



SUPERIOR COURT OF JUSTICE

COUNSEL/ENDORSEMENT SLIP

COURT FILE NO.: CV-23-00710259-00CL

DATE: NOVEMBER 30, 2023

NO. ON LIST: 2

TITLE OF PROCEEDING: IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF MASTERMIND GP INC.

BEFORE: JUSTICE STEELE

PARTICIPANT INFORMATION

For Applicant:

Name of Person Appearing	Name of Party	Contact Info
Natasha MacParland	Counsel for the Applicant, Mastermind GP Inc.	nmacparland@dwpv.com
Natalie Renner		nrenner@dwpv.com
Kristine Spence		kspence@dwpv.com

For Respondent:

Name of Person Appearing	Name of Party	Contact Info

For Other:

Name of Person Appearing	Name of Party	Contact Info
Sean Zweig	Counsel for the Proposed Monitor, Alvarez & Marsal Canada Inc. (Josh Nevsky)	zweigs@bennettjones.com
Joshua Foster		fosterj@bennettjones.com
Evan Cobb	Counsel for Canadian Imperial Bank of Commerce	evan.cobb@nortonrosefulbright.com
Tracy Sandler	Counsel for Gordon Brothers Canada ULC	tsandler@osler.com
Hannah Davis		hdavis@osler.com
Linda Galessiere	Counsel for Ricocan Real Estate Investment Trust, SmartCentres Real Estate Investment Trust, Cushman & Wakefield Asset Services ULC, and Darthmouth Crossing Limited	lgalessiere@clegal.ca

Dina Peat	Counsel for 1651051 Alberta Ltd., Canada Life Assurance Company, Hillcrest Holdings Inc. and Montez Hillcrest Inc, and Brant Plains Holding Inc.	dpeat@dv-law.com
Teodora Obradovic	Counsel for 15320 Bayview Avenue Holdings Limited	tobradovic@foglers.com
Jake Harris	Counsel for LEGO Canada Inc.	jake.harris@blakes.com
Arash Jazayeri	Counsel for Glendale Properties Inc. as agent for Fiona Strachan	arash@jazayerilaw.com
Dylan Chochla	Counsel for Unity Acquisitions Inc.	dchochla@fasken.com

ENDORSEMENT OF JUSTICE STEELE:

- [1] The Comeback Hearing for Mastermind GP Inc. and Mastermind LP (collectively the “Mastermind Entities”) was held via Zoom on November 30, 2023. The Court was informed that the Mastermind Entities are still pursuing a Potential Transaction in respect of certain locations. At the same time, the Mastermind Entities wish to move forward to liquidate inventory and other assets in certain locations.
- [2] The Mastermind Entities seek an amended and restated initial order (the “ARIO”) that, among other things, extends the stay to January 26, 2024, increases the Administration Charge and directors’ and officers’ Charge (“D&O Charge”), approves the Forbearance Agreement with CIBC and related relief (including approving the Pre-Filing Payments Order and the DIP Charge), and approves a key employee retention plan (the “KERP”) and related charge and sealing order in respect of the KERP.
- [3] In addition, the Mastermind Entities seek an Order (the “Liquidation Sale Approval Order”) that among other things, approves the Consulting Agreement and Sale Guidelines and authorizes Mastermind LP to undertake a liquidation sale of inventory and other assets in certain stores.
- [4] The Mastermind Entities provided notice of these proceedings to interested parties. The agreements and certain terms of the orders were subject to negotiation amongst various parties.
- [5] No person objected to the relief sought.
- [6] The Monitor supports the relief sought.
- [7] After having heard the submissions and reviewed the record, I released the two Orders (the ARIO and the Liquidation Sale Approval Order) with reasons to follow. These are my reasons.

Background

- [8] On November 23, 2023, the Mastermind Entities were granted protection under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985 c. C-36.

- [9] Under the Initial Order, among other things, Alvarez & Marsal Canada Inc. was appointed as the Monitor of the Mastermind Entities, an initial stay of proceedings was granted until November 30, 2023, an Administration Charge was granted in the amount of \$750,000, and a D&O Charge was granted in the amount of \$4,000,000.

The Liquidation Sale Approval Order

- [10] The Mastermind Entities seek the Court's approval to conduct a liquidation sale of their inventory and their furniture, fixtures, and equipment ("FF&E") in certain of their locations. In particular, the Mastermind Entities seek the Court's approval of (i) the Consulting Agreement with Gordon Brothers Canada ULC and the liquidation sale contemplated in the agreement; and (ii) the proposed Sale Guidelines.
- [11] The Court has the authority under s. 36 of the CCAA to grant the requested order.
- [12] Section 36(1) of the CCAA provides that a debtor company under CCAA protection "may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court." If a debtor company seeks to sell or otherwise dispose of assets outside the ordinary course of business, it must provide notice to the secured creditors who are likely to be affected by the proposed sale: s. 36(2), CCAA.
- [13] The Mastermind Entities have provided notice to their two secured creditors, CIBC and Birch Hill, both of which support the proposed sale.
- [14] Section 36(3) of the CCAA sets out the factors for the court to consider in determining whether to grant the authorization:
- a. Whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
 - b. Whether the monitor approved the process leading to the proposed sale or disposition;
 - c. Whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
 - d. The extent to which the creditors were consulted;
 - e. The effects of the proposed sale or disposition on the creditors and other interested parties; and
 - f. Whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

- [15] As noted in *Target Canada Co. (Re)*, 2015 ONSC 2066 (Ont. S.C.J. [Commercial List]), at para. 15, the factors set out in s. 36(3) of the CCAA "are not intended to be exhaustive, nor are they intended to be a formulaic check-list that must be followed in every sale transaction under the CCAA."

- [16] In considering the above factors, I am satisfied that the authorization should be granted. First, the process leading to the proposed sale was reasonable. The Mastermind Entities solicited bids from five experienced potential liquidators. After conducting an assessment, the Mastermind Entities selected Gordon Brothers, which has extensive experience conducting retail liquidations in Canada, and entered into the Consulting Agreement. Second, the Monitor supports the proposed sale and timeline. Third, the Mastermind Entities have consulted with key stakeholders, including their two secured creditors. The two secured creditors support the sale. The Mastermind Entities have also attempted to notify all of their landlords about the sale. Fourth, the liquidation process was designed to coincide with the holiday shopping season to maximize value realized from the sale. Further, the Consulting Agreement provides Mastermind LP with the flexibility to continue to pursue the Potential Transaction in respect of certain stores not subject to the immediate liquidation. However, the Consulting Agreement contemplates that if the Potential Transaction is not settled, the number of stores subject to the liquidation sale can be increased.
- [17] The Court also has comfort because the Liquidation Sale Approval Order, Consulting Agreement and Sale Guidelines are substantially similar to those used in other recent proceedings approved by this Court under s. 36 of the CCAA, specifically *Bed Bath & Beyond Canada Ltd.*, 2023 ONSC 1230 [Commercial List] and *Nordstrom Canada Retail Inc.*, 2023 ONSC 1814 [Commercial List].
- [18] I am satisfied that the proposed Liquidation Sale Approval Order, Sale Guidelines and Consulting Agreement are reasonable in the circumstances.

The Amended and Restated Initial Order

(a) Extension of the Stay

- [19] The applicant seeks an extension of the stay to January 26, 2024.
- [20] There is no opposition to the requested stay extension.
- [21] Under section 11.02(2) of the CCAA, the Court has the authority to extend a stay for any period necessary if the Court is satisfied that: (i) circumstances exist that make the order appropriate, and (ii) the applicant is acting in good faith and with due diligence.
- [22] I am satisfied that the criteria in s. 11.02(2) of the CCAA are met. The stay extension is needed for the liquidation sale to occur in respect of certain stores to maximize recoveries for Mastermind's creditors. Further, discussions are still ongoing in respect of the Potential Transaction. The length of the requested stay aligns with the sale terms, which is expected to be completed by January 14, 2024. In addition, the Mastermind Entities have acted, and continue to act, in good faith and with due diligence. They have provided notice to their stakeholders and state that they intend to continue engaging in discussions with their stakeholders as the proceedings progress.

(b) The KERP

- [23] The Mastermind Entities seek the Court's approval of a key employee retention plan for six employees of Mastermind LP who Mastermind has identified as being crucial to these CCAA proceedings. Whether a KERP is approved is a matter of discretion for this Court: s. 11, CCAA; *Canwest Global*

Communications Corp. (Re), [2009] O.J. No. 4286 (Ont. S.C.J. [Commercial List]), at para. 49, *Grant Forest Products Inc., Re*, 2009 CarswellOnt 4699 (Ont. S.C.J. [Commercial List]), at para. 8.

[24] The Court has approved similar KERP plans on many occasions where the plans covered employees who were critical for the stability of the business or have extensive knowledge of the debtor's business: *Target Canada Co. (Re)*, 2015 ONSC 303 [Commercial List], at para. 59, *Cinram International Inc., Re*, 2012 ONSC 3767 [Commercial List], at para. 91. The Court has approved similar plans in proceedings that are analogous to these proceedings: *Target Canada*, at para. 59, *Bed Bath & Beyond*, at para. 12.

[25] The evidence is that each of the employees included in the KERP has critical industry and knowledge of Mastermind's operations that will be "crucial in helping to facilitate the Sale and pursuing a Potential Transaction."

[26] The quantum of the financial incentives under the KERP range from 25% to 85% of the participant's salary. The amount was determined by the directors of the Mastermind Entities.

[27] Having reviewed the record, I am satisfied that it is appropriate to approve the KERP.

(c) *The KERP Charge*

[28] The Mastermind Entities also seek a charge on its assets in favour of its key employees in an amount up to \$286,000.

[29] In *Grant Forest Products*, the Court considered the following factors in determining whether to grant a KERP charge:

- a) Whether the Monitor supports the KERP agreement and charge;
- b) Whether the employees to whom the KERP applies would consider other employment options if the KERP agreement was not secured by the KERP charge;
- c) Whether the continued employment of the employees to whom the KERP applies is important for the stability of the business and to enhance the effectiveness of the marketing process;
- d) Whether the KERP charge was approved by the board of directors, including the independent directors, as the business judgment of the board should not be ignored;
- e) Whether the KERP charge is supported or consented to by secured creditors of the debtor; and
- f) Whether the payments under the KERP are payable upon the completion of the restructuring process.

[30] I agree with the submissions of the Mastermind Entities at para. 44 of their factum that the KERP Charge is appropriate and necessary. In particular, I note that these KERP participants are crucial for the stability of the business and may resign in the absence of the requested charge, and the Monitor supports the KERP

Charge. In addition, the secured creditors have been provided with notice and no party has objected to the proposed charge.

(d) The KERP Sealing Order

[31] The Mastermind Entities seek a sealing order for the KERP.

[32] Section 137(2) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 provides that the Court may order that any document filed in a civil proceeding be treated as confidential, sealed, and not form part of the public record.

[33] The Supreme Court of Canada, in *Sherman Estate v. Donovan*, 2021 SCC 25, at para. 38, articulated the test applicable when determining whether a sealing order ought to be granted:

The test for discretionary limits on presumptive court openness has been expressed as a two-step inquiry involving the necessity and proportionality of the proposed order (*Sierra Club*, at para. 53). Upon examination, however, this test rests upon three core prerequisites that a person seeking such a limit must show. Recasting the test around these three prerequisites, without altering its essence, helps to clarify the burden on an applicant seeking an exception to the open court principle. In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:

- i. Court openness poses a serious risk to an important public interest;
- ii. The order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,
- iii. As a matter of proportionality, the benefits of the order outweigh its negative effects.

Only where all three of these prerequisites have been met can a discretionary limit on openness – for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order – properly be ordered. This test applies to all discretionary limits on court openness, subject only to valid legislative enactments (*Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188, at paras. 7 and 22).

[34] Canadian courts have recognized the important public interests that CCAA proceedings serve and that the regime functions as a “supporting framework for the resolution of corporate insolvencies in the public interest.” *Re Nortel Networks*, [2009] O.J. No. 3169, at para. 29.

[35] In *Re Danier Leather Inc.*, 2016 ONSC 1044 [Commercial List], at paras 82-84, Penny J. addressed the test for a sealing order in respect of a KERP. He noted that “the KERP evidence involves matters of a private, personal nature” and that “it would be detrimental to the operations of Danier to disclose the identity of the individuals who will be receiving the KERP payments as this may result in other employees requesting such payments or feeling underappreciated.”

[36] The Mastermind Entities seek to protect commercially sensitive and confidential and personal information of its key employees in the context of these restructuring proceedings, which is an example of such public interests. The KERP in this case contains confidential and personal information of key employees including (i) identifiable information of the persons covered under the KERP; and (ii) commercially sensitive compensation information. The Mastermind Entities also want this information kept confidential because they are concerned that if the information were public, it could be detrimental to their liquidation strategy as it could result in other employees making similar demands. The Mastermind Entities need to be able to rely on their staff to continue working through the liquidation sale. The Mastermind Entities submit that the sealing order is essential for maintaining employee morale and thus maintaining stability in the business.

[37] I am satisfied that the benefits of the requested sealing order outweigh any deleterious effects. The sealing order is limited in scope (only applies to the KERP). The information in the KERP would not assist its stakeholders. However, disclosure of this confidential information would harm Mastermind's employees and breach their privacy interests.

[38] I am satisfied that the proposed sealing order is appropriate and satisfies the *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] S.C.J. No. 42 requirements, as modified in *Sherman Estate*.

[39] The applicant is directed to provide the sealed confidential exhibit to the Court clerk at the filing office in an envelope with a copy of this endorsement and the signed order (with the relevant provisions highlighted) so that the confidential exhibit can be physically sealed.

(e) Increase to D&O Charge and Administration Charge

[40] The Mastermind Entities seek to increase the Administration Charge from \$750,000 to \$1 million and increase the D&O Charge from \$4 million to \$5 million. Benefits under the D&O Charge will only be extended to the extent that there is insufficient coverage under directors' and officers' insurance policies.

[41] The Court has the authority to grant the charges, and under its authority to make the charges "in an amount that the court considers appropriate," the Court may increase the charges: s. 11, CCAA.

[42] In the Monitor's First Report, at paras. 5.12 and 5.15, the Monitor states that it assisted the Mastermind Entities in the calculation of the Administration Charge and the D&O Charge. The D&O Charge was calculated taking into consideration the amount of the Mastermind Entities' payroll, vacation pay and federal and provincial tax liabilities. The applicant noted that there is potential personal liability of the directors in respect of HST collected and not remitted, among other things. The Administration Charge was determined having regard to the nature of the proceedings, potential work involved, and the size of the charges in similar CCAA proceedings. With regard to both proposed increased charges, the Monitor indicated its view that they are reasonable and appropriate in the circumstances.

[43] I am satisfied that the proposed increase to the D&O Charge and Administration Charge is reasonable and appropriate in the circumstances.

(f) The Forbearance Agreement and Pre-Filing Payments Order

- [44] CIBC, Mastermind LP's primary and senior secured creditor, has a credit agreement with Mastermind LP, as borrower, and Mastermind GP, as guarantor, under which CIBC has committed a combined \$36,250,000 credit facility ("Credit Facilities"). CIBC has agreed to continue to make the Credit Facilities available to Mastermind LP during these CCAA proceedings, provided certain terms and conditions are satisfied.
- [45] The Forbearance Agreement sets out the terms upon which CIBC will continue to make the Credit Facilities available during these proceedings. The key terms and conditions require that the Mastermind Entities obtain the following relief:
- a. Authorization for the Mastermind Entities to use proceeds obtained after the filing date to pay Mastermind LP's pre-filing indebtedness under the Credit Facilities; and
 - b. A charge in favour of CIBC over the assets of the Mastermind Entities up to the maximum amount of availability under the Credit Facilities of \$36,250,000. The DIP Charge will only extend to amounts borrowed under the Credit Facilities.
- [46] Under s. 11 of the CCAA, the Court has broad discretion to make any order that is "appropriate in the circumstances." Court have previously relied on this jurisdiction to approve forbearance agreements setting out continued lending terms similar to those proposed in this case: *North America Tungsten Corp. (Re)*, 2015 BCSC 1376, *Clothing for Modern Times Ltd., Re*, 2012 CarswellOnt 21276 (Ont. S.C.J. [Commercial List]).
- [47] In *Tungsten* the BCSC approved the interim facility and forbearance agreement. The BCSC accepted the Monitor's position that "the Company would not be able to find other interim financing on more favourable terms and that without such financing, the Company would have no choice but to immediately cease operations." The BCSC was also satisfied that the interim facility would further the policy objectives underlying the CCAA by mitigating the effects of immediate cessation of operations.
- [48] The Mastermind Entities submit that the approval of the Forbearance Agreement and continued availability of the Credit Facilities is urgently required. They are in default of their obligations under the Credit Facilities and CIBC has indicated that they will exercise their enforcement remedies if the Forbearance Agreement is not in place. In addition, Mastermind LP is expected to run out of cash in the short term and needs to be able to access the Credit Facilities. Mastermind LP has immediate cash needs including payroll obligations of approximately \$1 million due on November 30, 2023, and rent in respect of 66 stores due on December 1, 2023.
- [49] The Forbearance Agreement sets out the terms upon which CIBC has agreed to continue to extend credit to the Mastermind Entities, which credit is needed for them to run the liquidation sale, pay their rent and employee salaries during these proceedings. One of the conditions in the agreement is that Court approval is granted in respect of the Forbearance Agreement. Other conditions include the Prefiling Payments Order and the granting of the DIP Charge.
- [50] The Prefiling Payments Order will allow CIBC to continue to sweep Mastermind's two deposit accounts and apply the proceeds to the pre-Filing amounts owing under the Credit Facilities. The Mastermind Entities have two deposit accounts, which CIBC sweeps daily, and two disbursement accounts that are

funded from the Credit Facilities. Under the proposed Order, CIBC will continue to sweep the deposit accounts.

- [51] The Court has the authority to approve the request for the Pre-Filing Payments Order under s. 11 of the CCAA.
- [52] The Court has accepted the use of similar facility arrangements provided it does not offend section 11.2 of the CCAA: *Gesco Industries (Re)*, 2023 ONSC 3050 [Commercial List], at paras. 29-31, *Re: Performance Sports Group Ltd.*, 2016 ONSC 6800 [Commercial List], at para. 22. Section 11.2(1) provides that the DIP security or charge “may not secure an obligation that exists before the order is made.”
- [53] The sweeping of the deposit accounts must not impact the relative pre-filing positions of secured creditors over Mastermind’s assets and Mastermind LP must only use post-filing cash receipts to pay down the Credit Facilities. That is, to avoid offending s. 11.2 of the CCAA, the advances made by CIBC under the DIP facility cannot be used to repay pre-filing obligations.
- [54] The sweeping of Mastermind’s deposit accounts and payment towards the pre-filing amounts owing under the Credit Facilities will not impact the relative pre-filing priority positions of the two secured lenders (Birch Hill and CIBC). The Birch Hill Lenders have subordinated their security interest in favour of CIBC under a subordination agreement. Further, it is a term of the Forbearance Agreement and the ARIO that no funds advanced under the Credit Facilities after the date of ARIO shall be used to pay any pre-filing obligations of the Mastermind Entities under the Credit Agreement or Forbearance Agreement. Because of the structure of the Mastermind Entities’ banking with CIBC, with the disbursement accounts being separate from the deposit accounts, the Mastermind Entities can adhere to this term.
- [55] I am satisfied that it is appropriate in the circumstances to approve the Forbearance Agreement, including the Prefiling Payments Order. This agreement needs to be in place so that the Mastermind Entities can continue to access the Credit Facilities and, among other things, pay their employees, their rent and pursue the liquidation sale and Potential Transaction.

(g) The DIP Charge

- [56] The Mastermind Entities seek a charge in favour of CIBC up to \$36,250,000 as security for amounts advanced under the Credit Facilities from and after the date of the ARIO. The Court has the authority under s. 11.2(1) of the CCAA to approve the charge and set its priority (s. 11.2(2)).
- [57] Section 11.2(4) of the CCAA sets out the following factors to guide the Court when deciding whether to approve a charge:
- a. The period during which the company is expected to be subject to proceedings under the CCAA;
 - b. How the company’s business and financial affairs are to be managed during the proceedings;
 - c. Whether the company’s management has the confidence of its major creditors;

- d. Whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
- e. The nature and value of the company's property;
- f. Whether any creditor would be materially prejudiced as a result of the security or charge; and
- g. The monitor's report on the cash-flows of the debtor.

[58] I am satisfied that the requested DIP Charge meets the requirements. The Monitor supports the granting of the DIP Charge, as does Birch Hill, the only other secured creditor. As noted above, the DIP Charge is a condition of the Forbearance Agreement with CIBC, which is necessary for continued financing (and operation) of the Mastermind Entities under the Credit Facilities. The Mastermind Entities have restricted the amount of the charge to the amount that will be reasonably needed to meet their needs while they pursue the sale and continue negotiations in respect of the Potential Transaction. The DIP Charge will only secure the amounts borrowed under the Credit Facilities and will not secure any pre-filing obligations.

Next Appearance

[59] The applicant is scheduled to return to Court on December 13, 2023 at 1:30 pm (45 minutes).

A handwritten signature in blue ink, appearing to be 'J. Hill', is located in the lower right quadrant of the page.

Date Released: December 2, 2023