

G. The Company is Properly Governed; More Work is to be Done and Granting Enhanced Powers to the Monitor is Not Required

55. The Board has acted appropriately and in the best interests of the Company and its stakeholders, with a clear focus on maximizing recoveries from the estate. It is important to note that the members of the Board do not receive any compensation for their services. As a result, the Board's oversight does not impose any additional cost on the Company's creditors.[64]

56. Payroll costs have been steadily decreasing over the course of these CCAA Proceedings. With the closing of all Stores and the completion of certain monetization transactions, positions have been quickly eliminated with the oversight of and in consultation with the Monitor to ensure that staffing levels remain appropriate. Total headcount has been reduced from approximately 8,374 as of May 31, 2025, to 113 as of July 11, 2025. [65] Headcount has been further reduced to

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[62] Answers to Undertakings from Cross-Examination of Michael Culhane; Exhibit B to Cross-Examination of Franco Perugini, Transcripts Brief, Tab D-b.
[63] Hilco Factum at para. 30(d).
[64] Third Culhane Affidavit at para. 67, Hilco RMR Tab 1.
[65] Third Culhane Affidavit at para. 69, Hilco RMR Tab 1.

64 as of the date of this factum and will be further reduced to 51 as of September 1, 2025.

57. A number of monetization and other steps remain to be completed by the Company. Those steps include:

(a) seeking approval of the Central Walk APA and close the CW Transaction (if approved);

(b) addressing any potential appeals to the CW Transaction motion;

(c) conducting the art collection auction;

(d) addressing the Royal Charter sale approval motion;

(e) completing various *WEPPA* matters for employees and former employees;

(f) addressing proposed hardship funds and historical Employee Health Trust arrangements;

(g) addressing FF&E removal matters;

(h) dealing with intercompany related matters including a subsidiary based in India;

(i) pursuing Pension surplus matters;

(j) attending to management of records, including the potential final donation to the Hudson's Bay Company Archives in Manitoba; and

(k) winding up the estate generally.[66]

58. The Company's stakeholders will benefit from the continued involvement and historical knowledge of the Board and management throughout the remaining monetization and other steps.

59. Professional fees will necessarily continue to be incurred in connection with the administration and wind-down of the Applicants' estates. Enhancing the Monitor's powers will not reduce such costs and may actually result in increased costs[67], for reasons including:

[66] July 31 Endorsement at para. 15; Affidavit of Franco Perugini sworn July 25, 2025, at para. 75, Motion Record of the Applicants Re: YM & IC Lease Assignment Agreements dated July 25, 2025, Tab 2.
[67] Third Culhane Affidavit at para. 70, Hilco RMR Tab 1.

(a) the Monitor does not possess the institutional knowledge of the existing management team and Board members in respect of the remaining monetization opportunities;

(b) Hilco assumes management will continue to be available to consult and assist the Enhanced Powers Monitor, despite the allegations raised in its motion; and

(c) the Monitor facing future intercreditor disputes may require the Court's directions more often than in the circumstance where the Company and its Board remain in position, and the Monitor is able to maintain its traditional, non-partisan role.

60. In refusing to approve the RFA previously, this Court provided for enhanced reporting requirements on the part of the Monitor. The Monitor has not sought the advice and directions of the Court in respect of any of the enhanced reporting. The Monitor has also supported the Applicants requested relief for stay extensions throughout these CCAA Proceedings and has opined that the Applicants have acted in good faith and with due diligence in these CCAA Proceedings.[68]

61. In addition, Pathlight does not support the relief being sought in respect of the Enhanced Powers Monitor.

PART III – ISSUES

62. The issues to be determined on this motion are whether this Court should:

(a) remove the directors of the Applicants pursuant to section 11.5(1) of the CCAA and enhance the powers of the Monitor to allow the Monitor to conduct the affairs and operations of the Applicants;

(b) order an allocation of costs associated with the CW Transaction;

(c) order that $4 million be distributed by the Applicants to Hilco; and

(d) order that the Purchaser's deposit under the Central Walk APA be preserved if the CW Transaction is not approved.

[68] Third Culhane Affidavit at paras. 71 and 73, Hilco RMR Tab 1; First Report of the Monitor dated March 16, 2025, at para. 8.5(b); Third Report of the Monitor dated May 9, 2025, at para. 9.6; Seventh Report at para. 8.4(b).

PART IV – LAW & ARGUMENT

A. The Court Should Not Remove the Applicants' Directors and Appoint a *De Facto* Receiver through an Enhancement of the Monitor's Powers

(i) Significant Threshold to Remove Directors

63. Subject to the typical limitations set out in an initial CCAA order, a CCAA debtor retains control of its business and affairs during the proceedings. However, in certain exceptional circumstances, the CCAA empowers the Court to depart from the usual debtor-in-possession model and intervene directly. Section 11.5(1) of the CCAA provides:

> "Removal of directors
>
> 11.5 (1) The court may, on the application of any person interested in the matter, make an order removing from office any director of a debtor company in respect of which an order has been made under this Act if the court is satisfied that the director is unreasonably impairing or is likely to unreasonably impair the possibility of a viable compromise or arrangement being made in respect of the company or is acting or is likely to act inappropriately as a director in the circumstances."[69]

64. The statutory discretion provided to the Court pursuant to section 11.5(1) is limited and requires the moving party to meet a "significant threshold". The following statements by Justice Wilton Siegel in *Unique Broadband*, highlight the significant threshold the Court must be satisfied of when exercising its discretion to remove directors under section 11.5(1), the continued application of the business judgement rule in CCAA proceedings, and the cautious approach the Court should adopt when intervening in corporate governance during a CCAA proceeding:

> "There is nothing in the wording of s.11.5 that displaces the ordinary standard of proof on a balance of probabilities. However, the language of s.11.5(1) does establish a significant threshold for the entitlement to relief thereunder."[70]
>
> "A determination as to whether conduct is impairing, or is likely to impair, a restructuring requires a careful examination of the actions of the directors in the context of the particular restructuring proceedings, the interests of the stakeholders and feasible options available to the debtor. A similar examination of the actions of the directors is required for a determination that a director has acted inappropriately in the circumstances of a particular restructuring. I note, in particular, that given this language, the fact that a shareholder or creditor may not agree with a decision of a director is far from being a sufficient ground for the

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[69] CCAA, s. 11.5(1).
[70] *Unique Broadband Systems (Re)*, 2011 ONSC 224 at para. 32. ["***Unique Broadband***"]. A copy of this decision is attached to this factum as **Schedule "C"**.

> director's removal. As a related matter, there is nothing in s.11.5 that evidences an intention to displace the "business judgment rule."[71]
>
> "The language of s. 11.5 expressly requires that the actions of a director "unreasonably" impair, or are likely to "unreasonably" impair, a viable restructuring or are "inappropriate", or are likely to be "inappropriate", in the circumstances."[72]
>
> "In addition, two other considerations also argue in favour of a significant threshold, although they may also be relevant to a determination regarding the exercise of judicial discretion where the necessary factual determinations have been made."[73]
>
> "First, removing and replacing the directors of a corporation, even a debtor corporation, subject to the CCAA, is an extreme form of judicial intervention in the business and affairs of a corporation. The Shareholders have elected the directors and remain entitled to bring their own action or replace directors under the applicable corporate legislation. At a minimum, in determining whether it should exercise its discretion, the court can take into consideration the absence of any such action by the other shareholders."[74]
>
> "Similarly, in a CCAA restructuring, the Monitor performs a supervisory function that provides a form of protection to the corporation's stakeholders. In determining whether to exercise its discretion in s.11.591), a court would ordinarily take into consideration the presence or absence of any recommendation from the Monitor."[75]
>
> "A particular objective of 206 [the moving party seeking the removal of directors] is to have a new board of directors review the decision of the UBS Directors to defend the DOL action brought against UBS. **However, section 11.5 cannot be used to replace a board of directors to the extent that the purpose of such relief is to have a new board of directors revisit decisions taken by the existing board**. …Equally important, as mentioned above, the "business judgment rule" continues to govern judicial intervention in the affairs of a debtor company under the CCAA. To succeed on this motion, 206 must provide evidence that establishes the elements of the test in section 11.5. It cannot do so on the factors before the court on this motion."[76] (Emphasis added).

65. Justice Fitzpatrick adopted the reasoning of the Court in *Unique Broadband*, including in respect of the significant threshold that the moving party must meet and the factors outlined by Justice Wilton Siegel, in addressing a motion in *Quest University* by a moving party seeking to remove and replace various governors of the CCAA debtor, being a post-secondary institution. Justice Fitzpatrick cited *Unique Broadband* with approval and held "[I]n addition, reading between the lines, VF's main complaint is that the Board disagrees with its vision as to how Quest's

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[71] *Unique Broadband* at para. 33.
[72] *Unique Broadband* at para. 34.
[73] *Unique Broadband* at para. 35.
[74] *Unique Broadband* at para. 36.
[75] *Unique Broadband* at para. 37.
[76] *Unique Broadband* at para. 56.

financial difficulties may be solved. This disagreement was not a basis upon which to overhaul the Board's composition under section 11.5 so as to give VF control of it."[77]

(ii) The Circumstances in this Case Do Not Warrant Enhancement of the Monitor's Powers

66. Hilco has failed to meet the significant threshold required in section 11.5 in seeking to remove the current directors and replace them through the use of an Enhanced Powers Monitor. Hilco alleges mismanagement by the Company and feigns surprise or criticizes the Applicants for matters that were foreseeable, inevitable and/or, in many instances, driven by or contributed to by Hilco's own conduct and commercial decisions.

67. Hilco's motion is instead framed as seeking to enhance the Monitor's powers. Hilco claims that due to the Applicants' mismanagement of the CCAA Proceedings, the Monitor should be furnished with additional powers so that it could (initially) decide whether to pursue the CW Transaction and now decide all future allocation and monetization issues. However, in addition to seeking an order granting additional powers to the Monitor, Hilco originally sought an order directing the Monitor to terminate the Central Walk APA (which it now takes no position on) and disclaim the CW Leases and now seeks a variety of orders including in respect of the allocation of costs to Pathlight in the CCAA Proceedings.

68. Hilco's underlying strategy is clear: pressure parties and force others to adopt Hilco's views of intercreditor rights and obligations, including requiring Pathlight to contribute to the carrying costs of the CW Transaction, despite the views of the Company and other stakeholders, while inexplicably avoiding a proper determination of rights under the Intercreditor Agreement at all costs. Hilco is effectively seeking to remove the Board and achieve its own objectives. The use of Section 11.5 for this very purpose, was cautioned against in *Unique Broadband* and *Quest University*.

(A) The CCAA Process would benefit from the ongoing involvement of the Board and Management

69. As noted above at paragraph 57 of this factum, there are a number of steps to continue to be taken by the Board and the Applicants. The CCAA Proceedings would benefit from the ongoing involvement of the Board and management with their institutional knowledge, in particular on issues such as, among others: (a) closing the CW Transaction (if approved) and addressing any

[77] *Quest University Canada (Re)*, 2020 BCSC 318 at para. 65. ["***Quest University***"]

potential appeals to the CW Transaction motion; (b) conducting the art collection auction and addressing the Royal Charter sale approval motion; (c) pursuing Pension surplus matters; and (d) addressing employee-related matters.

70. With respect to many of the remaining monetization efforts, the Company and its advisors have been and will be the driving force leading the efforts. Seeking to modify the process and abandon the accumulated knowledge and experience of the Company and its advisors would have an expensive and adverse impact on the outcome.

(B) Maintaining the Board preserves the Monitor's independence

71. While this Court has enhanced the powers of a CCAA monitor in other proceedings, such relief is generally sought at the request of the Applicants and Monitor in anticipation of the resignation of existing management or the Board, where there has been a void of management leading up to a proceeding or in the period at or near completion of a CCAA Proceeding.[78]

72. Courts have repeatedly expressed that such discretion should only be exercised in extraordinary circumstances. The traditional role of the Monitor in proceedings under the CCAA is that of the "eyes and ears" of the Court.[79] While this Court may use its discretion to enhance a monitor's powers beyond its supervisory role, it can only do so in "extraordinary circumstances" where "absolutely necessary". As held in *Fiera*, empowering a Monitor with broad powers should not be a routine or regular occurrence.[80]

73. The Court in *Fiera* also cautioned that the ability of the Court officer to remain neutral, through the imposition of the requested enhanced powers, should also be considered when it held: "… Finally, it is important that the Monitor retain (and be seen to retain) its neutrality. The Court should be careful not to risk potentially undermining that important objective unless there are exigent circumstances which necessarily demand that the Monitor be vested with increased powers."[81] This is especially important in this case, where the circumstances are that the Company, Pathlight, and Hilco, along with employees, pensioners, and other stakeholders, will continue to participate in these CCAA Proceedings, at times in an adversarial manner, requiring

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[78] Old GI Inc. et al., CCAA Super Monitor and Termination Order dated August 30, 2023 (Court File No. CV-23-0699824-00CL); *Body Shop Canada Limited*, Ancillary Order dated December 13, 2024 (Court File No. CV-24-00723586-00CL.
[79] *Ernst & Young Inc v Essar Global Fund Limited*, 2017 ONCA 1014 at para 10
[80] *Fiera Private Debt Fund v. Saltwire Network Inc*. 2024 NSSC 89 at para. 15 ["***Fiera***"], *Arrangement relative a Bloom Lake General*, 2021 QCCS 2946 at para. 80.
[81] *Fiera* at para. 15.

a neutral Monitor.

74. The Monitor maintains an important role to the CCAA process. Maintaining the debtors and Monitor in their traditional roles, avoids placing the Monitor in the intermediary position between creditors and other stakeholders for all future monetization matters.

75. Most importantly as it relates to the potential monetization of one of the material remaining assets, the Pension surplus, requiring an Enhanced Powers Monitor to pursue the realization of the Pension surplus on behalf of the Company for the benefit of secured creditors, would place it is in a conflicting position with respect to other stakeholders – including retirees and pension plan members – and in conflict with its duties to the Court to remain impartial.

76. Replacing the Board with an Enhanced Powers Monitor, or in the alternative, the appointment of Richter as Receiver, does not guarantee that the competing interests of the secured lenders will not require further debate, and is likely to require more advice and direction of this Court if the Court officer is placed between the major stakeholders. The Board has already been forced to address intercreditor disputes and has been the subject of criticism by Hilco for failing to follow its directions. To place a Court officer in this same position, with further adversarial steps remaining, would place the Monitor in an intolerable position that should be avoided.

77. While Hilco suggests that it seeks to enhance the Monitor's powers on the assumption that this neutral and independent party will benefit the process, Hilco has no intention of leaving these issues to a third party to determine. Further, Hilco's comments suggest it sees itself in an adversarial position to the Monitor already:

(a) Hilco is seeking pre-emptive orders that would order the Monitor to commit actions normally reserved to decisions based on the Company and the Monitor's own analysis and business judgement.

(b) The interrogatories provided to the Monitor in respect of the CW Transaction are adversarial in nature.

(c) At the hearing to approve the Monitor's activities on July 31, 2025, Hilco sought a declaration that any relief granted by the Court, including as to the approval of the Monitor's activities, would not prejudice Hilco's ability to challenge any claim to approval, payment, or allocation of any fees, costs and expenses, already accrued

or going forward. As noted by the Company's counsel, this is highly suggestive of a future "leverage" play involving the Monitor.

(d) Hilco's factum itself includes comments critical of the Monitor:

"unfortunately, the Court's hope in March 2025 that "the controls already in place, the obligations of the Applicants as parties to this proceeding, and the oversight of the Court-appointed Monitor, would be sufficient to protect the interests of the Lenders "has not come to pass" (Emphasis added).[82]

"The principal takeaway from the comparison is that the work of HBC, the Monitor and all their professionals has not generated an increase in net recoveries for creditors, but instead has caused remarkable deficits." (Emphasis added).[83]

(e) Hilco's factum includes comments which appear to be directed in ensuring future compliance:

"The FILO Agent intends to seek to remedy any inequities in respect of the proceeding in their entirety at an appropriate time."[84]

"Any order made concerning allocation or reimbursement of costs should be without prejudice to the right of the FILO Agent to assess, challenge or review any of the costs, fees and expenses of any parties paid by the ABL Priority Collateral, including before July 15, 2025."[85]

(C) Inaccurate Legal Propositions Advanced by Hilco

78. Hilco relies upon other caselaw in support of its motion and in doing so notes the factors in *Clover on Yonge* and *JBT Transport* and seeks to distinguish those factors or suggests there is a higher burden to satisfy to appoint a Receiver as compared to maintaining a monitor with enhanced powers.[86] A more careful read of these decisions concludes that the Court in *JBT Transport* cited the factors in *Clover on Yonge* – they are one and the same.[87]

79. The FILO relies upon a short excerpt from the article titled "In Search of a Purpose: The Rise of Super Monitors & Creditor-Driven CCAAs" in support of certain statements in its factum in respect of when Courts have been prepared to enhance the powers of a monitor.[88]

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[82] Hilco Factum at para. 2.
[83] Hilco Factum at para. 21.
[84] Hilco Factum at para. 40.
[85] Hilco Factum at para. 52.
[86] See paragraph 24-25 of the Hilco Factum and footnotes 49-50 of Hilco Factum.
[87] *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, 2020 ONSC 1953 at para 45; *JBT Transport Inc. (Re)*, 2025 ONSC 1436, at para 39.
[88] See Hilco Factum at para. 29 and footnote 56.

A more fulsome excerpt supports the Company's position (Hilco's cited portion in bold):

> "**To remove management from the helm** of this restructuring process and extend the powers of the monitor accordingly is a measure that courts have cautiously limited to exceptional circumstances. In addition to adducing evidence that the CCAA process is likely to preserve going concern value of the business**, it must be demonstrated to the court that** either (i) management has resigned, leaving no directors and officers in place, (ii) management is unfit to conduct a restructuring process in a manner that would be in the best interest of all stakeholders, (iii) **any potential restructuring path available would be doomed to fail**, and/or that (iv) management is conflicted, notably because it is participating in the SISP under a CCAA."
>
> "As we have stated, the monitor's traditional role was not intended to exceed supervisory powers. This is also consistent with the fact that the monitor does not possess the required skill set to run a business on a long term basis -- management does. This is why we believe that courts have and continue to exercise caution in all such cases in order to ensure that the powers afforded to the monitor are absolutely necessary and justified by specific and special circumstances."

B. Other Issues

80. Matters involving allocation issues involve intercreditor matters and will be addressed by Pathlight and Hilco. The Eighth Report has addressed the requests regarding the requested distribution and provides the Monitor's position that the allocation of costs related to the CW Transaction should be dealt with at a subsequent hearing on a full record after the Court has made a decision in respect of the motion seeking approval of the CW Transaction. All other matters in respect of the proposed use of the Purchaser's deposit, or orders pending appeal, are premature and should await this Court's decision on the motion seeking approval of the CW Transaction.

PART V – RELIEF SOUGHT

81. The Applicants therefore request that the Court dismiss the Hilco Motion in its entirety.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of August, 2025.

Stikeman Elliott LLP

Stikeman Elliott LLP
Lawyers for the Applicants

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Unique Broadband Systems (Re)*, 2011 ONSC 224.
2. *Quest University Canada (Re)*, 2020 BCSC 318.
3. Old GI Inc. et al., CCAA Super Monitor and Termination Order dated August 30, 2023 (Court File No. CV-23-0699824-00CL)
4. *Body Shop Canada Limited*, Ancillary Order dated December 13, 2024 (Court File No. CV-24-00723586-00CL
5. *Ernst & Young Inc v Essar Global Fund Limited*, 2017 ONCA 1014.
6. *Fiera Private Debt Fund v. Saltwire Network Inc*, 2024 NSSC 89.
7. *Arrangement relative a Bloom Lake General*, 2021 QCCS 2946.
8. *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.,* 2020 ONSC 1953
9. *JBT Transport Inc. (Re)*, 2025 ONSC 1436.

I certify that I am satisfied as to the authenticity of every authority.

Note: Under the Rules of Civil Procedure, an authority or other document or record that is published on a government website or otherwise by a government printer, in a scholarly journal or by a commercial publisher of research on the subject of the report is presumed to be authentic, absent evidence to the contrary (rule 4.06.1(2.2))

Date: August 25, 2025

Signature

SCHEDULE "B"
TEXT OF STATUTES AND REGULATIONS

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

Removal of directors

11.5 (1) The court may, on the application of any person interested in the matter, make an order removing from office any director of a debtor company in respect of which an order has been made under this Act if the court is satisfied that the director is unreasonably impairing or is likely to unreasonably impair the possibility of a viable compromise or arrangement being made in respect of the company or is acting or is likely to act inappropriately as a director in the circumstances."

SCHEDULE “C”
[ATTACHED]

CITATION: Unique Broadband Systems (Re), 2011 ONSC 224
COURT FILE NO.: CV-11-9283-00CL
DATE: 2012-01-25

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 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 UNIQUE BROADBAND SYSTEMS, INC.

BEFORE: Wilton-Siegel J.

COUNSEL: *Peter Roy* and *Sean Grayson*, for the Applicant, 2064818 Ontario Inc.

E. Patrick Shea, for the Applicant, Unique Broadband Systems, Inc.

Peter C. Wardle, for the UBS Directors, Grant McCutcheon, Henry Eaton and Robert Ulicki

Matthew P. Gottlieb, for the Monitor, Duff & Phelps Canada Restructuring Inc.

Raj Sahni, for Jolian Investments Inc., in its capacity as a creditor

HEARD: December 20, 2011

ENDORSEMENT

[1] 2064818 Ontario Inc. ("206") seeks an order pursuant to ss. 11.5(1) and (2) of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA") removing Grant McCutcheon ("McCutcheon") and Henry Eaton ("Eaton") as directors of Unique Broadband Systems, Inc. ("UBS"). UBS seeks an amendment to the initial order under the CCAA dated July 5, 2011 (the "Initial Order") granting protection to UBS that would extend the stay thereunder to include a stay of an oppression action against the UBS directors commenced by 206 on December 22, 2010 (the "Oppression Action"). I will deal with each matter in turn after briefly setting out the background.

Background

The Parties

[2] UBS is a public corporation incorporated in Ontario under the *Business Corporations Act*, R.S.O. 1990, c. B16 (the "OBCA").

[3] LOOK Communications Inc. ("Look") is a public corporation incorporated under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 (the "CBCA").

[4] UBS owns shares in Look carrying 39.2% of the equity and 37.6% of the votes. UBS also provides management services to Look pursuant to a management services agreement described below.

[5] 206 is a corporation controlled by Alex Dolgonos ("Dolgonos"). 206 is a substantial shareholder of UBS holding slightly less than 20% of the outstanding shares of UBS. Dolgonos also owns all of the outstanding shares of DOL Technologies Inc. ("DOL"), a private corporation incorporated under the OBCA.

The Election of the UBS Directors

[6] Each of the current UBS directors, being McCutcheon, Eaton and Robert Ulicki ("Ulicki") (collectively, the "UBS Directors"), was elected to the UBS board of directors at a special meeting of the shareholders held on July 5, 2010 to replace the former directors, being McGocy, Douglas Reesan and Louis Mitrovich, pursuant to s. 122 of the OBCA. The election of these directors was the subject of a proxy contest between the existing management and the shareholders who supported the UBS Directors.

[7] On July 6, 2010, UBS advised Look that it had the support of shareholders of Look possessing sufficient votes to effect a change of control of the board of directors of Look. UBS requested that the then-current board of Look resign and appoint a replacement slate of directors proposed by UBS, which included the UBS Directors, Laurence Silber ("Silber") and David Rattee ("Rattee"), without calling a special meeting of shareholders.

[8] On July 20, 2010, all five Look directors resigned and McCutcheon, Eaton and Ulicki were appointed directors of Look. On July 21, 2010, McCutcheon was also appointed the chief executive officer of Look, replacing McGocy who had previously served in that position pursuant to the provisions of a management services agreement between UBS and Look, described below. Silber and Rattee were subsequently elected directors of Look on July 27, 2010. Ulicki resigned from the board of directors on September 29, 2010, with the result that there are currently four directors of Look.

[9] The UBS Directors were re-elected at the annual general meeting of UBS shareholders on February 25, 2011. 206 opposed the current slate of directors and proposed its own slate, which included the two directors it seeks on this motion to have installed as directors in place of McCutcheon and Eaton.

The Current Litigation

[10] UBS had previously retained DOL pursuant to an agreement dated July 12, 2008 (the "DOL Technology Agreement") to provide the services of Dolgonos as a "chief technology officer" to UBS. The DOL Technology Agreement was terminated by DOL after the election of the UBS Directors based on "change of control" provisions in the Agreement. DOL then commenced an action against UBS claiming amounts totalling approximately $8.6 million. This action is being defended by UBS, which asserts that the largest component of the DOL claim is

not payable pursuant to the terms of the DOL Technology Agreement. UBS has also counterclaimed to set aside the DOL Technology Agreement.

[11] UBS had also previously retained Jolian Investments Inc., a corporation controlled by Gerald McGoey ("McGoey"), to provide his services as chief executive officer of UBS pursuant to an agreement dated January 1, 2006 (the "Jolian Agreement"). The Jolian Agreement was also terminated by Jolian after the election of the UBS Directors based both on the failure to elect McGoey to the UBS board and on "change of control" provisions in the Agreement. Jolian then commenced an action against UBS claiming amounts totalling approximately $7.5 million. This action is also being defended by UBS, which asserts that the largest component of the Jolian claim is also not payable pursuant to the terms of the Jolian Agreement. UBS has also counterclaimed to set aside the Jolian Agreement. On July 5, 2010, McCutcheon was appointed the chief executive officer of Look to replace McGoey.

[12] In the DOL action and the Jolian action, DOL, Dolgonos, Jolian and McGoey brought motions seeking confirmation of their right to an advancement of funds in respect of the legal costs of pursuing their respective claims and defending the UBS counterclaims against them. UBS resisted such relief and sought an order requiring the parties to return certain retainers previously advanced by UBS to counsel for such parties. By order dated April 11, 2011, Marrocco J. held that these parties were entitled to an advancement of funds as more particularly specified therein. UBS has appealed this order to the Court of Appeal and, pending the hearing of such appeal, has refused to advance or pay any of the amounts addressed in the order of Marrocco J.

[13] In addition, on July 6, 2010, Look also commenced an action against Dolgonos, DOL, McGoey and Jolian, among others, seeking damages based on allegations of breach of fiduciary duty and negligence. The action relates to certain restructuring awards paid by Look in 2009, for which Look seeks recovery.

The Oppression Action

[14] On December 22, 2010, DOL commenced the Oppression Action against both UBS and the UBS Directors. At the hearing of this motion, 206 advised that it is not pursuing the claims against UBS. The statement of claim in the Oppression Action seeks nine separate heads of relief against the UBS Directors in addition to interest and costs.

[15] The Oppression Action centres on two principal allegations. First, it is alleged the UBS Directors acted oppressively in approving a settlement between UBS and Look that was made pursuant to an agreement dated December 3, 2010 (the "Amending Agreement"), that amended a management services agreement dated May 19, 2004 between UBS and Look (collectively, with the Amending Agreement, the "Look MSA"). Second, it is alleged that, by failing to re-elect McGoey to the UBS board of directors on July 5, 2011, the UBS Directors intentionally triggered certain provisions of the Jolian Agreement, giving rise to a right in favour of Jolian to terminate the Agreement. It is alleged that these actions of the UBS Directors exposed UBS to the consequences of the default. 206 also alleges that the UBS Directors acted improperly in

defending the DOL claim described above. More generally, 206 alleges that the UBS Directors have depleted the funds of UBS by these actions contrary to their announced intention at the time of the proxy fight in July 2010 to minimize UBS' expenses and conserve its funds.

[16] 206 seeks damages for oppressive behavior against the UBS Directors in the amount of any loss suffered as a result of execution of the Amending Agreement and in the amount of any payment required to be made to Jolian under the Jolian Agreement. It also seeks declarations that the UBS Directors had a conflict of interest in respect of the execution of the Amending Agreement and have preferred the Look shareholders over the UBS shareholders. On these grounds, 206 further seeks an order removing the UBS Directors from the UBS board.

The CCAA Proceedings

[17] UBS is insolvent. It obtained protection under the CCAA pursuant to the Initial Order. Duff & Phelps Canada Restructuring Inc. (the "Monitor") has been appointed the monitor in the CCAA proceedings. Under the Initial Order, the Oppression Claim is currently stayed against UBS but not against the UBS Directors.

[18] Pursuant to an order dated August 4, 2011, the court approved a claims process in respect of claims against UBS. In accordance with this order, 206 filed a proof of claim in an amount "to be determined" that specifically referred to, and attached, the statement of claim in the Oppression Action.

[19] The largest claims filed in the claims process are: the DOL and Jolian claims described above; a contingent claim by Look for the remainder of the monies due to it under the Amending Agreement, which will expire in June 2012 provided UBS continues to provide services to Look in accordance with the terms of the Look MSA; and the 206 claim in respect of the Oppression Action. Each of the UBS Directors also filed contingent claims respecting indemnification of legal fees that may be incurred in defending the Oppression Action, based on indemnities dated July 5, 2010 granted to them by UBS.

[20] 206 took the position that McCutcheon and Eaton should not review any of the claims filed against UBS in the claims process by virtue of the alleged conflict of interest addressed below. While UBS disputes the existence of such a conflict of interest, these directors did not participate in the UBS review of the claims filed with it, which were therefore reviewed by Ulicki alone together with legal counsel. The UBS position regarding each of these claims was provided to the Monitor by letter dated December 9, 2011.

The Oppression Claim

[21] UBS seeks to have the court exercise its authority under s. 11.03(1) of the CCAA to extend the stay of proceedings in the Initial Order to include the Oppression Action in respect of the UBS Directors. It seeks to have the Oppression Action determined in its entirety in the CCAA proceedings.

[22] UBS makes several arguments in support of this relief. Among others, it submits that the requested relief will further the purposes of the CCAA by allowing the directors to focus on the restructuring rather than diverting their time and effort to other litigation. 206 says that this argument is of no force if the court finds that McCutcheon and Eaton are conflicted and grants its motion to replace them. Given the determination below on 206's motion, I accept this argument of UBS.

[23] In addition to the forgoing reason for extending the stay, there are three other considerations that also support such an order.

[24] First, unless and until a court determines that the UBS Directors are not entitled to indemnification by UBS in respect of the claims made against them in the Oppression Action, the UBS Directors have claims against UBS in the CCAA proceedings arising out of the Oppression Action that must be addressed in the restructuring. As a result, the restructuring cannot proceed until the Oppression Action and related indemnification claims are determined.

[25] Second, the Jolian claim against UBS is already proceeding in the CCAA proceedings. Given the similarity in the factual matrix between the claims in the Jolian action and the Oppression Action, any determination in the Jolian action will also likely apply to the claims and defences in the Oppression Action. Accordingly, the Oppression Action must proceed within the CCAA proceedings to avoid the possibility of both a multiplicity of actions and potentially conflicting decisions.

[26] Lastly, I note that there is no suggestion of any material prejudice to 206 if the determination of the Oppression Action also proceeds within the CCAA proceedings.

[27] Based on the foregoing considerations, the UBS motion to extend the stay in the Initial Order is granted.

Removal Motion

[28] I propose to first address the applicable law in respect of this motion before considering the specific issue in this proceeding.

Applicable Law

[29] Section 11.5 of the CCAA provides as follows:

> (1) The court may, on the application of any person interested in the matter, make an order removing from office any director of a debtor company in respect of which an order has been made under this Act if the court is satisfied that the director is unreasonably impairing or is likely to unreasonably impair the possibility of a viable compromise or arrangement being made in respect of the company or is acting or is likely to act inappropriately as a director in the circumstances.

(2) The court may, by order, fill any vacancy created under subsection (1).

[30] Accordingly, to succeed on this motion, 206 must demonstrate that the actions of McCutcheon and Eaton, or their positions as directors of both UBS and Look, are such that either (1) they are unreasonably impairing or are likely to impair the possibility of a viable restructuring; or (2) they are acting or are likely to act improperly as directors. Further, it should be noted that any such order, while it requires such a finding, remains subject to the discretion of the court.

[31] 206 does not propose a particular standard applicable to a determination under s. 11.5, apart from stating that the CCAA is remedial legislation and should therefore be construed liberally in accordance with the modern purposive approach to statutory interpretation. I understand this to mean that 206 would interpret s. 11.5(1) to establish a low threshold for entitlement to relief thereunder. UBS submits that there must be a "clear demonstration" of facts supporting a determination under s. 11.5, which appears directed more toward the standard of proof required than the nature of the threshold established under s. 11.5(1).

[32] There is nothing in the wording of s. 11.5 that displaces the ordinary standard of proof on a balance of probabilities. However, the language of s. 11.5(1) does establish a significant threshold for the entitlement to relief thereunder.

[33] A determination as to whether conduct is impairing, or is likely to impair, a restructuring requires a careful examination of the actions of the directors in the context of the particular restructuring proceedings, the interests of the stakeholders and the feasible options available to the debtor. A similar examination of the actions of the directors is required for a determination that a director has acted inappropriately in the circumstances of a particular restructuring. I note, in particular, that given this language, the fact that a shareholder or creditor may not agree with a decision of a director is far from being a sufficient ground for the director's removal. As a related matter, there is nothing in s. 11.5 that evidences an intention to displace the "business judgment rule".

[34] Further, the language of s. 11.5 expressly requires that the actions of a director "unreasonably" impair, or are likely to "unreasonably" impair, a viable restructuring or are "inappropriate", or are likely to be "inappropriate", in the circumstances.

[35] In addition, two other considerations also argue in favour of a significant threshold, although they may also be relevant to a determination regarding the exercise of judicial discretion where the necessary factual determinations have been made.

[36] First, removing and replacing directors of a corporation, even a debtor corporation subject to the CCAA, is an extreme form of judicial intervention in the business and affairs of the corporation. The shareholders have elected the directors and remain entitled to bring their own action to remove or replace directors under the applicable corporate legislation. At a minimum, in determining whether it should exercise its discretion, the court can take into consideration the absence of any such action by the other shareholders.

[37] Similarly, in a CCAA restructuring, the Monitor performs a supervisory function that provides a form of protection to the corporation's stakeholders. In determining whether to exercise its discretion in s. 11.5(1), a court would ordinarily take into consideration the presence or absence of any recommendation from the Monitor.

Analysis and Conclusions

Positions of the Parties

[38] 206 asserts that McCutcheon and Eaton have a conflict of interest as directors of both UBS and Look which prevents them from fulfilling their responsibilities as directors in the restructuring and justifies an order under s. 11.5 of the CCAA.

[39] 206 has advised the court that it does not allege a monetary conflict based on a larger personal economic interest in Look than in UBS. Instead, 206 alleges that McCutcheon and Eaton are conflicted by virtue of their concurrent positions as directors of both UBS and Look. 206 says that, as a result, these directors can have no role in the UBS CCAA proceedings and should be removed.

[40] UBS takes the position that these directors are not conflicted and are not prevented from participating in any aspect of the CCAA proceedings except for (1) the determination of the Look contingent claim; and (2) the determination of their individual contingent claims for indemnification. It says that, as a result of the position taken by 206 regarding the review of the claims filed under the CCAA proceedings, McCutcheon and Eaton voluntarily did not participate in the UBS review of these claims. However, they intend to be involved on a going-forward basis after determination of this motion, subject to the exceptions described above.

Analysis and Conclusions

[41] For the purposes of this motion, I accept the premise of 206's argument — that the presence of a conflict of interest may prevent directors from fulfilling their responsibilities in a CCAA proceeding to the extent that their continued involvement unreasonably impairs, or is likely to unreasonably impair, the possibility of a viable compromise or arrangement being made in respect of the insolvent company. I also accept that McCutcheon and Eaton have a conflict of interest as directors of both Look and UBS that prevents them from acting in respect of any matter within the CCAA proceedings that pertains to the relationship between the two corporations.

[42] However, such a conflict of interest is not, by itself, sufficient to satisfy the requirements of s. 11.5. Courts have long recognized that interlocking directorships are acceptable, often inevitable or necessary, in the corporate context. Further, the Court of Appeal expressly recognized that "a reasonable apprehension that directors may not act neutrally because they are aligned with a particular group of shareholders or stakeholders" is insufficient for removal of directors: see *Stelco Inc. (Re)*, [2005] O.J. No. 1171 (C.A.), at para. 76. Instead, courts recognize that conflicts of interest may exist that are to be dealt with in accordance with applicable fiduciary law principles. There is nothing in s. 11.5 that evidences an intention to alter the

general rule, stated by Blair J.A. in *Stelco*, at paras. 74-76, that apprehension of bias is insufficient, on its own, to remove a director.

[43] More generally, as Blair J.A. made clear in *Stelco*, at paras. 74-76, directors will only be removed if their conduct, rather than the mere existence of a conflict of interest, justifies such a sanction:

> In my view, the administrative law notion of apprehension of bias is foreign to the principles that govern the election, appointment and removal of directors, and to corporate governance considerations in general. Apprehension of bias is a concept that ordinarily applies to those who preside over judicial or quasi-judicial decision-making bodies, such as courts, administrative tribunals or arbitration boards. Its application is inapposite in the business decision-making context of corporate law. There is nothing in the CBCA or other corporate legislation that envisages the screening of directors in advance for their ability to act neutrally, in the best interests of the corporation, as a prerequisite for appointment.
>
> Instead, the conduct of directors is governed by their common law and statutory obligations to act honestly and in good faith with a view to the best interests of the corporation, and to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances (CBCA, s. 122(1)(a) and (b)). The directors also have fiduciary obligations to the corporation, and they are liable to oppression remedy proceedings in appropriate circumstances. These remedies are available to aggrieved complainants -- including the respondents in this case -- but they depend for their applicability on the director having engaged in conduct justifying the imposition of a remedy.
>
> If the respondents are correct, and reasonable apprehension that directors may not act neutrally because they are aligned with a particular group of shareholders or stakeholders is sufficient for removal, all nominee directors in Canadian corporations, and all management directors, would automatically be disqualified from serving. No one suggests this should be the case. Moreover, as Iacobucci J. noted in *Blair* v. *Consolidated Enfield Corp.*, [1995] 4 S.C.R. 5, (S.C.C.) at para. 35, "persons are assumed to act in good faith unless proven otherwise". With respect, the motion judge approached the circumstances before him from exactly the opposite direction. It is commonplace in corporate/commercial affairs that there are connections between directors and various stakeholders and that conflicts will exist from time to time. Even where there are conflicts of interest, however, directors are not removed from the board of directors, they are simply obliged to disclose the conflict and, in appropriate cases, to abstain from voting. The issue to be determined is not whether there is a connection between a director and other shareholders or stakeholders, but rather whether there has been some conduct on the part of the director that will justify the imposition of a corrective sanction. An apprehension of bias approach does not fit this sort of analysis.

[44] Accordingly, on this motion, 206 must demonstrate either (1) that McCutcheon and Eaton have breached their duties as directors in respect of the conflict that exists in a manner that constitutes acting inappropriately in the circumstances; or (2) that the existence of such conflict of interest prevents them from acting as directors of UBS in a meaningful manner in the restructuring such that they are unreasonably impairing the possibility of a viable restructuring.

[45] I am not persuaded that the fact that McCutcheon and Eaton are directors of both UBS and Look justifies an order replacing them as directors of UBS under s. 11.5 of the CCAA on either ground. I reach this conclusion for the following reasons.

[46] First, the evidence does not disclose that this conflict of interest has prevented the USB board from functioning. Prior to the CCAA proceeding, the Amending Agreement was negotiated between Rattee, on behalf of Look, and Ulicki on behalf of UBS with the benefit of legal counsel. 206 may object to the result on the basis that the agreement was not in the best interests of UBS. However, that is a matter to be addressed in the Oppression Action. It cannot be said that the fact that the other two directors were unable to participate in the decision prevented the negotiations between UBS and Look from proceeding to a conclusion or would have resulted in a different agreement.

[47] Moreover, it should be noted that the Amending Agreement was negotiated and signed before the CCAA proceedings began. In the current proceeding, the only issue that is relevant to the progress of a restructuring of UBS in which the two directors have a conflict of interest is the Look contingent claim. Apart from their individual indemnification claims, there is nothing that prevents these directors from acting in respect of all other aspects of the CCAA proceedings. The fact that they have not done so to date is attributable not to any legal impediment but to the position taken by 206, which cannot survive the order giving effect to these Reasons.

[48] Second, I am not persuaded that the record demonstrates a preference by these directors for the shareholders of Look over the shareholders of UBS. I will first address three specific matters raised by 206 as evidence of this alleged preferment. I will then address the issue more generally.

[49] The first allegation pertains to the terms of the Amending Agreement, which involved a release of a payment obligation of Look to UBS of $900,000. This has been addressed above — the determination of this allegation is a matter for the Oppression Action. The court cannot reach any conclusion on this issue at this time based on the record before the court.

[50] The second allegation is that the UBS Directors are spending the remaining cash of UBS rather than causing Look to pay a dividend to the Look shareholders, including UBS. This allegation is part of a larger allegation that the UBS Directors are taking an inordinate amount of time to deal with the claims filed in the CCAA proceeding and refuse to consider financing alternatives, with the result, if not the intention, that the Look shares owned by UBS will be ultimately sold at a discount to Look or its other principal shareholder, a brother of Silber.

[51] The evidence does not support this allegation for a number of reasons. Whether or not McCutcheon and Eaton are on the Look board, the non-UBS directors of Look will determine

whether to pay a dividend based on their view of the best interests of Look. UBS cannot cause such a dividend to be paid. On this basis, I do not see how the failure of the Look board to consider such a dividend is a relevant consideration. Further, for the moment at least, the evidence does not support 206's position that there is an imminent likelihood that UBS will run out of cash to fund its operations. Moreover, there can be no restructuring plan until the principal claims in the claims process are resolved. While the time spent responding to the claims filed may have been longer than desirable, the evidence does not, at the present time, support the conclusion that the three-month period was inordinate and without reasonable explanation. Lastly, and in any event, 206 has failed to put a specific, alternative funding proposal to the directors for their consideration.

[52] The third allegation is that the Look shareholders have benefitted from the UBS proxy fight by which the UBS Directors were nominated. UBS bore the $600,000 cost of the proxy fight. Referring to a letter of Ulicki to Rattee and Silber dated November 17, 2010, 206 says that, absent the UBS proxy fight, UBS would have controlled Look and the cost of any Look action against Dolgonos, DOL, McGoey and Jonah would have been borne by individual 206 shareholders.

[53] While this may be factually correct, there is no evidence before the court that would justify a conclusion that, in taking such action, the UBS Directors preferred the Look shareholders to the UBS shareholders. Their position is that there is a common interest in initiating claims against the defendants in the Look action. On the current evidence, this position is at least as probable as 206's position. The court cannot determine this issue on this motion.

[54] More generally, the fact that UBS and Look have adopted a common position in regard to Dolgonos and McGoey, and their respective companies, since the election of the UBS Directors is not, *per se*, evidence that McCutcheon and Eaton are preferring the interests of the Look shareholders over the interests of the UBS shareholders. The actions that the UBS Directors, including McCutcheon and Eaton, have taken may not be supported by Dolgonos and 206, but that is not evidence of the alleged preferment absent proof as to the absence of any reasonable basis for the actions of the UBS Directors. At this stage in the proceedings, such proof is not before the court.

[55] In reaching the foregoing conclusions, I should add that the court has also had regard to the Monitor's advice that it has not observed any conduct of these directors that will compromise the CCAA proceeding or UBS's attempt to restructure, and that it has also not observed any conduct that the Monitor would consider inappropriate or would cause the Monitor concern that they would act inappropriately in the future. Further, the Monitor has advised that, in its view, there would be no benefit and substantial harm to the CCAA proceedings if these directors were removed from their position. This advice would argue against the exercise of the court's discretion in the present circumstances even if 206 had otherwise established activity on the part of these directors that satisfied the requirements of s. 11.5.

[56] Lastly, the backdrop to this motion is a dispute between two opposing groups of UBS shareholders. A particular objective of 206 is to have a new board of directors review the

decision of the UBS Directors to defend the DOL action brought against UBS. However, s. 11.5 cannot be used to replace a board of directors to the extent that the purpose of such relief is to have a new board of directors revisit decisions taken by the existing board. At this stage, the court cannot decide the merits of the issues of the appropriateness of the past payments to Dolgonos and McGocy, the actions of the UBS Directors in respect of the Amending Agreement, or their competing visions for the future of Look/UBS. These issues involve all three of the UBS Directors. These issues are the subject of the litigation between the parties, including the Oppression Action, to be addressed in the claims process with the CCAA proceedings. Equally important, as mentioned above, the "business judgment rule" continues to govern judicial intervention in the affairs of a debtor corporation under the CCAA. To succeed on this motion, 206 must provide evidence that establishes the elements of the test in section 11.5. It cannot do so on the facts before the court on this motion.

[57] Based on the foregoing, the 206 motion to replace McCutcheon and Eaton as directors of UBS is dismissed.

Costs

[58] The parties will have thirty days from the date of this Endorsement to make written submissions as to costs not to exceed five pages in length.

Wilton-Siegel J.

Date: January 25, 2012

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED, AND IN THE MATTER OF 1242939 B.C. UNLIMITED LIABILITY COMPANY et al.

Court File No. CV-25-738613-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

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