

Court File No. CV-17-11785-00CL

**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 **EXPRESS FASHION APPAREL  
CANADA INC.** and **EXPRESS CANADA GC GP, INC.**

APPLICANTS

**AFFIDAVIT OF TODD PAINTER**  
(Sworn May 4, 2017)

**(Motion for Approval of Consulting Agreement and Sale Guidelines)**

I, Todd Painter, of the city of New Albany, in the State of Ohio, the President of the applicants Express Fashion Apparel Canada Inc. ("**Express Canada**") and Express Canada GC GP, Inc. (together with Express Canada, the "**Applicants**"), MAKE OATH AND SAY:

1. I am the President and sole officer and director of each of the Applicants. As such, I have personal knowledge of the matters deposed to herein. Where I have relied on other sources for information, I have so stated and I believe them to be true. In preparing this affidavit, I consulted with representatives of Alvarez & Marsal Canada Inc. in its capacity as proposed monitor to the Applicants ("**A&M**") and legal advisors of the Applicants.
2. I make this affidavit in support of the motion brought by the Applicants and Express Canada GC, LP (collectively, the "**Express Canada Entities**") seeking an Order, substantially in the form attached to the Motion Record, that would, among other things, approve the Consulting Agreement and Sale Guidelines (each as defined below) (the "**Proposed Sale Approval Order**").

## A. Background

3. The Express Canada Entities were granted protection from their creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA") pursuant to an initial order of the Ontario Superior Court of Justice (Commercial List) dated May 4, 2017 (the "**Initial Order**"). A copy of the Initial Order is attached to my affidavit as **Exhibit A**.

4. Among other things, the Initial Order: (1) appoints A&M to act as the monitor in the CCAA proceedings (in that capacity, the "**Monitor**"); and (2) grants a stay of proceedings until June 3, 2017, or such later date as this Honourable Court may order.

5. Further details regarding the background to this proceeding are set out in my affidavit sworn May 3, 2017 ("**Initial Order Affidavit**"). Except where so stated, capitalized terms not otherwise defined in this affidavit have the meanings given to them in the Initial Order Affidavit. A copy of the Initial Order Affidavit without exhibits is attached to this affidavit as **Exhibit B**.

## B. Consulting Agreement and Sale Guidelines

6. To maximize the value to be realized from Express Canada's inventory (the "**Merchandise**") and its furniture, fixtures, and equipment (collectively, the "**FF&E**") for the benefit of all stakeholders, the Express Canada Entities are seeking the Court's approval of the following:

- (a) the Letter Agreement Governing Inventory Disposition between Express Canada and Merchant Retail Solutions ULC (the "**Consultant**") dated May 3, 2017 regarding the liquidation of the Merchandise and FF&E (the "**Consulting Agreement**"); and

- (b) proposed sale guidelines for the orderly liquidation of Express Canada's remaining Merchandise and FF&E, which are attached as Schedule "B" to the Consulting Agreement (the "**Sale Guidelines**").

7. The realization process set out in the Consulting Agreement and the Sale Guidelines was designed by the Express Canada Entities and the Consultant, in consultation with A&M. I expect that this realization process will maximize the value realized from the sale of Express Canada's Merchandise and FF&E for the benefit of stakeholders.

8. It is my understanding that the Monitor supports the approval of the Consulting Agreement, including the Sale Guidelines. The Express Canada Entities intend to engage with the Landlords with respect to the Sale Guidelines prior to the return of the motion.

**(a) Solicitation and Selection of the Proposed Consultant**

9. In anticipation of a potential CCAA filing, the Express Canada Entities, with the assistance of A&M, contacted two third party liquidation firms to solicit proposals to conduct or consult on an orderly liquidation of the Merchandise and FF&E. The solicited liquidators had been selected based on their qualifications and prior experience handling large-scale retail liquidations, including large-scale retail liquidations in Canada and are well-known to Express Canada's Landlords. I am advised by Tracy Sandler, counsel for the Express Canada Entities, that they are among the most experienced liquidation firms operating in North America.

10. The solicited liquidators were invited to submit bids for the purposes of selecting an agent or a consultant, on an exclusive basis, to assist the Express Canada Entities in conducting the sale of the Merchandise and FF&E. Two common ways for such bids to be structured are: (1) an equity proposal, which generally involves the liquidator conducting the process and guaranteeing a net

minimum amount that would be paid to Express Canada; and (2) a fee proposal, which involves the liquidator consulting on the liquidation process in exchange for a percentage fee of the sales.

11. The solicited liquidators each returned executed nondisclosure agreements and were given access to a virtual data room containing financial and other information concerning the Merchandise and FF&E. Express Canada, with the assistance of A&M, answered questions from the solicited liquidators regarding the Merchandise and FF&E. Additionally, the solicited liquidators conducted site visits of a number of Express Canada stores to inspect the Merchandise and FF&E to assist them in structuring their proposals.

12. Both solicited liquidators submitted proposals before the requested deadline, one on its own, and the other as a proposed joint venture with another third party liquidator. Both of the solicited liquidators structured their bids as fee proposals (as opposed to equity proposals).

13. Following a careful review of the proposals, the Express Canada Entities, in consultation with A&M, selected the Consultant's proposal. The Express Canada Entities believe that the Consultant's proposal was the most favourable and will provide for the best recovery for stakeholders, and they felt confident that the Consultant would deal with the Landlords and customers in a professional manner. I understand that the Monitor shares this view.

14. The Consultant is an affiliate of Hilco Merchant Resources, LLC and has extensive experience in conducting retail liquidations. The Consultant's recent experience in Canada includes Target Canada, American Apparel Canada, BCBG Canada, and Danier Leather.

**(b) Consulting Agreement and Sale Guidelines**

15. On May 3, 2017, the Consultant and Express Canada entered into the Consulting Agreement, a copy of which is attached as **Exhibit C** to this affidavit. Capitalized terms used in

this section that are not otherwise defined have the meanings given to them in the Consulting Agreement. It is my understanding that the Monitor supports the selection of the Consultant and Express Canada entering into the Consulting Agreement.

16. The Consulting Agreement is expressly subject to Court approval and will not have any force or effect if Court approval is not obtained.

17. If approved by this Court, the Consulting Agreement provides that the Consultant will serve as the exclusive consultant for the purpose of conducting a sale of the Merchandise and FF&E at all 17 of the Express Canada stores in Ontario, Alberta, and British Columbia.

18. Under the Consulting Agreement, the Consultant would earn a fee of 1.75% of the gross proceeds (net of applicable HST/GST) for the sale of Merchandise at the stores. In addition, the Consultant would be entitled to a 17.5% commission on any gross proceeds (net of applicable HST/GST) from the sale of FF&E.

19. Some of the key terms of the Consulting Agreement include:

- (a) The sale of the Merchandise in accordance with the Sale Guidelines (described in greater detail below) (the “Sale”) shall commence no later than May 11, 2017 and shall conclude no later than June 15, 2017. However, the Consultant and Express Canada may, in consultation with the Monitor, agree to terminate the Sale at any store location prior to June 15, 2017.
- (b) In collaboration with Express Canada, the Consultant shall, *inter alia*: (i) provide qualified supervisors to oversee the management of the stores and the Sale; (ii) determine appropriate advertising; (iii) determine appropriate discounts and staffing levels; (iv) oversee the display of Merchandise; (v) evaluate Merchandise

sales; and (vi) assist with managing and controlling loss prevention and employee relations matters.

- (c) Express Canada shall (including through the administrative services agreement effective as of May 3, 2017 between the Express Canada Entities and Express, LLC (the “**Administrative Services Agreement**”)), *inter alia*: (i) employ the store employees, other than the supervisors provided by the Consultant; (ii) be responsible for all taxes, costs, rent, expenses, etc. relating to its stores and employees; (iii) collect and remit HST/GST and other taxes; (iv) arrange for ordinary maintenance of point-of-sale equipment; and (v) use reasonable efforts to ensure that the Consultant is able to use the stores for the Sale.
- (d) Express Canada shall (through the Administrative Services Agreement) provide central administrative services necessary for the Sale, including point-of-sale administration, sales audits, cash reconciliation, accounting, and payroll processing.
- (e) Express Canada shall be responsible for all costs and expenses of the Sale, including store-level operating expenses and the Consultant’s reasonable out of pocket expenses. To manage costs, however, Express Canada and the Consultant have established a budget (attached to the Consulting Agreement as Schedule “C”).
- (f) During the Sale, all accounting matters, including fees, expenses and other amounts payable under the Consulting Agreement, shall be reconciled by the parties, in consultation with the Monitor, on every Wednesday of the prior calendar week and the amounts determined to be owing for that prior calendar week shall be paid within seven days after each weekly reconciliation. Within 45 days following the

termination of the Sale for the last store, Express Canada and the Consultant, in consultation with the Monitor, will complete a final reconciliation of all amounts payable under the Consulting Agreement, with payment within 10 days thereafter.

- (g) Express Canada shall be responsible for maintaining liability insurance policies covering injuries to persons and property in or in connection to the Stores. In addition, the Consultant shall be responsible for maintaining, at its own expense, liability insurance of at least \$2 million (on an occurrence basis) and \$5 million (on an aggregate basis) covering injuries to persons and property in or in connection with the Consultant's provision of services at the stores. Both Express Canada and the Consultant shall be responsible to maintain workers compensation insurance.
- (h) The Consultant will not have any right, title or interest in the Merchandise or the FF&E.
- (i) All sales of Merchandise shall be "final" with no returns allowed, unless Express Canada directs otherwise.

20. The Consulting Agreement is also subject to the Sale Guidelines attached as Schedule "B" to the Consulting Agreement. Express Canada and the Consultant prepared the Sale Guidelines in consultation with A&M and, I am advised by Ms Sandler and believe, after taking into account the court approved Sale Guidelines in recent Canadian retail store liquidations. The Sale Guidelines provide, among other things:

- (a) The Sale shall be conducted in accordance with the terms of the applicable Lease, except as otherwise set out in any Court Order, the Sale Guidelines, or in any

subsequent written agreements between Express Canada and the applicable Landlord (as approved by the Consultant).

- (b) The Sale shall be conducted so that each of the stores remains open, before it is vacated, during its normal hours of operation provided for in the applicable Lease.
- (c) The Sale will end by no later than June 15, 2017.
- (d) All display and hanging signs used by the Consultant in connection with the Sale shall be professionally produced and hung in a professional manner. No sign shall advertise the sale as a “bankruptcy”, “liquidation” or “going out of business” sale. However, notwithstanding anything in the Leases, the Consultant may advertise an “everything on sale”, “everything must go”, “store closing”, or similar themed sale.
- (e) The purchasers of FF&E shall only be permitted to remove the FF&E either through the back shipping areas or through other areas after a store has closed. The FF&E must be removed after business hours, unless it can fit into a shopping bag, in which case it may be removed during business hours through the front door. FF&E may only be removed with the Landlord’s supervision, if required by the Landlord.
- (f) The Consultant shall not conduct any auctions of Merchandise or FF&E at any of the stores.
- (g) Signs must be posted in the cash register areas of each store informing customers that all sales are “final”.
- (h) At the conclusion of the Sale in each store, the Consultant and Express Canada will arrange for the premises to be cleaned.



21. In accordance with the Consulting Agreement, an advance payment of costs and expenses was made to the Consultant in the amount of \$50,000.

**C. Continuing Stakeholder Engagement**

22. Express Canada intends to consult with its Landlords throughout the realization process, including in respect of any Landlord concerns with signage advertising the Sale. As noted, the Express Canada Entities intend to engage the Landlords with respect to the Sale Guidelines prior to the return of the motion, which meetings have already commenced.

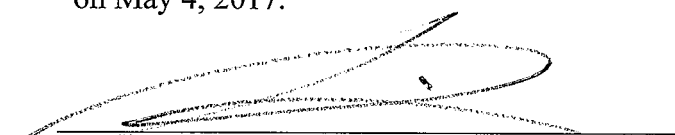
**D. Conclusion**

23. I believe that the Consulting Agreement and Sale Guidelines would benefit all of the Express Canada Entities' stakeholders and that engaging a professional liquidator to assist with the sale of the Merchandise and FF&E will produce better results than attempting to liquidate without professional assistance.

24. The Express Canada Entities believe that it is crucial to begin the realization process immediately to implement the orderly wind down of the business and to maximize the value realized for all stakeholders. I am advised by the Monitor and believe that the Monitor supports the proposed Consulting Agreement and Sale Guidelines, including the proposed timeline.

SWORN BEFORE ME at Toronto, in Ontario

on May 4, 2017.



*Commissioner for Taking Affidavits*

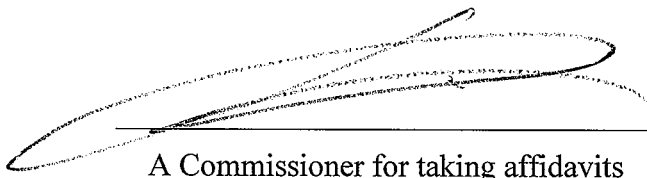
**William David Rankin**



**TODD PAINTER**

**TAB A**

THIS IS **EXHIBIT "A"**  
TO THE AFFIDAVIT OF TODD PAINTER,  
SWORN BEFORE ME THIS  
4TH DAY OF MAY, 2017.



A Commissioner for taking affidavits

**William David Rankin**

Court File No. CV-17-11785-00CL

ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST

THE HONOURABLE MR.	)	THURSDAY, THE 4 <sup>th</sup>
	)	
JUSTICE HAINEY	)	DAY OF MAY, 2017



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 EXPRESS FASHION APPAREL  
CANADA INC. AND EXPRESS CANADA GC GP, INC.

**INITIAL ORDER**

THIS APPLICATION, made by Express Fashion Apparel Canada Inc. (“**Express Canada**”) and Express Canada GC GP, Inc. (together with Express Canada, the “**Applicants**”), pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “**CCAA**”) was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of Todd Painter sworn May 3, 2017 and the Exhibits thereto (the “**Painter Affidavit**”) and the pre-filing report dated May 3, 2017 of Alvarez & Marsal Canada Inc. in its capacity as proposed Monitor of the Applicants (in such capacity, the “**Proposed Monitor**”), and on hearing the submissions of counsel for the Applicants and Express Canada GC, LP (the “**Partnership**”, and collectively with the Applicants, the “**Express Canada Entities**”), Express, LLC and the Proposed Monitor and on reading the consent of the Proposed Monitor to act as the Monitor,

## SERVICE

1. THIS COURT ORDERS that the time for service of the Notice of Application and the Application Record is hereby abridged and validated so that this Application is properly returnable today and hereby dispenses with further service thereof.

## APPLICATION

2. THIS COURT ORDERS AND DECLARES that the Applicants are companies to which the CCAA applies. Although not an Applicant, the Partnership shall enjoy the benefits of the protections and authorizations provided by this Order.

## PLAN OF ARRANGEMENT

3. THIS COURT ORDERS that the Applicants, individually or collectively, shall have the authority to file and may, subject to further order of this Court, file with this Court a plan of compromise or arrangement (hereinafter referred to as the “Plan”).

## POSSESSION OF PROPERTY AND OPERATIONS

4. THIS COURT ORDERS that the Express Canada Entities shall remain in possession and control of their respective current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the “Property”). Subject to further Order of this Court, the Express Canada Entities shall continue to carry on business in a manner consistent with the preservation of the value of their business (the “Business”) and Property. The Express Canada Entities shall each be authorized and empowered to continue to retain and employ the employees, advisors, consultants, agents, experts, appraisers, valuers, brokers, accountants, counsel and such other persons (collectively “Assistants”) currently retained or employed by them, with liberty to retain such further Assistants as they deem reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order.

5. THIS COURT ORDERS that the Express Canada Entities shall be entitled to continue to utilize the central cash management system currently in place as described in the Painter Affidavit or, with the consent of the Monitor, replace it with another substantially similar central

cash management system (the “Cash Management System”) and that any present or future bank (or other similar entity) providing the Cash Management System (including, without limitation, Fifth Third Bank and Bank of America Merchant Services Canada Corp.) shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken under the Cash Management System, or as to the use or application by the Express Canada Entities of funds transferred, paid, collected or otherwise dealt with in the Cash Management System, shall be entitled to provide the Cash Management System without any liability in respect thereof to any Person (as hereinafter defined) other than the Express Canada Entities, pursuant to the terms of the documentation applicable to the Cash Management System, and shall be, in their capacity as provider of the Cash Management System, an unaffected creditor in these proceedings and under the Plan with regard to any claims or expenses they may suffer or incur in connection with the provision of the Cash Management System.

6. THIS COURT ORDERS that the Express Canada Entities shall be entitled but not required to pay the following expenses whether incurred prior to or after this Order:
- (a) all outstanding and future wages, salaries, employee benefits (including, without limitation, employee medical, dental and similar benefit plans or arrangements), amounts owing under the Credit Card (as defined in the Painter Affidavit), vacation pay and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements, and all other payroll processing expenses;
  - (b) all outstanding or future amounts owing in respect of existing return policies, refunds, discounts or other amounts on account of similar customer programs or obligations;
  - (c) all outstanding or future amounts related to honouring gift cards issued before or after the date of this Order;
  - (d) the fees and disbursements of any Assistants retained or employed by the Express Canada Entities at their standard rates and charges;
  - (e) with the consent of the Monitor, amounts owing for goods or services actually supplied to the Express Canada Entities prior to the date of this Order by:

- (i) providers of credit, debit and gift card processing related services;
- (ii) logistics or supply chain providers, including customs brokers and freight forwarders and security and armoured truck carriers; and
- (iii) other third party suppliers up to a maximum aggregate amount of \$50,000, if, in the opinion of the Express Canada Entities, the supplier is critical to the Orderly Wind-down (as hereinafter defined).

7. THIS COURT ORDERS that, except as otherwise provided to the contrary herein, the Express Canada Entities shall be entitled but not required to pay all reasonable expenses incurred by them in carrying on the Business in the ordinary course during the Orderly Wind-down after this Order, and in carrying out the provisions of this Order and any other Order of this Court, which expenses shall include, without limitation:

- (a) all expenses and capital expenditures reasonably necessary for the preservation of the value of the Property or the Business including, without limitation, payments on account of insurance (including directors and officers insurance), maintenance and security services; and
- (b) payment for goods or services actually supplied to the Express Canada Entities following the date of this Order.

8. THIS COURT ORDERS that the Express Canada Entities shall remit, in accordance with legal requirements, or pay:

- (a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from the Express Canada Entities' employees' wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, (iii) Quebec Pension Plan, and (iv) income taxes;
- (b) all goods and services taxes, harmonized sales taxes or other applicable sales taxes (collectively, "Sales Taxes") required to be remitted by the Express Canada Entities in connection with the sale of goods and services by the Express Canada Entities, but only where such Sales Taxes are accrued or collected after the date of this Order, or

where such Sales Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order;

- (c) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business, workers' compensation or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by the Express Canada Entities; and
- (d) taxes under the *Income Tax Act* (Canada) or other relevant taxing statute giving rise to any statutory deemed trust amounts in favour of the Crown in right of Canada or any Province thereof or any political subdivision thereof or any other taxation authority.

9. THIS COURT ORDERS that, except as specifically permitted herein, the Express Canada Entities are hereby directed, until further Order of this Court: (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by any one of the Express Canada Entities to any of their creditors as of this date; (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of the Property; and (c) to not grant credit or incur liabilities except in the ordinary course of the Business or pursuant to this Order or any other Order of the Court.

#### **ORDERLY WIND-DOWN**

10. THIS COURT ORDERS that the Express Canada Entities shall, subject to such requirements as are imposed by the CCAA, have the right to:

- (a) permanently or temporarily cease, downsize or shut down any of their respective businesses or operations, and to dispose of redundant or non-material assets not exceeding \$50,000 in any one transaction or \$250,000 in the aggregate;
- (b) terminate the employment of such of their employees or temporarily lay off such of their employees as the relevant Express Canada Entity deems appropriate;



- (c) pursue all offers for sales of material parts of the Business or Property, in whole or part, subject to prior approval of this Court being obtained before any sale (except as permitted by paragraph 10(a) above); and
- (d) apply to this Court for such approval, vesting or other Orders as may be necessary to consummate sale transactions for all or any part of the Property, including, without limitation, approval of a consulting or liquidation agreement concerning the liquidation of inventory, furniture, fixtures, and equipment forming part of the Property, and any related relief.

all of the foregoing to permit the Express Canada Entities to proceed with an orderly wind-down of the Business (the “Orderly Wind-down”).

#### **REAL PROPERTY LEASES**

11. THIS COURT ORDERS that until a real property lease to which Express Canada is a party is disclaimed in accordance with the CCAA or otherwise consensually terminated, Express Canada shall pay, without duplication, all amounts constituting rent or payable as rent under such real property lease (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable to the landlord under such lease, but for greater certainty, excluding accelerated rent or penalties, fees or other charges arising as a result of the insolvency of the Express Canada Entities or the making of this Initial Order) or as otherwise may be negotiated between Express Canada and the landlord from time to time (“Rent”), for the period commencing from and including the date of this Order, twice-monthly in equal payments on the first and fifteenth day of each month, in advance (but not in arrears). On the date of the first of such payments, any Rent relating to the period commencing from and including the date of this Order shall also be paid.

12. THIS COURT ORDERS that Express Canada shall provide each of the relevant landlords with notice of its intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes Express Canada’s entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any

applicable secured creditors, such landlord and Express Canada, or by further Order of this Court upon application by Express Canada on at least two (2) days' notice to such landlord and any such secured creditors. If Express Canada disclaims the lease governing such leased premises in accordance with Section 32 of the CCAA, it shall not be required to pay Rent under such lease pending resolution of any such dispute (other than Rent payable for the notice period provided for in Section 32(5) of the CCAA), and the disclaimer of the lease shall be without prejudice to Express Canada's claim to the fixtures in dispute.

13. THIS COURT ORDERS that if a notice of disclaimer is delivered pursuant to Section 32 of the CCAA by Express Canada, then (a) during the notice period prior to the effective time of the disclaimer, the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving Express Canada and the Monitor 24 hours' prior written notice, and (b) at the effective time of the disclaimer, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against Express Canada in respect of such lease or leased premises, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

#### **STAY OF PROCEEDINGS**

14. THIS COURT ORDERS that until and including June 3, 2017, or such later date as this Court may order (the "Stay Period"), no proceeding or enforcement process in any court or tribunal (each, a "Proceeding") shall be commenced or continued against or in respect of the Express Canada Entities or the Monitor, or their respective employees and representatives acting in such capacities, or affecting the Business or the Property, except with the written consent of the Express Canada Entities and the Monitor, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Express Canada Entities or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.

#### **NO EXERCISE OF RIGHTS OR REMEDIES**

15. THIS COURT ORDERS that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the

foregoing, collectively being “Persons” and each being a “Person”) against or in respect of the Express Canada Entities or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended except with the prior written consent of the Express Canada Entities and the Monitor, or leave of this Court, provided that nothing in this Order shall (i) empower the Express Canada Entities to carry on any business which the Express Canada Entities are not lawfully entitled to carry on, (ii) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

#### **NO INTERFERENCE WITH RIGHTS**

16. THIS COURT ORDERS that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, lease, sublease, licence or permit in favour of or held by the Express Canada Entities, except with the prior written consent of the Express Canada Entities and the Monitor, or leave of this Court. Without limiting the foregoing, no right, option, remedy, and/or exemption in favour of the relevant Express Canada Entity shall be or shall be deemed to be negated, suspended, waived and/or terminated as a result of this Order.

#### **CONTINUATION OF SERVICES**

17. THIS COURT ORDERS that during the Stay Period, all Persons having oral or written agreements with the Express Canada Entities or statutory or regulatory mandates for the supply of goods and/or services, including without limitation all computer software, communication and other data services, centralized banking services, cash management services, payroll and benefits services, insurance, warranty services, freight services, transportation services, customs clearing, warehouse and logistics services, utility or other services to the Business or the Express Canada Entities, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Express Canada Entities, and that the Express Canada Entities shall be entitled to the continued use of their current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Express Canada Entities in

accordance with normal payment practices of the Express Canada Entities or such other practices as may be agreed upon by the supplier or service provider and each of the Express Canada Entities and the Monitor, or as may be ordered by this Court.

#### **NON-DEROGATION OF RIGHTS**

18. THIS COURT ORDERS that, notwithstanding anything else in this Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided on or after the date of this Order, nor shall any Person be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the Express Canada Entities. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

#### **EMPLOYEE RETENTION PLAN**

19. THIS COURT ORDERS that the Employee Retention Plan (the “ERP”), as described in the Painter Affidavit, is hereby approved and the Express Canada Entities are authorized to make the payments contemplated by the ERP.

#### **PROCEEDINGS AGAINST DIRECTORS AND OFFICERS**

20. THIS COURT ORDERS that during the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Express Canada Entities with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Express Canada Entities whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, until a compromise or arrangement in respect of the Express Canada Entities, if one is filed, is sanctioned by this Court or is refused by the creditors of the Express Canada Entities or this Court.

#### **DIRECTORS’ AND OFFICERS’ INDEMNIFICATION AND CHARGE**

21. THIS COURT ORDERS that the Express Canada Entities shall jointly and severally indemnify their directors and officers against obligations and liabilities that they may incur as

directors or officers of the Express Canada Entities after the commencement of the within proceedings, except to the extent that, with respect to any officer or director, the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct.

22. THIS COURT ORDERS that the directors and officers of the Express Canada Entities shall be entitled to the benefit of and are hereby granted a charge (the "Directors' Charge") on the Property, which charge shall not exceed an aggregate amount of \$500,000, as security for the indemnity provided in paragraph 21 of this Order. The Directors' Charge shall have the priority set out in paragraphs 33 and 35 herein.

23. THIS COURT ORDERS that, notwithstanding any language in any applicable insurance policy to the contrary, (a) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge, and (b) the Express Canada Entities' directors and officers shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 21 of this Order.

#### **APPOINTMENT OF MONITOR**

24. THIS COURT ORDERS that Alvarez & Marsal Canada Inc. is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the business and financial affairs of the Express Canada Entities with the powers and obligations set out in the CCAA or set forth herein and that the Express Canada Entities and their affiliates, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Express Canada Entities pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

25. THIS COURT ORDERS that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

- (a) monitor the Express Canada Entities' receipts and disbursements;

- (b) assist with the Orderly Wind-down of the Business and operations of the Express Canada Entities;
- (c) liaise with Assistants, to the extent required, with respect to all matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein;
- (d) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, certain shared services provided to the Applicants by Express U.S. during the Orderly Wind-down and such other matters as may be relevant to the proceedings herein;
- (e) advise the Applicants in their development of the Plan and any amendments to the Plan;
- (f) assist the Applicants in their preparation of their cash flow statements and the dissemination of other financial information;
- (g) assist the Applicants, to the extent required by the Applicants, with the holding and administering of creditors' or shareholders' meetings for voting on the Plan;
- (h) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the Express Canada Entities, wherever located and to the extent that is necessary to adequately assess the Express Canada Entities' business and financial affairs or to perform its duties arising under this Order;
- (i) oversee and consult with the Express Canada Entities, any liquidation agent, and any Assistants retained (including brokers), to the extent required, with respect to any and all wind-down activities and/or any marketing or sale of the Property and the Business or any part thereof;
- (j) be at liberty to engage independent legal counsel or such other persons, or utilize the services of employees of its affiliates, as the Monitor deems necessary or advisable

respecting the exercise of its powers and performance of its obligations under this Order;

- (k) be at liberty to serve as a “foreign representative” of the Express Canada Entities in any proceeding outside Canada; and
- (l) perform such other duties as are required by this Order or by this Court from time to time.

26. THIS COURT ORDERS that the Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof.

27. THIS COURT ORDERS that nothing herein contained shall require the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, “**Possession**”) of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the *Ontario Environmental Protection Act*, the *Ontario Water Resources Act*, or the *Ontario Occupational Health and Safety Act* and regulations thereunder (the “**Environmental Legislation**”), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

28. THIS COURT ORDERS that the Monitor shall provide any creditor of the Express Canada Entities with information provided by the Express Canada Entities in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information

disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Express Canada Entities is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Express Canada Entities may agree.

29. THIS COURT ORDERS that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, including, for greater certainty, in the Monitor's capacity as "foreign representative", save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

30. THIS COURT ORDERS that the Monitor, counsel to the Monitor and counsel to the Express Canada Entities shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, whether incurred prior to or subsequent to the date of this Order, by the Express Canada Entities as part of the costs of these proceedings. The Express Canada Entities are hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor and counsel for the Express Canada Entities on a weekly basis and, in addition, the Express Canada Entities are hereby authorized to pay to the Monitor, counsel to the Monitor, and counsel to the Express Canada Entities, retainers in the aggregate amount of \$250,000 to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

31. THIS COURT ORDERS that the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

32. THIS COURT ORDERS that the Monitor, counsel to the Monitor, and counsel to the Express Canada Entities shall be entitled to the benefit of and are hereby granted a charge (the "**Administration Charge**") on the Property, which charge shall not exceed an aggregate amount of \$650,000, as security for their professional fees and disbursements incurred at their respective standard rates, both before and after the making of this Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 33 and 35 hereof.



**VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER**

33. THIS COURT ORDERS that the priorities of the Directors' Charge and the Administration Charge, as between them, shall be as follows:

First – Administration Charge (to the maximum amount of \$650,000); and

Second – Directors' Charge (to the maximum amount of \$500,000);

34. THIS COURT ORDERS that the filing, registration or perfection of the Administration Charge and the Directors' Charge (collectively, the "**Charges**") shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

35. THIS COURT ORDERS that each of the Administration Charge and the Directors' Charge shall constitute a charge on the Property and such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**"), except for (a) any Person with a properly perfected purchase money security interest under the *Personal Property Security Act* (Ontario) or any other personal property registry system, or (b) any Person who is a "secured creditor" as defined in the CCAA that has not been served with notice of the application for this Order.

36. THIS COURT ORDERS that except as otherwise expressly provided for herein, or as may be approved by this Court, the Express Canada Entities shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Administration Charge and the Directors' Charge, unless the Express Canada Entities also obtain the prior written consent of the Monitor and the beneficiaries of the Administration Charge and the Directors' Charge, or further Order of this Court.

37. THIS COURT ORDERS that the Administration Charge and the Directors' Charge shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "**Chargees**") shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any

bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an “Agreement”) which binds the Express Canada Entities, and notwithstanding any provision to the contrary in any Agreement:

- (a) the creation of the Charges shall not create or be deemed to constitute a breach by the Express Canada Entities of any Agreement to which it is a party;
- (b) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the Charges; and
- (c) the payments made by the Express Canada Entities pursuant to this Order and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

38. THIS COURT ORDERS that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the Express Canada Entities’ interest in such real property leases.

#### **SERVICE AND NOTICE**

39. THIS COURT ORDERS that the Monitor shall (i) without delay, publish in The Globe and Mail (National Edition) a notice containing the information prescribed under the CCAA, (ii) within five days after the date of this Order, (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send or cause to be sent, in the prescribed manner, a notice to every known creditor who has a claim against the Express Canada Entities of more than \$1000, and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder, provided

that the Monitor shall not make the claims, names and addresses of individuals who are creditors publicly available, unless otherwise ordered by the Court.

40. THIS COURT ORDERS that any employee of any of the Express Canada Entities that receives a notice of termination from any of the Express Canada Entities by electronic transmission or electronic mail shall be deemed to have received such notice of termination at the time that the notice of termination is sent.

41. THIS COURT ORDERS that the E-Service Protocol of the Commercial List (the "Guide") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Guide (which can be found on the Commercial List website at: [www.ontariocourts.ca/scj/practice/practice-directions/toronto/eservice-commercial/](http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/eservice-commercial/)) shall be valid and effective service. Subject to Rule 17.05 this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules of Civil Procedure. Subject to Rule 3.01(1)(d) of the Rules of Civil Procedure and paragraph 13 of the Guide, service of documents in accordance with the Guide will be effective on transmission. This Court further orders that a Case Website shall be established in accordance with the Guide with the following URL: [www.alvarezandmarsal.com/expresscanada](http://www.alvarezandmarsal.com/expresscanada) (the "Monitor's Website").

42. THIS COURT ORDERS that if the service or distribution of documents in accordance with the Guide is not practicable, the Express Canada Entities and the Monitor are at liberty to serve or distribute this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or facsimile transmission to the Express Canada Entities' creditors or other interested parties at their respective addresses as last shown on the records of the Express Canada Entities and that any such service or distribution by courier, personal delivery or facsimile transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

43. THIS COURT ORDERS that the Express Canada Entities and the Monitor and their counsel are at liberty to serve or distribute this Order, any other materials and orders as may be reasonably required in these proceedings, including any notices, or other correspondence, by forwarding true copies thereof by electronic message to the Express Canada Entities' creditors or other interested parties and their advisors. For greater certainty, any such distribution or service

shall be deemed to be in satisfaction of a legal or judicial obligation, and notice requirements within the meaning of clause 3(c) of the *Electronic Commerce Protection Regulations*, Reg. 81000-2-175 (SOR/DORS).

#### **GENERAL**

44. THIS COURT ORDERS that the Express Canada Entities or the Monitor may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

45. THIS COURT ORDERS that nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Express Canada Entities, the Business or the Property.

46. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the Express Canada Entities, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Express Canada Entities and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Express Canada Entities and the Monitor and their respective agents in carrying out the terms of this Order.

47. THIS COURT ORDERS that each of the Express Canada Entities and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order.


48. THIS COURT ORDERS that any interested party (including the Express Canada Entities and the Monitor) may apply to this Court to vary or amend this Order at the comeback motion scheduled for May 25, 2017, on not less than seven (7) calendar days' notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

49. THIS COURT ORDERS that this Order and all of its provisions are effective as of 12:01 a.m. Eastern Standard/Daylight Time on the date of this Order.

ENTERED AT / INSCRIT À TORONTO  
ON / BOOK NO:  
LE / DANS LE REGISTRE NO:

MAY 04 2017

PER / PAR:

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A. Anissimova  
Registrar

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

Court File No: CV-17-11785-00CL

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT  
OF EXPRESS FASHION APPAREL CANADA INC. and EXPRESS  
CANADA GC GP, INC.**

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**

PROCEEDING COMMENCED AT TORONTO

**ORDER**

**OSLER, HOSKIN & HARCOURT LLP**

100 King Street West  
1 First Canadian Place  
Suite 6200, P.O. Box 50  
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Tracy C. Sandler (LSUC #: 32443N)  
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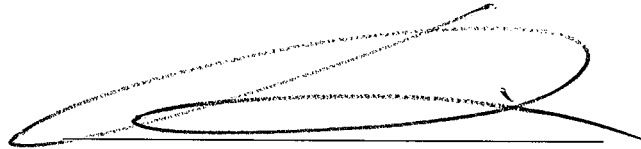
Tel: 416.362-2111

Fax: 416.862.6666

Lawyers for the Applicants

**TAB B**

**THIS IS EXHIBIT "B"**  
TO THE AFFIDAVIT OF TODD PAINTER,  
SWORN BEFORE ME THIS  
4TH DAY OF MAY, 2017.

A handwritten signature in black ink, consisting of a large, sweeping loop that starts on the left, goes up and over, then comes down and under, ending on the right. The signature is written over a horizontal line.

A Commissioner for taking affidavits

**William David Rankin**



Court File No.

**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 **EXPRESS FASHION APPAREL**  
**CANADA INC.** and **EXPRESS CANADA GC GP, INC.**

APPLICANTS

**AFFIDAVIT OF TODD PAINTER**  
(Sworn May 3, 2017)

I, Todd Painter, of the City of New Albany, in the State of Ohio, the President of the Applicants Express Fashion Apparel Canada Inc. and Express Canada GC GP, Inc. (together, the “**Applicants**”), MAKE OATH AND SAY:

1. This affidavit is made in support of an application by the Applicants for an Initial Order and related relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “**CCAA**”). Although the limited partnership Express Canada GC, LP (“**Express Canada LP**”) is not an applicant in this proceeding, the Applicants seek to have a stay of proceedings and other benefits of an Initial Order under the CCAA extend to Express Canada LP, which is wholly owned by the Applicants and performs functions integral to the Applicants’ business. Together, the Applicants and Express Canada LP are defined in this affidavit as the “**Express Canada Entities**”.

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2. I am currently the Vice President – International of Express, LLC (“**Express U.S.**”), the direct parent company of Express Fashion Apparel Canada Inc. and the indirect parent company of Express Canada GC GP, Inc. In my role, I have ultimate oversight of Express U.S.’s operations outside of the United States, which includes Canada. I am also the President and sole director of each of the Applicants, positions that I have held since April 20, 2017. Prior to my appointment as President, since 2012, I served as Vice President of each of the Applicants and, prior to that, was Assistant Treasurer. As such, I have personal knowledge of the matters deposed to herein. Where I have relied on other sources for information, I have so stated and I believe them to be true. In preparing this affidavit, I have also consulted with former members of the Applicants’ boards of directors, senior management teams, senior management of certain of the Applicants’ affiliated companies, and the Applicants’ financial and legal advisors.

3. All references to monetary amounts in this affidavit are in Canadian dollars unless noted otherwise.

4. This affidavit is organized into the following sections:

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## A. Introduction

5. Express Fashion Apparel Canada Inc. (“**Express Canada**”) operates 17 retail stores in premium malls in Ontario, Alberta, and British Columbia, selling apparel, accessories, and other products under the “EXPRESS” brand-name. As of January 28, 2017, Express, Inc., the indirect and ultimate parent of the Applicants, through its subsidiaries and affiliates, operated 656 stores across the United States, Canada and Puerto Rico, and had approximately 18,000 employees and approximately US\$2.2 billion in annual sales.

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6. Since entering the Canadian marketplace in 2011, Express Canada has struggled to reach critical mass and achieve profitability. Brand awareness remains low among Canadian consumers, occupancy costs have been unsustainable relative to sales, and unfavourable exchange rates have put and continue to put an enormous strain on the business.

7. Express Canada has experienced losses during each year of operations, and the majority of its Canadian locations have posted losses each year. The only reason Express Canada has survived over the past six years is because of the significant financial and operational support of its U.S. parent, Express U.S. Without this support as described in greater detail below, the Express Canada Entities cannot continue operating.

8. Express Canada's performance in fiscal 2016 (its year end was January 28, 2017) declined significantly. Its sales decreased by 9% in 2016, resulting in continued and increasingly negative cash flow. Its earnings before interest, taxes, depreciation, and amortization ("EBITDA") for 2016 were negative \$7.4 million, prior to taking into account accounting adjustments based on the transfer pricing policy discussed below.

9. Since 2011, Express U.S. has absorbed most of Express Canada's cumulative losses through market support adjustments under its transfer pricing policy. In essence, Express Canada buys all of its inventory for resale from Express U.S. and relies on operational, management, and administrative services provided by Express U.S. To date, Express U.S. has provided Express Canada with approximately \$56.4 million in market support credits. This was in addition to Express U.S.'s approximately \$30 million investment in Express Canada.

10. Given Express Canada's poor financial performance and resulting negative cash flow, Express U.S. has determined, after considering all reasonably available options, that it is in the

best interests of its stakeholders to discontinue further financial and operational support for Express Canada. As a result, Express Canada cannot continue as a going concern. Express Canada has accordingly determined that it must cease operations in Canada and as a result of such decision, is insolvent and is seeking protection from its creditors under the CCAA.

11. Express Canada's resolution to cease operations has resulted in events of default under each of the 17 leases to which Express Canada is a party (collectively, the "Leases" and each, a "Lease"). These defaults have resulted in either the automatic acceleration of some or all rents due under the Leases or the ability of Express Canada's landlords (the "Landlords") to accelerate all rents due under the Leases. As a result, the claims of the Landlords under the Leases have crystalized. The remaining obligations over the term of the Leases are approximately \$120 million. Even after taking into account the obligation of the Landlords to mitigate their damage claims, the aggregate amounts owing to the Landlords under these Leases far surpass \$5 million. Further, the crystalized Landlord claims, arising from Express Canada's decision to cease operations, together with the Express Canada Entities' other debts, exceed the realizable value of the Express Canada Entities' assets and the Express Canada Entities have insufficient funds to satisfy all such claims. The Express Canada Entities are therefore insolvent.

12. To wind down operations in a responsible, controlled and orderly manner, and to maximize value for its stakeholders, Express Canada requires the flexibility of the CCAA and breathing space from the exercise of creditor remedies, as it prepares to liquidate its remaining inventory with assistance from a third-party professional liquidator and vacate its leased retail stores.

13. An orderly wind down requires the involvement of many stakeholders and Court supervision. Express Canada, in consultation with Alvarez & Marsal Canada Inc. (the "Proposed

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**Monitor**”), has selected a professional third party liquidator (Merchant Retail Solutions ULC) (the “**Liquidator**”) that it believes would assist in maximizing the potential proceeds from the sale of its remaining inventory and furniture, fixtures, and equipment. If an Initial CCAA Order is granted, the Applicants intend to promptly serve a motion seeking this Court’s approval of an orderly Realization Process (as defined below) and of the selection of the Liquidator to assist with this process.

14. The liquidation professionals at the Liquidator advise, and I believe, that Express Canada’s active participation in this orderly wind down process, along with the support of Express U.S., is essential to maximizing recoveries for the benefit of the stakeholders of the Express Canada Entities, as a whole. In turn, this engages:

(a) *Express Canada’s employees*, including the district manager, front-line sales associates and store managers, who have expertise in the operations of Express stores. Express Canada proposes to implement an employee retention program that would see them paid until June 15, 2017 and, for some employees, a small bonus;

(b) *Express Canada’s landlords and other suppliers*, such as its credit card processor, with whom Express Canada will need to engage during the critical window of time available for the realization of assets. To maximize recovery, Express

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Canada must complete the realization phase of this proceeding before the summer season (which is traditionally slow for Canadian apparel retailers), leaving it only a matter of weeks to complete the process. Express Canada will need to engage with the Landlords to understand their concerns during the Realization Process, including in respect of liquidation signage and store hours, with a view to arriving

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at a consensual process that benefits the stakeholders of the Express Canada Entities, as a whole; and

- (c) *Express U.S.*, which provides all back-office business and administrative support services. As set out above, without these services, Express Canada could not operate and would be forced to immediately shut down, to the detriment of its stakeholders. Express U.S. also owns all trademarks and other intellectual property (“IP”) associated with the “EXPRESS” brand-name, which Express Canada must licence to conduct its business. Thus, without Express U.S.’s agreement to continue providing critical services and licencing IP during the wind down process, the Realization Process would be impeded and disorderly.

15. Express U.S. has terminated its agreements with Express Canada for the provision of management services and IP, replacing them with shared-service and licencing agreements for the limited purposes of an orderly wind down. I am advised by senior management of Express U.S., and believe, that Express U.S. will only agree to continue providing these crucial services and licencing IP on the condition that the orderly wind down is supervised by the Court in accordance with the CCAA. As the sole director of the Applicants, in consultation with my advisors, I have concluded that this Application under the CCAA and the proposed Initial Order is the best alternative that is available to the Express Canada Entities, will maximize realizations and will result in the best possible outcome for stakeholders in the circumstances.

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16. Previously, Express Canada implemented a number of strategies to avoid winding down its operations. Over the past few years, it has attempted to address the challenges of operating its business in Canada, including by approaching certain of the Landlords to reduce occupancy costs. Certain of the Landlords were supportive, and this initiative resulted in some rent relief.

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However, despite the foregoing rent relief, Express Canada continued to operate at a loss as it was not enough to overcome declining sales and unfavourable exchange rates – even when combined with Express Canada’s strategic initiatives to improve operations, such as modifying merchandising, pricing, and promotional strategies, and investing in marketing and analytics.

17. Express Canada has subsequently explored other strategies to bring operating costs in line with sales, including potentially seeking significantly larger rent reductions, variable rent structures based on future sales levels, and closing poorer performing locations. None of these alternatives provide realistic solutions. Despite considerable effort, the business in Canada is no longer sustainable.

18. As noted above, a significant contributor to the lack of viability of Express Canada’s business is high operating costs, in particular, rent and other payments to Landlords. Given the performance of the Canadian stores, however, further rent reductions to bring the operating costs in line with sales are not considered to be commercially achievable. Express Canada’s occupancy costs as a percentage of sales are trending in the range of 40% which I understand is significantly higher than industry benchmarks and are unsustainable. This problem would only become worse with time, as Express Canada’s Leases provide for escalating rent payments over the remaining lease terms (approximately 4 ¾ to 7 ¾ years each). The magnitude of rent reductions needed, considering the decreasing top-line sales, would simply not be realistic.

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19. Recently, in light of the poor operating results in fiscal 2016, Express U.S. and Express Canada again reviewed all potential options for the Canadian business. However, with the cumulative losses generated by the business, the unfavourable exchange rate, the poor retail climate in Canada, and unsustainable operating costs, it was determined that the only option is for Express Canada to wind down operations in each of its 17 Canadian retail stores.

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20. The Liquidator has extensive experience in the Canadian retail market and has worked cooperatively with Canadian landlords on numerous other engagements to conduct orderly retail liquidations. However, each of Express Canada's Leases requires continuous operation in the leased premises and restricts any sort of liquidation sale. Express Canada has taken these restrictions into account in its decision to wind down operations; however, the exercise of any contractual remedies by any of the Landlords without leave of the Court, would affect the time-sensitive Realization Process. Express Canada believes that the flexibility of the CCAA and the assistance of this Court is required to provide a platform for a consensual resolution of any issues with the Landlords and to achieve maximum recoveries.

21. In summary, the Express Canada Entities require a stay of proceedings and related relief under the CCAA in order to continue operating throughout the contemplated orderly wind down and Realization Process. The stay will provide the Express Canada Entities with the flexibility to implement an orderly and responsible cessation of operations, with the ultimate goal of developing a plan or arrangement for the benefit of all of their stakeholders.

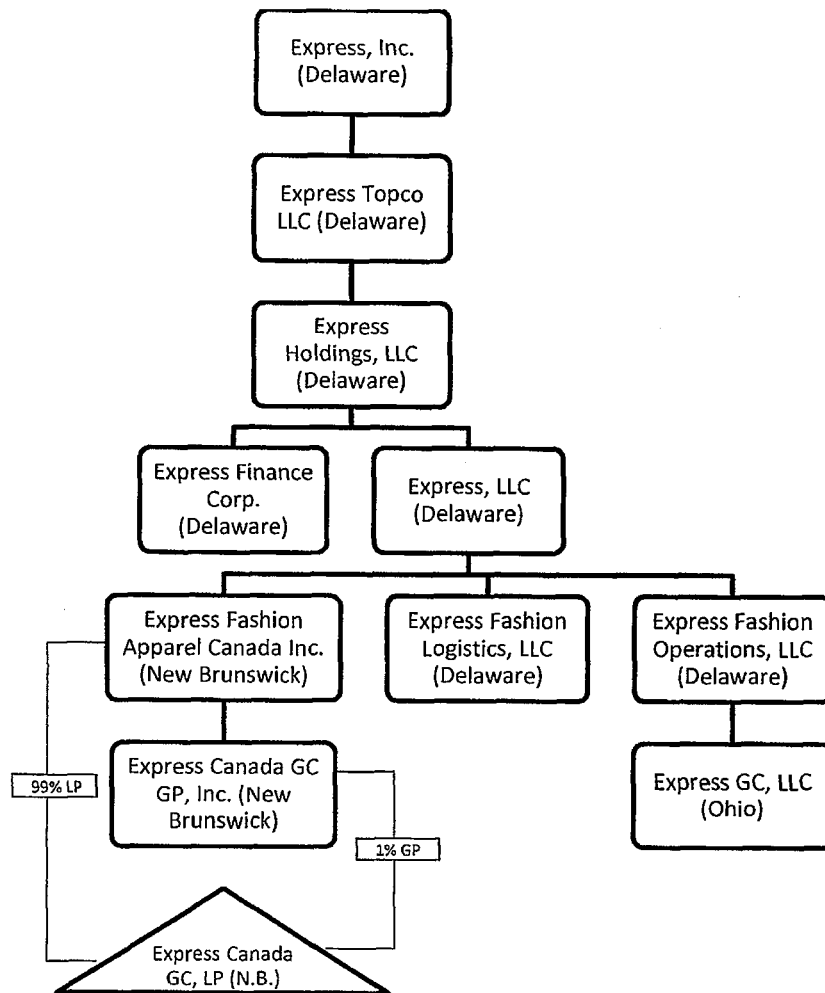
## **B. Corporate Structure**

### **(a) Express Fashion Apparel Canada Inc.**

22. Express Canada is a New Brunswick corporation with its registered head office in Saint John, New Brunswick. As illustrated below, Express Canada is an indirect wholly-owned subsidiary of Express, Inc., a Delaware corporation traded on the New York Stock Exchange under the ticker symbol "EXPR". The solid lines show a direct parent-subsidary relationship:

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23. Express Canada is 100% directly owned by Express U.S. (Express, LLC), a Delaware limited liability company.

24. As stated above, I became a director of Express Canada on April 20, 2017 and I am currently the sole director. On April 20, 2017, the two then-current directors of Express Canada were removed from their positions. I am also currently the sole officer of Express Canada, holding the position of President since April 20, 2017.

- 11 -

25. Express Canada is the operating company in Canada and is the counterparty to the retail store Leases. As explained below, it licences the IP and purchases all of its merchandise for resale from its parent, Express U.S., and conducts the Express retail operations in Canada.

**(b) Express Canada GC GP, Inc. and Express Canada GC, LP**

26. The Applicant, Express Canada GC GP, Inc. ("**Express Canada GC**") is a New Brunswick corporation with its head office in Saint John, New Brunswick. As shown in the chart above, Express Canada GC is a direct subsidiary of Express Canada. Accordingly, Express Canada GC is also an indirect subsidiary of Express U.S.

27. I became a director of Express Canada GC on April 20, 2017 and I am currently the sole director. On April 20, 2017, the two then-current directors of Express Canada GC were removed from their positions. I am also currently the sole officer of Express Canada GC, holding the position of President since April 20, 2017.

28. Express Canada GC is the general partner of Express Canada LP, a limited partnership existing under the laws of New Brunswick. As indicated in the chart above, Express Canada GC holds a 1% interest in Express Canada LP, with the remaining 99% being held by Express Canada.

29. As explained in more detail below, Express Canada LP issues Gift Cards (defined below) that are redeemable for Express merchandise in Canadian stores and online. Express Canada LP is therefore integral to the operations of the Express Canada Entities. Express Canada LP is also party to certain of the agreements with third parties that distribute Gift Cards.

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**C. Chief Place of Business**

30. The chief place of business of the Applicants is Ontario. Although the Applicants' registered head offices are located in New Brunswick, 11 of their 17 retail stores are located in Ontario. Express Canada therefore has more retail stores and sales in Ontario than in any of the other provinces in which it operates. Further, the majority of Express Canada's employees work in Ontario, and none in New Brunswick.

**D. The Business of the Applicants**

**(a) Canadian Apparel Retail Industry**

31. Canadian clothing and accessories retail stores generated aggregate sales revenue of approximately \$31.4 billion in 2016.<sup>1</sup> The retail apparel industry is highly competitive. In Canada, Express Canada's major competitors include Banana Republic, The Gap, Aritzia, H&M, Zara, and Garage, among many others.

32. The competitive retail industry in Canada has undergone significant changes in the past several years. This includes the entry of new retail concepts, the significant growth of online shopping, and an increase in both the frequency and level of discounts offered by retailers through promotions delivered to customers in-store and online. As a result of these changes, many Canadian retailers have experienced financial challenges and have discontinued their operations, including Costa Blanca, Jacob, Mexx Canada, Smart Set, Target Canada, and BCBG Max Azria.

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<sup>1</sup> Statistics Canada, Retail sales, by industry (unadjusted), online: <http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/trad15a-eng.htm>.

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**(b) Express Retail Business**

33. Express Canada opened its first stores in the Canadian marketplace in 2011. Express Canada's retail stores sell predominately private label merchandise under the "EXPRESS" label.

34. Express Canada's stores typically sell or carry the following categories of merchandise:

(a) Apparel and accessories, including clothing and apparel for men and women, accessories, and shoes; and

(b) Personal care products, including fragrances and certain cosmetic products.

35. Express Canada does not operate a separate e-commerce website. Although Canadian customers can purchase merchandise from [www.express.com](http://www.express.com), U.S.-based entities, not the Express Canada Entities, operate this website and conduct transactions with consumers ordering from Canada.

**(c) Leases and Retail Stores**

**(i) Store Formats and Locations**

36. The typical format for Express Canada retail stores is a strategically located store in a premium mall or shopping centre. The average store size is approximately 8,900 square feet.

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37. Express Canada conducts business through 17 retail locations in Ontario, Alberta, and British Columbia. The following chart sets out Express Canada's current store locations by geographical region:

<b>Province</b>	<b>Number of Express Canada Locations</b>
<i>Ontario</i>	11
<i>Alberta</i>	4
<i>British Columbia</i>	2
<b>Total</b>	<b>17</b>

38. All of the Express Canada Entities' retail operations are conducted in leased facilities. As of May 1, 2017, Express Canada, the lessee of all of the Leases, was to the best of its knowledge current on all of its lease obligations.

39. The Leases for Express Canada's retail stores are generally for terms of approximately 10 years, with between approximately 4  $\frac{3}{4}$  and 7  $\frac{3}{4}$  years remaining on their respective terms. Express Canada generally does not have the option to extend or renew its Leases beyond their existing terms, with the exception of the Lease in respect of the Express Canada store located in First Canadian Place, Toronto. This Lease contains the option for Express Canada to extend the Lease for one period of five years past the current term of the Lease.

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**(ii) Landlords**

40. Express Canada leases stores across Canada from third party landlords. Express Canada's Leases are generally with large retail landlords who own malls and shopping centres across Canada.

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41. The legal entities that are Landlords vary within landlord groups, often because special purpose corporations within the landlord groups have title to real property leased to Express Canada. Express Canada's Leases can be organized among six landlord groups:

<b>Landlord Group</b>	<b>Number of Express Canada Locations</b>
<i>Brookfield</i>	1
<i>Cadillac Fairview</i>	11
<i>Ivanhoe Cambridge</i>	1
<i>Morguard</i>	1
<i>Oxford Properties</i>	2
<i>Triple Five</i>	1
<b>Total</b>	<b>17</b>

**(iii) Lease Provisions**

42. Typical of retail store leases in Canada, many of the Leases contain provisions that impact Express Canada store operations, including:

- (a) *Going-Out-of-Business Sale Restrictions*: All of Express Canada's retail Leases contain restrictions that relate to going out of business sales in one form or another, including in most cases blanket prohibitions on "bankruptcy sales", "going out of business sales", "liquidation sales", and other similar terms.
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- (b) *Operating Covenants*: All of Express Canada's retail Leases contain operating covenants that require Express Canada to continuously occupy and operate in the leased premises, with various levels of detail. Most Leases require Express Canada to continue to operate the entire leased premises.
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**(iv) Express U.S. Indemnities**

43. Nine of Express Canada's retail Leases are currently subject to indemnities granted by Express U.S. in favour of the applicable Landlord. At one time or another, Express U.S. provided indemnities for 14 of Express Canada's retail store locations. However, as of May 1, 2017, the indemnities for five of the Leases had expired, with Express U.S. having no ongoing liability under those Leases after December 31, 2016.

44. Eight of the remaining indemnities expire between January 31, 2022 and January 31, 2025. Although these indemnities originally expired on December 31, 2016, they were extended and capped in maximum value in exchange for rent relief pursuant to certain tenant assistance agreements with the applicable Landlords.

45. The final remaining indemnity is not capped and runs the entire term of the applicable Lease.

46. Each of the nine unexpired indemnities contains provisions to the effect that Express U.S.'s obligations are not affected by the bankruptcy, winding down, or other creditors' proceedings in respect of Express Canada or the disclaimer of the applicable Lease.

**(d) Merchandising and Sourcing**

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47. Express Canada sources merchandise for retail sale exclusively from Express U.S. Before it was terminated on May 3, 2017 (as discussed below), these transactions were governed by a purchasing agreement effective as of October 1, 2011 between Express U.S. and Express Canada ("**Purchasing Agreement**"). Attached to my affidavit as **Exhibit A** is a copy of the Purchasing Agreement. Under this agreement, Express U.S. sourced and sold retail products to Express

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Canada. Express Canada then purchased these products from Express U.S. in agreed quantities at Express U.S.'s original acquisition cost.

48. Express U.S. ships inventory to Express Canada multiple times each month, with legal title transferring when the merchandise leaves the Ohio shipping building destined for Canada.

49. Express Canada has no direct third party merchandise suppliers, which significantly reduces the number of arm's length creditors of Express Canada.

50. The prices charged by Express U.S. to Express Canada for retail products provided to Express Canada under the Purchasing Agreement are calculated to provide Express Canada with an appropriate operating margin based on a transfer pricing study and Express U.S.'s transfer pricing policy last updated on October 31, 2016 ("**Transfer Pricing Policy**"). Attached to my affidavit as **Exhibit B** is a copy of the Transfer Pricing Policy. The overall objective of the Transfer Pricing Policy is to price transactions between Express Canada and Express U.S. in accordance with the terms and conditions that are similar to those which would govern an arm's length transaction. This analysis includes reviewing financial benchmark data for comparable third party companies to estimate the operating margins that an arm's length retailer (comparable to Express Canada's business) would expect to achieve.

51. The intercompany transfer prices recorded for products sold to Express Canada are based on Express U.S.'s original acquisition cost. Monthly invoices are issued by Express U.S. to Express Canada (in an electronic format) to record the intercompany purchases. At month end, a market support adjustment, derived from Express U.S.'s transfer pricing policies, is recorded such that Express Canada achieves a targeted operating income of approximately 3% of sales. Because Express Canada has been operating at a loss since inception, the market support

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adjustment provides a benefit to Express Canada, significantly reducing the price it pays for inventory purchases and other services described below. That is, at the end of each month, Express Canada's performance is reviewed to determine the extent of its losses. To compensate for such losses and to provide Express Canada with the targeted operating income, Express U.S. applies the market support adjustment to effectively reduce the prices paid by Express Canada for inventory and other services.

52. The monthly market support adjustments result in Express U.S. generating consistent and growing losses on the sale of retail products and the provision of services to Express Canada. For the fiscal year ended January 28, 2017, Express Canada received the benefit of market support adjustments totalling approximately \$12.8 million, effectively reducing its operating costs by this amount. Likewise, Express Canada received the benefit of adjustments of approximately \$12.3 million and \$11.5 million in fiscal 2014 and fiscal 2015, respectively.

53. Since establishing Express Canada in 2011, Express U.S. has provided a total of approximately \$56.4 million in market support credits to Express Canada. This amount is in addition to Express U.S.'s investment in Express Canada of approximately \$30 million.

54. Effective May 3, 2017, Express Canada and Express U.S. agreed to terminate the Purchasing Agreement. Express Canada does not intend to order any additional merchandise from Express U.S. during the CCAA proceedings. It does intend to receive the product that has already left the Ohio shipping building as title has already transferred to Express Canada.

55. Pursuant to the CCAA Services Agreement (as defined below), the Transfer Pricing Policy will cease to have effect as between Express U.S. and Express Canada as of May 3, 2017.

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(e) **Support Services of Express U.S.**

56. Express Canada's business is dependent on Express U.S. for administrative and business support services, including legal, accounting/finance, internal audit, treasury, tax, insurance/risk management, information technology ("IT"), store operations, procurement, real estate, marketing, and logistics services (collectively, "**Shared Services**"). Prior to May 3, 2017, Express U.S. provided these Shared Services from its head office in Ohio under a shared services agreement effective as of October 1, 2011 between Express U.S. and Express Canada (the "**Services Agreement**"). Without the Shared Services, the situation in the Canadian business would be chaotic. Express Canada cannot operate or function without the provision of the Shared Services from Express U.S. and, if the Shared Services were not provided, would be required to immediately cease operations. Attached to my affidavit as **Exhibit C** is a copy of the Services Agreement.

57. Under the Transfer Pricing Policy described above, Express Canada remunerates Express U.S. for Shared Services provided under the Services Agreement at cost, invoiced quarterly. Express U.S. calculates the actual total Shared Services costs incurred each quarter. Actual costs are pooled enterprise wide at year-end, with estimates being used for interim quarters based on the previous year's costs. These costs for Shared Services cover, among other things, wages and benefits of employees engaged in the performance of Shared Services, the costs of supervising the employees, and employees' insurance. The actual costs are allocated to Express Canada based on relevant factors, such as the number of stores, relative percentage of overall sales, and time studies.

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58. For the fiscal year ending January 28, 2017, Express Canada incurred a total of approximately \$1.1 million in fees for Shared Services. In the previous fiscal year, these service fees totalled approximately \$1.5 million.

59. On May 3, 2017, Express U.S. and Express Canada agreed to terminate the Services Agreement effective May 3, 2017. Express U.S. and the Express Canada Entities entered into a new administrative services agreement effective May 3, 2017 (the “**CCAA Services Agreement**”) for Express U.S. to continue providing Shared Services solely for the purposes of effecting an orderly wind down as part of a CCAA proceeding. A copy of the CCAA Services Agreement is attached to this affidavit as **Exhibit D**.

60. Under the CCAA Services Agreement, the Express Canada Entities agreed to pay an arm’s length fee to Express U.S. for the provision of Shared Services. It is anticipated that the total cost to Express Canada for the Shared Services during the orderly wind down will be approximately \$200,000, plus certain costs for Canadian expenses paid for by Express U.S. As the Transfer Pricing Policy will no longer apply after the Applicants file this Application under the CCAA, the market support adjustments described above will not continue to effectively reduce the costs of Shared Services to Express Canada.

61. The CCAA Services Agreement will only stay in effect for the duration of the CCAA proceedings. ~~Express U.S. would not be prepared to provide these Shared Services to a third party.~~

**(f) Intellectual Property**

62. All IP relating to the “EXPRESS” brand is owned by Express U.S. Pursuant to a licence agreement effective as of September 20, 2011 (the “**Licence Agreement**”), Express U.S. granted

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Express Canada a non-exclusive right to use the “EXPRESS” name, trademarks, and copyrights, together with related advertising materials and other marketing IP (including, for example, all advertising, promotional materials, store layouts and designs, product designs and store signage). Attached to my affidavit as **Exhibit E** is a copy of the Licence Agreement.

63. Although the Licence Agreement provided for Express Canada to pay Express U.S. a royalty determined in accordance with the applicable transfer pricing study, Express U.S. has in fact never charged Express Canada a royalty fee, as the Canadian retail operations were viewed by Express U.S. as a start-up. The suspended royalty fee has not accrued as a debt owing to Express U.S. and is not a liability of Express Canada.

64. On May 3, 2017, Express U.S. and Express Canada agreed to terminate the Licence Agreement effective May 3, 2017. Express U.S. and Express Canada entered into a new licence agreement effective as of May 3, 2017 (the “**CCAA Licence Agreement**”) for Express U.S. to grant Express Canada a royalty-free licence to use the essential IP for the duration, and limited purposes, of the wind down and realization process. A copy of the CCAA Licence Agreement is attached to this affidavit as **Exhibit F**. Express U.S. would not grant a royalty-free licence to use its IP to any third party.

**(g) Employees**

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65. As of the April 28, 2017 pay date, Express Canada employed 56 full-time employees and 283 part-time employees. A typical Express Canada store is staffed by 20 employees, with additional coverage during holidays and peak selling periods. The staff includes both full and part-time sales associates and store management (assistant managers, co-managers and store managers). With the exception of one district manager, all of Express Canada’s employees are

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store level employees. Sales associates report to and work under the supervision of the store management. The store managers oversee and are responsible for operations in their store, and report to the Express Canada district manager.

66. Store managers and the district manager are compensated through base salary and both company paid and partially company paid benefits, unless they opt out. Other sales associates are paid hourly wages; full time sales associates are also compensated with both company paid and partially company paid benefits, unless they opt out. In addition, store managers, co-managers, assistant managers, and the single district manager are eligible to receive bonuses if revenue and other certain targets are reached or exceeded, subject to the terms and conditions of the bonus program(s). Express Canada reserved the right to change or update the bonus program(s) at any time. Given the current performance of the Canadian stores, there are no outstanding bonuses payable. As of the filing of this Application, all existing bonus programs available to employees of Express Canada have been terminated and will be replaced by the employee retention program described in more detail below.

67. There are no registered pension plans or stock option plans for the Express Canada's managers or other employees. The employees are non-unionized and there is no collective agreement applicable to any of the retail store operations.

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68. As of April 21, 2017, 51 Express Canada associates were enrolled in the health benefits program providing supplemental medical, pharmacy, dental, life insurance, and disability programs. Express Canada has also established a group RRSP for employees who have completed at least one year of service (at least 1,000 hours worked in the year). Express Canada matches the first 4% that the employee saves of their eligible compensation through the program. As of May 1, 2017, only four Express Canada associates were enrolled in the group RRSP,

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which had a balance of \$70,216 administered by Desjardins Financial Security Life Assurance Company. During the orderly wind down, Express Canada proposes to continue matching the participating employees' RRSP contributions.

69. Employees enrolled in the group RRSP are given the option under the plan to: (1) transfer their plan to a registered pension plan; (2) transfer their plan to an individual RRSP; or (3) receive plan contributions plus any investment earnings in cash, subject to any withholding taxes (except for locked-in contributions and investment earnings transferred from a registered pension plan, which cannot be paid in cash, but which must be transferred pursuant to applicable laws). Express Canada intends to assist the associates participating in the group RRSP in dealing with their investments as part of these proceedings.

70. Express Canada employees are also eligible to receive discounts on purchases of Express merchandise, subject to the terms and conditions of the employee discount policy. During the orderly wind down, Express Canada proposes to continue the employee discount policy for a period of time.

71. Express Canada's payroll is processed by Express U.S., with Canadian withholding taxes and benefits being processed by Ceridian Canada Ltd. For 2016, Express Canada's average biweekly payroll was approximately \$218,000 (or \$5.7 million annually). None of Express Canada's employees are paid or employed by Express U.S., or any other U.S. based entity.

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**(h) Gift Cards**

72. Express Canada customers can purchase gift cards ("**Gift Cards**") to be redeemed for merchandise in Express Canada stores (that is, only in brick-and-mortar Express stores located in Canada) or through the e-commerce website at [www.express.com](http://www.express.com).

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73. Gift Cards sold in Canada were generally issued by Express Canada LP and are sold in Express Canada stores and through third party gift card sellers in Canada, including InComm Canada Prepaid, Inc. (“**InComm**”), CardSwap Inc., and National Gift Card Corp. As of April 1, 2017, the Express Canada Entities had an approximately \$423,000 liability for outstanding Gift Cards (with approximately \$370,000 of that liability being that of Express Canada LP, and with the remaining \$53,000 liability being that of Express Canada). As Express Canada receives the proceeds from the sale of Gift Cards, it owes a payable to Express Canada LP of \$377,000, although Express Canada is insolvent. These are the only assets and liabilities of Express Canada LP, making it insolvent. I understand that the Applicant Express Canada GC, as the general partner of Express Canada LP, is ultimately liable for the obligations of Express Canada LP. Express Canada GC has no material assets and is therefore also insolvent.

74. The largest distributor of Gift Cards is InComm, although it has not ordered any new Gift Cards for distribution through its kiosks since 2015. The Gift Cards that InComm distributes are inactive until they are sold to customers. When such a Gift Card is sold, the card is activated and a percentage of the sale proceeds is retained by InComm, with the balance of the sale proceeds paid to Express Canada. Before the Gift Card is activated, it does not represent a liability for any of the Express Canada Entities.

75. The other third party gift card sellers in Canada distribute pre-activated Gift Cards. However, less than \$2,000 is outstanding for Gift Cards sold through these other gift card sellers.

76. It is proposed in the Initial Order that outstanding Gift Cards will be honoured by Express Canada in the ordinary course at its retail locations but that further Gift Cards would not be sold or activated. Express Canada intends to direct its third party service provider responsible for activating Gift Cards to cease doing so as of the filing of this Application. This will not affect



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outstanding Gift Cards. In the view of Express Canada and the Liquidator, honouring outstanding Gift Cards will promote goodwill among customers during the orderly wind down and will assist in maximizing value for stakeholders as a whole by, among other factors, attracting customers to the Canadian retail stores. For similar reasons, it is proposed in the Initial Order that existing return policies for merchandise purchased prior to this Application be honoured during the wind down.

**(i) Suppliers**

77. As noted, Express Canada has no third party inventory suppliers (all inventory is purchased from Express U.S.) and therefore has a much smaller creditor profile than other retailers who purchase their inventory directly from third party suppliers.

78. Certain logistics services are supplied to Express Canada by Mast Logistics Services, Inc. (“**Mast**”). However, Mast contracts directly with Express U.S. and not Express Canada for the provision of Canadian logistics services. These logistics services are included in the Shared Services that Express U.S. provides to Express Canada.

79. Since September 2016, all of Express Canada’s credit and debit card transactions have been processed exclusively by Bank of America Merchant Services (“**BAMS**”). Express Canada relies on the services of BAMS to operate, as it would otherwise be unable to accept credit and debit cards in its retail stores. It is therefore proposed that the services provided by BAMS be continued under the protections in the proposed Initial Order and that BAMS be unaffected by any Plan filed by the Applicants in the CCAA proceedings.

80. Express Canada retail stores are also supplied with essential utilities (*e.g.*, water, fuel and electricity), at Express Canada’s expense, which, depending on the terms of the particular Lease,

may be paid to the Landlord at first instance. The continuous provision of these utilities is essential to operations.

(j) **Banking and Cash Management Systems**

81. Express Canada maintains a centralized cash management system which is administered by Express U.S. from the Columbus, Ohio head office to collect, transfer, and disburse funds generated by the operations of Express Canada (the “**Cash Management System**”).

82. Express Canada is wholly dependent upon Express U.S. for all treasury, banking and related services that are provided by Express U.S.

83. Express Canada has eight bank accounts, each maintained at Fifth Third Bank. Secured receipts and debit/credit card receipts are deposited into separate deposit accounts on a daily basis. These deposit accounts are zero balance Canadian dollar accounts and funds are transferred electronically on a daily basis into a single master account (the “**Canadian Master Account**”).

84. Express Canada maintains five disbursement accounts that process all outgoing wires, Automatic Clearing House (ACH) and cheque payments for disbursements to landlords, vendors, employees, Express U.S. for inventory purchases and intercompany charges, and for taxes. These disbursement accounts are funded by the Canadian Master Account.

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85. Express Canada provides a credit card to the Canadian district manager (the “**Credit Card**”) primarily for travel, store, and other miscellaneous expenses. Express Canada estimates that, on average, approximately \$1,800 is charged to the Credit Card on a monthly basis and that, as of April 27, 2017, approximately \$1,200 was accrued and unpaid under the Credit Card.

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86. Express U.S.'s Cash Committee meets on a regular basis to monitor, among other things, the cash needs of Express Canada. In addition, Express U.S.'s Financial Planning and Analysis department provides forecasts of income and expenses for Express Canada to assist with the evaluation of available cash for the year.

**E. Financial Position of Express Canada and Express Canada GC**

87. As a publicly traded company, Express, Inc. files consolidated financial statements with the U.S. Securities and Exchange Commission. These financial statements include the consolidated results of operations in the U.S., Canada, and other regional markets. A copy of Express, Inc.'s audited financial statements as of January 28, 2017 is attached as **Exhibit G** to this affidavit.

88. Express U.S. prepares stand-alone balance sheets for Express Canada's operations, a copy of which as at April 1, 2017 is attached as **Exhibit H** to this affidavit. These balance sheets reflect the consolidated financial position of all of the Express Canada Entities and have not been audited. Certain information contained in these unaudited balance sheets is summarized below.

**(a) Assets**

89. As at April 1, 2017, the Express Canada Entities had combined total assets with a book value of \$28,631,726.69, consisting of \$21,147,585.64 in current assets and \$7,484,141.05 in long-term assets.

90. The Express Canada Entities' asset position reflects that, in the past 12 months, Express Canada paid approximately \$18.1 million to Express U.S. to reduce or pay off intercompany balances, including payments in respect of past inventory purchases and for the provision of

Shared Services by Express U.S., net of the benefits received through the Transfer Pricing Policy. These intercompany balances are described more fully below.

(i) **Current Assets**

91. As at April 1, 2017, the Express Canada Entities' current assets consisted of the following:

- (a) *Cash and cash equivalents* – \$13,796,404.68
  - (b) *Net receivables* – \$279,152.59, reflecting receivables related to HST/GST payments.
  - (c) *Inventories* –\$5,434,591.72, reflecting the actual cost of the inventory acquired from Express U.S. As discussed above, owing to the market support adjustments, the amounts that Express Canada paid for this inventory were ultimately substantially less.
  - (d) *Prepaid rent* – \$1,393,461.63, reflecting amounts for April rent. As April rent had not yet been expensed, a corresponding account payable was booked as a liability.
  - (e) *Other current assets* – \$243,975.02, including other prepaid amounts, such as prepaid insurance and amounts paid for marketing services.
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92. The majority of the Express Canada Entities' current assets are therefore comprised of cash and cash equivalents and inventories.

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**(ii) Non-Current Assets**

93. As at April 1, 2017, the Express Canada Entities' non-current assets consisted of the following:

(a) *Property and equipment – approximately \$7.5 million*, reflecting the depreciated book value of fixed assets and furniture in Express Canada's retail stores. These assets were generally acquired through Express U.S.'s approximately \$30 million investment in Express Canada, described below under Shareholder's Equity. The assets have subsequently depreciated in value, as reflected in the books and records of Express Canada.

(b) *Other non-current assets – \$7,200.00*

94. Given the Transfer Pricing Policy, Express Canada had no tax losses to create a deferred tax asset. Given the Licence Agreement and the fact that IP in the "EXPRESS" brand is owned by Express U.S., Express Canada has no non-current assets or goodwill related to tradenames or trademarks.

**(b) Liabilities**

95. As at April 1, 2017, the Express Canada Entities' total liabilities were approximately \$11,918,759.34, consisting of current liabilities of \$2,094,635.59 and long-term liabilities of \$9,824,123.75. These liabilities as at April 1, 2017 did not reflect the contingent claims of Landlords for future rent payments for the remaining terms of the Leases, which have crystallized by Express Canada's decision to cease operations and corporate actions taken in connection with such decision.

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**(i) Current Liabilities**

96. As at April 1, 2017, the Express Canada Entities' current liabilities included:
- (a) *Accounts payable* – \$1,377,719.56, including the corresponding accounts payable for pre-paid rent (discussed above) (approximately \$1.1 million of the total accounts payable) and amounts owing to other third party trade creditors (approximately \$300,000 of the total payables).
  - (b) *Deferred revenue* – \$423,008.59, reflecting the amount of outstanding Gift Cards.
  - (c) *Accrued expenses and other liabilities* – \$1,021,643.27, consisting of amounts accrued in respect of sales taxes, salary and vacation pay, and other third party trade creditors.
  - (d) *Intercompany liabilities* – (\$727,735.83), reflecting a balance owing by Express U.S. to Express Canada (given the timing of intercompany transfers and adjustments). This intercompany balance is described more fully below.

**(ii) Long-Term Liabilities**

97. As at April 1, 2017, the Express Canada Entities' long-term liabilities included deferred lease credits of \$9,824,123.75, comprised of two long-term liabilities:
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- (a) *Tenant Allowances* – *Approximately \$3 million*, reflecting allowances received from Landlords to support leasehold improvements (e.g., renovations), received at the beginning of the lease term and amortized over the life of the Lease. Approximately \$3 million of these allowances have not yet been amortized.
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- (b) *Straight Line Rent Accrual – Approximately \$6.9 million*, reflecting the accounting treatment of Express Canada's Leases, given that the rent payments escalate over time. For Leases of this nature, generally accepted accounting principles require Express Canada to calculate the average rent payment over the life of the Lease and to record Lease expenses consistently on that basis (*i.e.*, based on the average, rather than the actual cash rental payments, which increase over time). Based on this accounting treatment, in the early years of the Lease, the tenant accrues expenses that are higher than the actual cash payments (resulting in a cash advantage). However, the inverse is true for later periods, as the actual cash rent payments exceed the accrued rent expense. Generally accepted accounting principles require the tenant to record the benefit accrued in the early years as a long-term liability. This is common within the retail industry generally.

98. As set out above, as the sole director of Express Canada, in consultation with my advisors, I resolved on May 3, 2017 to cease operations and wind down the business. The realizable value of Express Canada's assets is insufficient to satisfy the claims of the Landlords, resulting from the cessation of operation, under their respective Leases, even after taking into account the mitigation obligation of the Landlords. Express Canada has insufficient financial resources to satisfy all such Landlord obligations. Accordingly, Express Canada is insolvent. As noted above, ~~Express Canada LP and Express Canada GC are independently insolvent given~~ Express Canada LP's Gift Card liability.

**(c) Stockholders' Equity**

99. As at April 1, 2017, the stockholders' equity in respect of the Express Canada Entities was \$16,712,967.35, consisting of the following:

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- (a) *Additional Paid in Capital* – \$29,563,661.26, reflecting Express U.S.’s investment in Express Canada. Although this investment was originally a debt owing by Express Canada to Express U.S., the debt was equitized on May 5, 2014. That is, Express U.S.’s investment became an equity investment (paid in capital) in Express Canada rather than a debt claim. This amount stays constant year-to-year on the Express Canada Entities’ balance sheet.
- (b) *Accumulated other comprehensive income* – (\$1,138.56)
- (c) *Retained earnings* – (\$12,849,555.35), reflecting Express Canada’s accumulated losses after taking into account the market support adjustment from Express U.S. Even though Express U.S. makes adjustments to ensure that Express Canada generates operating profits of 3%, Express Canada may still incur a net loss due to additional costs, such as asset impairments. Importantly, Express Canada has had to take impairments reflecting that certain of its stores are not viable. As a result, the retained earnings of the Express Canada Entities are negative notwithstanding the financial support of Express U.S.

100. Express U.S.’s losses from the expansion into Canada are much higher than the negative retained earnings entry on the balance sheet. Factoring out the market support adjustments ~~(which are built into the retained earnings entry), the retained earnings would reflect additional~~ losses of approximately \$56.4 million.

**(d) Earnings**

101. Since 2011, Express Canada has experienced yearly losses across the majority of its now 17 Canadian locations.



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102. For the fiscal year ended January 28, 2017, Express Canada generated revenue of \$45 million, or approximately \$295 per square foot of leased premises. These results lag behind Express U.S.'s operations and are insufficient to absorb Express Canada's occupancy costs.

103. Reflecting Express Canada's high occupancy costs (described in more detail below), its EBITDA in 2016 was negative \$7.4 million prior to taking into account the market support adjustments. These negative earnings take into account the straight-line impact of the short term rent concessions, discussed above, from certain Landlords. Without these concessions, EBITDA would have been even more unfavourable.

104. Most of Express Canada's losses are absorbed by Express U.S. on a monthly basis through the market support adjustments. As noted above, the Transfer Pricing Policy provides that Express U.S. sells inventory to Express Canada to maintain the latter's operating margin, the result being that Express Canada is able to purchase inventory from Express U.S. at significantly discounted prices. Thus, although the Express Canada Entities' balance sheets on their face reflect positive earnings for some years, this is because the losses have already been absorbed by Express U.S. through the pricing of inventory transfers. As Express U.S. has resolved to discontinue supporting Express Canada's losses, Express Canada cannot continue operating. As also noted above, notwithstanding Express U.S. absorbing most of the losses, Express Canada has still accumulated negative earnings exceeding \$12 million.

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105. Of all of the 17 retail stores, only one Express Canada store generated positive EBITDA in 2016 in a nominal amount. Although certain stores' sales showed improvements in 2015, sales declined approximately 9% in 2016, resulting in increasingly negative cash flow.

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106. Express Canada's gross occupancy costs are currently trending in the range of 40% of its revenue which is significantly higher than industry benchmarks. As Express Canada's Leases provide for escalating rent payments, these unsustainable ratios would likely only worsen with time. This cost structure cannot be brought into sustainable levels with the sorts of temporary rent concessions that certain of the Landlords have previously been willing to offer. The magnitude of rent reductions that would be required to make Express Canada sustainable are not practical or realistic for either the Landlords or Express Canada.

107. The continued appreciation of the U.S. dollar relative to the Canadian dollar has added significant strain on the business. All of Express Canada's inventories are purchased in U.S. dollars, with merchandise necessarily being priced in stores competitively in Canadian dollars. Accordingly, given the weakness of the Canadian dollar, Express Canada (or Express U.S., to the extent it absorbs the loss) must pay relatively more for its inventory which is purchased in U.S. dollars, negatively impacting its profit margin.

108. Additionally, softness in the western Canadian market due to declining energy prices and the corresponding impact on consumer spending has depressed Express Canada's sales in this region.

**(e) Intercompany Balance**

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109. As of April 1, 2017, there was an intercompany balance of \$727,735.83 owing by Express U.S. to Express Canada. However, the amounts owing either to/by Express Canada from/to Express U.S. depend on the timing of payments and the application of transfer pricing adjustments. At other times, Express Canada owes amounts to Express U.S. To the best of my knowledge, as of today's date, the April 1, 2017 intercompany balance will have reversed, such

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that Express Canada is now in a net debtor position with respect to Express U.S. Express Canada, in consultation with the Proposed Monitor, is in the process of reconciling the intercompany balance. If appointed as the monitor, the Proposed Monitor will provide an updated balance to the Court in a post-filing report.

110. At any given time, the intercompany balance reflects unpaid amounts due from Express Canada to Express U.S., such as amounts owing for inventory and Shared Services, and other adjustments to reimburse Express U.S. where it has undertaken costs on behalf of Express Canada (e.g., insurance or other amounts paid for Express Canada's benefit). The intercompany balance also reflects the market support adjustments in favour of Express Canada (which effectively reduced the amounts Express Canada owes to Express U.S. for inventory and Shared Services).

111. Express Canada incurs interest on the intercompany balance when net amounts are owing to Express U.S., and it earns interest on the balance when amounts are owed by Express U.S. In either case, interest is recorded quarterly in arrears based on an interest rate of 0.96% per annum.

112. Throughout the 2016 calendar year, the intercompany balance reflected a net balance owing by Express Canada to Express U.S. (i.e., it reflected a debt of Express Canada). Although Express Canada made periodic payments (totalling \$11 million) against this debt over the course of the 2016 calendar year to Express U.S., the balance owing to Express U.S. had increased by the end of the year (largely due to Express Canada's continued acquisition of inventory and its use of Shared Services). As of December 31, 2016, Express Canada owed Express U.S. a net liability of approximately \$9.6 million.

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113. In early January, 2017, Express Canada fully discharged this liability to Express U.S. by making a cash payment exactly equal to the balance owing as of December 31, 2016. Express Canada had sufficient cash resources to make this payment.

114. Following this payment, in January, 2017, intercompany adjustments reversed the balance between Express Canada and Express U.S., with Express U.S. becoming the debtor. In particular, Express U.S. continued to apply in Express Canada's favour the market support adjustments (reducing the purchase price of inventory and services sold to Express Canada) and other adjustments (including because Express Canada had overpaid for Shared Services fees in 2016 based on estimates).

115. From the end of January, 2017 to the end of March, 2017, the intercompany balance had been owing from Express U.S. to Express Canada. However, the balance in favour of Express Canada was reduced each month since the end of January, 2017, given that Express Canada continued to purchase inventory from Express U.S. and to utilize Shared Services for which fees were owing to Express U.S. These amounts were set off against the balance owing to Express Canada. As noted above, to the best of my knowledge, the intercompany balance will have reversed as of today's date, such that Express Canada currently owes a debt to Express U.S.

**(f) Secured Debt**

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116. The only creditor that holds general security over the assets of Express Canada is Express U.S. There are no secured creditors of any of the other Express Canada Entities. PPSA search results for Ontario, Alberta, British Columbia, and New Brunswick are attached as **Exhibit I**.

117. Under a General Security Agreement dated as of January 5, 2017 (the "GSA"), Express Canada granted to Express U.S. a general security interest over substantially all of its Property

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and assets. Attached to my affidavit as **Exhibit J** is a copy of the GSA. The GSA secures any amounts owing from time to time by Express Canada to Express U.S., arising after January 5, 2017, including all future amounts owing under the Purchasing Agreement, the Services Agreement, and the License Agreement.

118. The GSA was entered into while Express U.S. and Express Canada were considering all options for the future of Express Canada. Express U.S. had already invested substantial amounts in Express Canada, and the performance of the Canadian business continued to deteriorate. In this context, and as part of the broader consideration of options, Express U.S. advised Express Canada that it required security in order for Express U.S. to continue to provide products and services to Express Canada under the Purchasing Agreement, the Services Agreement, and the License Agreement. Express Canada also provided the security in consideration for Express U.S. providing further accommodations, loans and extensions of credit under these agreements.

119. From January 5, 2017, when the GSA was entered into, until April 1, 2017, Express Canada accumulated an approximately \$875,000 payable owing to Express U.S. (which was secured under the GSA). This was offset by a receivable of approximately \$1.6 million owing to Express Canada by Express U.S., leaving the intercompany balance of \$727,735.83 owing to Express Canada. As noted above, I understand that the intercompany balance has reversed as of today's date, such that Express U.S. is now a secured creditor of Express Canada.

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**(g) Other Stakeholders**

120. As of April 30, 2017, there were no outstanding litigation claims against the Express Canada Entities.

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121. Express Canada expects the Landlords to be a significant component of the creditor body. Trade claims by Express Canada's other suppliers are expected to be less than \$1 million.

**F. Urgent Need for Relief**

122. As described above, Express U.S. has provided Express Canada with approximately \$56.4 million in market support payments to support the expansion into Canada since 2011, in addition to its approximately \$30 million investment. However, after considering all reasonable alternatives, Express U.S. has determined that it will no longer invest resources in the Express Canada Entities and it will no longer support the continued operations of Express Canada at a loss.

123. In the past few years, Express Canada, with the assistance of Express U.S., has attempted to address its operating challenges, including by undertaking numerous strategic initiatives focused on improving profitability, including approaching the Landlords to reduce occupancy costs. For example, as a result of certain tenant assistance agreements discussed above, Express Canada was able to generate approximately \$3 million in annual cash savings for two years. However, certain of the other Landlords did not provide any relief.

124. As set out above, Express Canada has explored other strategies to reduce occupancy costs, including the possibility of larger, more permanent rent reductions, possible variable rent structures based on future sales, and closures of poorer performing locations. However, none of these potential strategies are achievable or practical.

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125. In addition to reducing occupancy costs, Express Canada, with the assistance of Express U.S., implemented a number of operational improvement initiatives, including: (1) modifications to merchandising strategies, pricing, and promotional strategies; (2) investments in marketing,

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IT, analytics, and brand surveys; and (3) various other programs in an attempt to increase brand awareness and boost top line performance.

126. However, the temporary rent relief and Express Canada's operational initiatives have not been enough to compensate for declining sales and unsustainable occupancy costs relative to sales. Further, the temporary rent relief has not been enough to compensate for the unfavourable foreign exchange on inventory purchases. As Express U.S. purchases inventory in U.S. dollars and Express Canada sells it in Canadian dollars, the unfavourable exchange rates put strain on this business model.

127. Following a thorough review of Express Canada's poor performance and negative cash flow, and after the careful consideration of all options, I am informed by senior management of Express U.S. that the board of managers determined on May 3, 2017 that, in its business judgment, it is in the best interests of its business to discontinue its support of Express Canada and to focus instead on other regional markets.

128. Due to its operational and financial dependence on Express U.S., Express Canada cannot continue operations without the full support of Express U.S, including a licence to use Express U.S.'s IP relating to the "EXPRESS" brand name. As that support is no longer available, Express Canada has no choice but to cease operations in Canada and to conduct an immediate orderly and responsible wind down of operations for the benefit of its stakeholders.

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129. As set out above, the corporate actions of Express Canada, including the resolution to cease operations, have resulted in events of default under each of the Leases, which events of default have in turn, resulted in either the automatic acceleration of some or all rents due under the Leases or the ability of the Landlords to accelerate all rents due thereunder. I am aware that

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the Landlords have contingent claims for future rent payments and unpaid tenant allowances, and possibly other claims, under the long-term Leases that far exceed \$5 million and which, together with the Express Canada Entities' other liabilities, exceed the Express Canada Entities' total assets. As a result, without the funding and financial support from Express U.S. required to keep Express Canada operational, the Express Canada Entities have insufficient assets to satisfy their debts, cannot meet their obligations as they come due, and are therefore insolvent.

130. Express Canada has determined that an orderly and controlled wind down would be in the best interests of all stakeholders, including Landlords. However, the continued support, assistance and co-operation of Express U.S. is required to conduct an orderly and controlled wind down of Express Canada's operations. The continued provision of Shared Services by Express U.S. is essential for Express Canada to operate. Express Canada also requires a licence from Express U.S. to use the "EXPRESS" name and other IP to conduct an orderly realization of its remaining merchandise. I am informed by senior management of Express U.S. that the board of managers has determined that Express U.S. would only be willing to continue supporting Express Canada through the provision of Shared Services and IP if: (1) it is for the limited purposes of an orderly wind down; and (2) the wind down is court-supervised under the CCAA.

131. On May 3, 2017, after being informed of the decision of Express U.S. to discontinue its support of the Canadian operations, the boards of directors of Express Canada and Express Canada GC (each through me as the sole director) resolved to commence this CCAA proceeding.

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#### **G. Relief Sought**

132. The Applicants believe that this CCAA proceeding is the most practical method to ensure a fair and orderly wind down of the Express Canada business, which will maximize recoveries in

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the interests of all stakeholders. The Applicants also understand that Express U.S. will only continue to support the operations of the Express Canada business in a process conducted pursuant to the CCAA. The Applicants are hopeful that the proposed CCAA proceedings will culminate in a consensual plan of compromise, with broad support among stakeholders.

**(a) Stay of Proceedings**

133. The Express Canada Entities urgently require a stay of proceedings and other protections as provided by the CCAA so that they will have the breathing space to develop and conduct a controlled and orderly wind down of operations for the benefit of their stakeholders. It would be detrimental to Express Canada's ability to conduct a responsible wind down and realization process in the best interests of its stakeholders if proceedings were commenced or rights or remedies executed against the Express Canada Entities in the short period available to maximize recoveries for all stakeholders.

134. The Applicants request that the benefit of the stay be extended to Express Canada LP, a limited partnership closely intertwined with the operations of the Applicants in respect of the issuance of Gift Cards. The extension of the benefit of the stay to Express Canada LP is necessary to maintain stability and value in the CCAA process. Any proceedings commenced against Express Canada LP would necessarily involve key personnel of the Applicants, who collectively hold a 100% interest in Express Canada LP. For example, to respond to any claim, the Applicants would need to provide evidentiary support through witnesses or documents. The need to provide such support could be a significant distraction for the Applicants' key personnel and would distract from the paramount goal of achieving an orderly and controlled wind down.

135. Having regard to the circumstances, the granting of a stay is in the best interests of the Applicants and their stakeholders. The stay will provide the Applicants with the breathing space required to develop and oversee an orderly wind down process, which in turn will help to protect the interests of the Applicants' stakeholders, including employees, suppliers, Landlords, and customers, all with the eventual goal of developing and implementing a plan of arrangement to distribute recoveries to creditors.

**(b) Proposed Monitor**

136. The Proposed Monitor has consented to act as the monitor of the Express Canada Entities under the CCAA. A copy of the Proposed Monitor's consent to act as monitor is attached to my affidavit as **Exhibit K**.

137. I understand that the Proposed Monitor will file a pre-filing report with the Court as Proposed Monitor in conjunction with the Applicants' request for relief under the CCAA.

**(c) Administration Charge**

138. In connection with its appointment, it is proposed that the Proposed Monitor, along with its counsel and counsel to the Express Canada Entities, will be granted a Court-ordered charge on the present and future assets, property and undertakings of the Express Canada Entities ("**Property**"), as security for their respective fees and disbursements relating to services rendered in respect of the Express Canada Entities up to a maximum of \$650,000 (the "**Administration Charge**"). The Administration Charge is proposed to have first priority over all other charges.

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**(d) Directors' and Officers' Protection**

139. I am advised by Tracy Sandler of Osler, Hoskin & Harcourt LLP, counsel for the Applicants, and believe that, in certain circumstances, directors can be held liable for certain obligations of a company owing to employees and government entities, which may include unpaid accrued wages and unpaid accrued vacation pay, together with unremitted sales, goods and services, and harmonized sales taxes.

140. It is my understanding that the Applicants' present and former directors and officers who are or were employed by either of the Applicants are among the potential beneficiaries under a liability insurance policy that has an aggregate annual limit of US\$10 million, with a US\$1 million deductible. This policy only covers directors' statutory liabilities for taxes (provided the Canada Revenue Agency has commenced collection proceedings against the individual directors), including employee income tax withholdings, but not unpaid accrued wages. I do not believe that this insurance policy provides sufficient coverage against the potential liability that the directors could incur in relation to this CCAA proceeding.

141. In light of the potential liabilities and the insufficiency of available insurance, I, as the only current director and officer of the Applicants, have indicated that my continued service and involvement in this proceeding is conditional upon the granting of an Order under the CCAA which grants a charge in favour of the directors and officers of the Applicants in the amount of \$500,000 on the Property of the Express Canada Entities (the "**Directors' Charge**"). The Directors' Charge would be subordinate to the proposed Administration Charge. The Directors' Charge would act as security for the indemnification obligations for directors' potential liabilities, as set out above. The Directors' Charge is necessary so that the Express Canada Entities may benefit from my experience with the business as I guide the realization and wind

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down efforts. The charge would only be relied upon to the extent of the insufficiency of the existing insurance.

**(e) Cash Flow Forecast**

142. The Applicants, with the assistance of the Proposed Monitor (if appointed, in such capacity, the “**Monitor**”), have prepared 13-week cash flow projections as required by the CCAA. A copy of the cash flow projections is attached as **Exhibit L**. The cash flow projections demonstrate that the Express Canada Entities have sufficient liquidity to continue going concern operations during the proposed stay period should the stay of proceedings be granted. It is not contemplated that the Express Canada Entities will require debtor-in-possession financing.

143. The Applicants anticipate that the Monitor will provide oversight and assistance and will report to the Court in respect of the Express Canada Entities’ actual results relative to cash flow forecast during this proceeding. Existing accounting procedures will provide the Monitor with the ability to accurately track the flow of funds and assist with any issues that may arise.

**(f) Payments During the CCAA Proceedings**

144. During the course of this proceeding, Express Canada intends to make payments for goods and services supplied to it post-filing in the ordinary course, as set out in the cash flow projections described above and as permitted by the draft Initial Order.

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145. Express Canada is proposing in the draft Initial Order that it be authorized, with the consent of the Monitor, but not required, to make certain payments for goods and services actually supplied to Express Canada prior to the date of the Initial Order, the suppliers of which include: (1) providers of credit, debit and gift card processing services (e.g., BAMS); and (2)

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logistics or supply chain providers (e.g., customs brokers and freight forwarders). These categories of suppliers are fundamental to continuing operations and any disruption of their services could jeopardize the orderly wind down, given the expedited timelines for the orderly wind down. Accordingly, the Applicants seek additional flexibility in ensuring the supply of required services remains uninterrupted. For third party suppliers other than (1) and (2), the draft Initial Order proposes permitting payments in respect of pre-filing amounts up to a maximum of \$50,000 with the consent of the Monitor, if, in the opinion of the Express Canada Entities, the supplier is critical to the orderly wind down of Express Canada's business.

**(g) Liquidation Consultant and Realization Process**

146. As part of the overall wind down process for the Canadian business, the Applicants intend to seek the Court's approval to, in consultation with the Monitor, implement a proposed realization process ("**Realization Process**") to liquidate Express Canada's remaining inventory, furniture, fixtures and equipment (collectively, the "**Merchandise & FF&E**").

147. The Applicants intend to file a motion seeking approval of the Realization Process and a consulting agreement with the Liquidator as soon as possible should the proposed Initial Order be granted. Express Canada intends to propose the following timeline for its CCAA proceedings subject to the direction of this Honourable Court:

<b>Proposed Date</b>	<b>Step</b>
May 4, 2017	Hearing of application for Initial CCAA Order
May 5, 2017	Serve motion seeking approval of Realization Process and sale guidelines
May 10, 2017	Hearing to approve the Realization Process and sale guidelines
May 11, 2017	Commence liquidation of Canadian stores

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Proposed Date	Step
May 25, 2017	Hearing for CCAA claims process motion, comeback motion, and stay extension
June 15, 2017	Projected liquidation sale end date and Express Canada to vacate leased premises
July 5, 2017	Proposed CCAA claims process bar date (deadline to file claims in the CCAA process)

148. The Applicants believe that engaging a professional liquidator such as the Liquidator to undertake a sale of the Merchandise & FF&E will produce better sales results than an attempt by Express Canada to sell the Merchandise & FF&E without such professional assistance. At the same time, the Liquidator advises that the involvement of Express Canada in the Realization Process is essential to maximizing the proceeds. The Applicants accordingly believe that it is crucial to seek Court approval of the Realization Process as soon as possible to maximize the amounts available to their stakeholders and to avoid depressed results during the looming summer months.

**(h) Employee Retention Program**

149. Express Canada proposes in connection with this Application to provide its sales associates and store management with working notice of termination, effective June 15, 2017. Given the essential role that employees would play in the Realization Process, Express Canada has developed a twofold employee retention program (the “ERP”) to incentivize active employees to remain in their positions. I understand that the Proposed Monitor supports the ERP.

150. First, Express Canada proposes to offer a retention incentive payment equal to the employee’s regular wages (calculated in accordance with applicable employment standards legislation) for any period not worked because their respective stores closed before the targeted

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completion date of the Realization Process on June 15, 2017. For example, if the decision is made to close a store one week before June 15, 2017 because the Realization Process was completed in respect of that store ahead of schedule, Express Canada proposes to pay that store's active employees a retention incentive payment equal to one week of regular wages. Express Canada believes that this will incentivize employees to remain in their positions and perform an efficient realization.

151. Second, Express Canada and the Liquidator have developed, in consultation with the Proposed Monitor, a field management retention and sales bonus program for the district manager and store management (store managers, co-managers, associate managers, and sales leaders) who will be essential to managing the wind down at the regional and store-levels. Eligible employees who remain actively employed until Express Canada provides termination/release dates could obtain bonuses paid out of a budget pool equal to approximately 10% of the eligible payroll during the anticipated five week Realization Process. Based on current payroll, the bonus pool should not exceed approximately \$56,500. Eligible employees would earn 60% of their budgeted bonus payment (determined based on their positions with Express Canada) for remaining in their positions until their release date. If the Realization Process reaches certain overall sales goals, the eligible employees could earn the remaining 40%.

152. Express Canada also proposes during the Realization Process to continue matching employees' contributions to the group RRSP in accordance with the plan and to continue the employee discount policy.

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153. Payments to employees under the proposed ERP would be conditional upon the employees not having resigned or having been terminated for cause prior to the payment date.

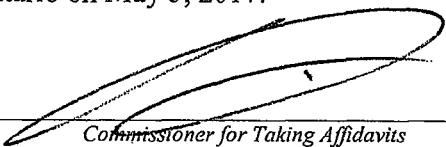
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**H. Conclusion**

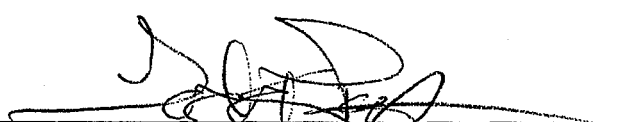
154. I believe that Express Canada and Express U.S. have made every reasonable effort, and assessed every available option, in their extensive efforts to find a way to succeed in Canada. However, no way was identified that could stop the significant losses projected for the foreseeable future.

155. I am confident that granting the Initial Order sought by the Applicants is in the best interests of the Express Canada Entities and their stakeholders, generally. Without the stay of proceedings, the Express Canada Entities face an immediate cessation of operations rather than an orderly and responsible wind down. I believe that the CCAA proceeding is the only viable method to effect a fair and orderly wind down process for the benefit of all stakeholders.

SWORN BEFORE ME at Toronto, in  
Ontario on May 3, 2017.



*Commissioner for Taking Affidavits*



**TODD PAINTER**

**William David Rankin**

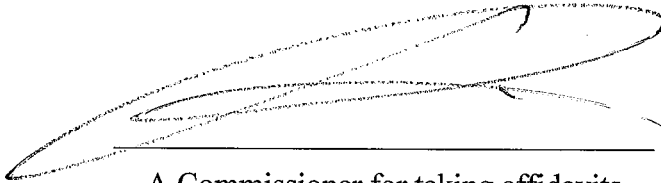
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TAB C

THIS IS **EXHIBIT "C"**  
TO THE AFFIDAVIT OF TODD PAINTER,  
SWORN BEFORE ME THIS  
4TH DAY OF MAY, 2017.

A handwritten signature in black ink, appearing to read "William David Rankin", written over a horizontal line.

A Commissioner for taking affidavits

**William David Rankin**

# MERCHANT RETAIL SOLUTIONS ULC

May 3, 2017

VIA EMAIL

Express Fashion Apparel Canada Inc.  
 c/o Tracy C. Sandler, Partner  
 OSLER, HOSKIN & HARCOURT LLP  
 100 King Street West - 1 First Canadian Place  
 Suite 6200, P.O. Box 50  
 Toronto ON M5X 1B8  
 Phone: 416-862-5890  
 Cell: 416-560-6523  
 Email: [tsandler@osler.com](mailto:tsandler@osler.com)

And

Todd Painter  
 EXPRESS FASHION APPAREL CANADA INC.  
 44 Chipman Hill, Suite 1000,  
 Saint John, NB E2L 4S6, Canada  
 Phone: 614-474-4089  
 Facsimile: 614-474-3492  
 Email: [tpainter@express.com](mailto:tpainter@express.com)

Re: Letter Agreement Governing Inventory Disposition

Dear Tracy and Todd:

By executing below, this letter shall serve as an agreement ("Agreement") between Merchant Retail Solutions, ULC, an affiliate of Hilco Merchant Resources, LLC ("Consultant" or a "Party"), and Express Fashion Apparel Canada Inc., on the other hand ("Merchant" or a "Party" and together with the Consultant, the "Parties"), under which Consultant shall act as the exclusive consultant for the purpose of conducting a sale of certain Merchandise (as defined below) at the Merchant's stores set forth on Exhibit A (each a "Store" and collectively, the "Stores") through a "Store Closing", "Everything Must Go", "Everything on Sale" or similar themed sale (the "Sale") in accordance with the terms of the sale guidelines substantially in the form attached hereto as Exhibit B (the "Sale Guidelines"). Only Merchant-approved Sale terminology will be utilized at each Store.

The Merchant intends to file an application with the Ontario Superior Court of Justice (Commercial List) (the "Court") for protection under the *Companies' Creditors Arrangement Act* (the "CCAA Proceedings"). As part of the CCAA Proceedings, (a) it is contemplated that Alvarez & Marsal Canada Inc. will be appointed as monitor of the Merchant (if appointed, in such capacity, the "Monitor"), and (b) the Merchant intends to obtain an order approving, among other things, this Agreement and the conduct of the Sale, in accordance with the terms hereof and the Sale Guidelines (the "Sale Approval Order").

**A. Merchandise**

For purposes hereof, "Merchandise" shall mean all goods, saleable in the ordinary course, located in the Stores on the Sale Commencement Date (defined below). "Merchandise" does not mean and shall not include: (a) goods that belong to sublessees, licensees or concessionaires of Merchant or are leased or licensed from third parties by Merchant; (b) owned furnishings, trade fixtures, equipment and improvements to real property that are located in the Stores (collectively, "FF&E"), or any FF&E that is leased by Merchant located in the Stores; and (c) damaged or defective merchandise that cannot be sold.

**B. Sale Term**

For each Store, the Sale shall commence no later than May 11, 2017 (the "Sale Commencement Date") and conclude no later than June 15, 2017 (the "Sale Termination Date"); provided, however, that the Parties may, in consultation with the Monitor, mutually agree in writing to terminate the Sale at any Store prior to the Sale Termination Date. The period between the Sale Commencement Date and the Sale Termination Date shall be referred to as the "Sale Term." At the conclusion of the Sale, Consultant shall surrender the premises for each Store to Merchant (a) in broom clean condition, and (b) if requested by Merchant, in accordance with the lease requirements for such premises; provided, however, that, if Merchant requests that Consultant surrender any premises in accordance with the lease requirements, Merchant shall bear all costs and expenses associated with surrendering the premises in accordance with the lease requirements for such premises to the extent such expenses were incurred by Consultant in accordance with a budget mutually agreed to in writing between the Consultant and Merchant. At the conclusion of the Sale at each Store, Consultant shall photographically document the condition of each such Store and provide such photographs to Merchant within ten (10) days. Photographs shall reference with specificity each Store by number, name and/or location.

**C. Project Management**

(i) Consultant's Undertakings

During the Sale Term, Consultant shall, in collaboration with Merchant, (a) provide qualified supervisors (the "Supervisors") engaged by Consultant and approved in advance by Merchant to oversee the management of the Stores and the Sale; (b) determine appropriate point-of-sale and external advertising for the Stores, approved in advance by Merchant; (c) determine appropriate discounts of Merchandise, staffing levels for the Stores, and appropriate bonus and incentive programs, if any, for the Stores' employees, in each case approved in advance by Merchant in consultation with the Monitor; (d) oversee display of Merchandise for the Stores; (e) to the extent that information is available, evaluate sales of Merchandise by category and sales reporting and monitor expenses; (f) maintain the confidentiality of all proprietary or non-public information regarding Merchant in accordance with the provisions of the confidentiality agreement signed by the Parties; (g) assist Merchant in connection with managing and controlling loss prevention and employee relations matters; (h) to the extent necessary, assist Merchant in obtaining all required permits and governmental consents required to conduct the Sale; (i) ensure that all marketing, advertising and other communications provided by Merchant to Consultant for distribution to customers are provided to customers by including same in bags along with purchased

merchandise or through other similarly appropriate means; and (j) provide such other related services deemed necessary or appropriate by Merchant and Consultant.

Without limiting the generality of the foregoing, all information of a business nature relating to the pricing, sales, promotions, marketing, assets, liabilities or other business affairs of Merchant, its customers, employees, parent, subsidiary, or other affiliated entities (for purposes of this paragraph, all such entities are included within each reference to "Merchant") is Merchant's confidential, trade secret information ("Merchant Confidential Information"), which is and shall remain the exclusive intellectual property of Merchant. Except as may be required for Consultant to perform its obligations under this Agreement in respect of the Sale, Consultant shall not divulge, furnish, make available, or in any other manner disclose such information to any third party other than Consultant's officers, employees, representatives, and agents. Consultant shall take and shall cause its officers, employees, representatives, and agents to take such action as shall be reasonably necessary or advisable to preserve and protect the confidentiality of Merchant Confidential Information. Consultant agrees to maintain strict confidentiality and agrees that it may use Merchant Confidential Information only as reasonably necessary to the performance of its obligations related to the Sale. If and to the extent the use or other handling of any Personal Information is necessary for Consultant to perform its obligations hereunder, Consultant shall comply with all Data Security Requirements and such other reasonable restrictions requested by Merchant. For purposes of this Agreement, "Personal Information" means any natural person's name, street address, telephone number, e-mail address, social security number, driver's license number, passport number, credit card number, or user or account number, or any other piece of information that, individually or when combined with other information, allows the identification of a natural person or is otherwise considered personally identifiable information or personal data protected under any applicable Data Security Requirement. For purposes of this Agreement, "Data Security Requirements" means, collectively, all of the following to the extent relating to privacy, security, or security breach notification requirements: (a) Merchant's own rules, policies, and procedures; (b) all applicable statutes and regulations; (c) industry standards applicable to the industry in which the Merchant's business is conducted (including, as applicable, the Payment Card Industry Data Security Standard (PCI DSS)); and (d) contracts into which Merchant has entered or by which it is otherwise bound, provided such contracts (or the requirements of such contracts) are provided to Consultant.

The Parties expressly acknowledge and agree that Merchant shall have no liability to the Supervisors for wages, bonuses, benefits, severance pay, termination pay, vacation pay, pay in lieu of notice of termination or any other liability arising from Consultant's hiring or engagement of the Supervisors, and the Supervisors shall not be considered employees of Merchant.

(ii) Merchant's Undertakings

During the Sale Term, Merchant shall: (a) be the employer of the Stores' employees, other than the Supervisors; (b) be responsible for all taxes, costs, expenses, accounts payable, and other liabilities relating to the Stores, the Stores' employees and other representatives of Merchant; (c) prepare and process all tax forms and other documentation; (d) collect all HST/GST and other applicable taxes assessed on the sale of the Merchandise and pay them to the appropriate taxing authorities for the Stores; (e) use reasonable efforts to cause Merchant's employees to cooperate with Consultant and the Supervisors; (f) execute all agreements mutually determined by the Merchant and Consultant, in consultation with the Monitor, to be necessary or desirable for the

operation of the Stores during the Sale; (g) arrange for the ordinary maintenance of all point-of-sale equipment required for the Stores; and (h) use reasonable efforts to ensure that Consultant has quiet use and enjoyment of the Stores for the Sale Term in order to perform its obligations under this Agreement.

Merchant shall provide throughout the Sale Term central administrative services necessary for the Sale, including (without limitation) customary POS administration, sales audit, cash reconciliation, accounting, and payroll processing, as currently available through the Merchant's existing accounting and IT systems, all at no cost to Consultant.

The Parties expressly acknowledge and agree that Consultant shall have no liability to Merchant's employees for wages, bonuses, benefits, severance pay, termination pay, vacation pay, pay in lieu of notice of termination or any other liability arising from Merchant's employment, hiring or retention of its employees, and such employees shall not be considered employees of Consultant.

**D. The Sale**

All sales of Merchandise shall be made on behalf of Merchant. Consultant does not have, nor shall it have, any right, title or interest in the Merchandise. All sales of Merchandise shall be by cash, gift card, merchandise credit, or credit or debit card in accordance with Merchant's policies, and shall be "final" with no returns accepted or allowed, unless otherwise directed by Merchant.

**E. Consultant Fee and Expenses in Connection with the Sale**

In consideration of its services hereunder, Consultant shall earn a fee equal to one and three quarters percent (1.75%) of the Gross Proceeds of Merchandise sold at the Stores during the Sale Term (the "Merchandise Fee"). For purposes of this Agreement, "Gross Proceeds" means gross receipts, net of applicable HST/GST.

Merchant shall be responsible for all expenses of the Sale, including (without limitation) all Store level operating expenses, all costs and expenses related to Merchant's other retail store operations, and Consultant's other reasonable, documented out of pocket expenses (the "Costs"). To control Costs, Merchant and Consultant have established an aggregate budget (the "Expense Budget") of certain delineated expenses, including (without limitation) payment of the costs of supervision (including (without limitation) Supervisors' wages, fees, travel, and deferred compensation) and advertising costs. The Expense Budget for the Sale is attached hereto as Exhibit C. The Expense Budget may only be modified with the consent of the Monitor and by mutual written (including email) agreement of Consultant and Merchant. The costs of supervision set forth on Exhibit C include, among other things, industry standard deferred compensation. Notwithstanding anything herein to the contrary, unless consented to by the Monitor and otherwise agreed to by Merchant, Merchant shall not be obligated to pay costs of supervision and advertising costs that have not been included, or provided for, in the Expense Budget, as may be amended in accordance with this Agreement.

**F. Furniture, Fixtures and Equipment**

Consultant shall sell the FF&E in the Stores that is owned by the Merchant (the "Express FF&E") from the Stores themselves. Merchant shall be responsible for all reasonable and

documented costs and expenses incurred by Consultant in connection with the sale of the Express FF&E, which costs and expenses shall be incurred pursuant to a written budget or budgets (in addition to the Expense Budget) to be established from time to time with the consent of the Monitor and by mutual agreement of the Parties (such costs and expenses, not including the Costs, shall be referred to as the "FF&E Costs"). Consultant shall have the right to abandon at the Stores any unsold Express FF&E.

In consideration for providing the services set forth in this section F, Consultant shall be entitled to a commission from the sale of the Express FF&E equal to seventeen and one half percent (17.5%) of the Gross Proceeds of the sale of the Express FF&E (the "FF&E Fee").

#### **G. Payments & Accounting**

Upon execution of this Agreement, the Merchant shall pay by wire transfer to the Consultant an advance payment of costs and expenses delineated in the Expense Budget of CAD\$50,000 (the "Sale Expense Advance") which shall be held by Consultant and applied towards Expense Budget items as incurred.

During the Sale Term, all accounting matters (including, without limitation, the determination of the Merchandise Fee, Costs, FF&E Fee, FF&E Costs and all other fees, expenses, or other amounts reimbursable or payable hereunder) shall be reconciled by the Parties, in consultation with the Monitor, on every Wednesday for the prior calendar week and the amounts determined to be owing for such prior calendar week pursuant to such reconciliation shall be paid within seven (7) days after each such weekly reconciliation.

The Parties shall, in consultation with the Monitor, complete a final reconciliation and settlement of all amounts payable to pursuant to this Agreement (including, without limitation, the determination of the Merchandise Fee, Costs, FF&E Fee, FF&E Costs and all other fees, expenses, or other amounts reimbursable or payable hereunder) no later than forty five (45) days following (a) the Sale Termination Date for the last Store (the "Final Reconciliation"), or (b) the date upon which this Agreement is terminated in accordance with its terms. Within ten (10) days after the Final Reconciliation, (a) any amounts that are determined to be owing by Merchant to the Consultant shall be paid by the Merchant to the Consultant, (b) any amounts that are determined to be owing by the Consultant to the Merchant as a result of any overpayments shall be paid by the Consultant to the Merchant, and (c) any portion of the Sale Expense Advance not applied by the Consultant in accordance with this Agreement shall be returned to Merchant.

#### **H. Indemnification**

##### **(i) Merchant's Indemnification**

Merchant shall indemnify, defend, and hold Consultant and its consultants, members, managers, partners, officers, directors, employees, attorneys, advisors, representatives, lenders, potential co-investors, principals, affiliates, and Supervisors (collectively, "Consultant Indemnified Parties") harmless from and against all liabilities, claims, demands, damages, costs and expenses (including reasonable attorneys' fees) arising from or related to: (a) the willful or negligent acts or omissions of Merchant or the Merchant Indemnified Parties (as defined below); (b) the material breach of any provision of this Agreement by Merchant; (c) any liability or other claims, including,

without limitation, product liability claims, asserted by customers, any Store employees (under a collective bargaining agreement or otherwise), or any other person (excluding Consultant Indemnified Parties) against Consultant or a Consultant Indemnified Party, except claims arising from Consultant's negligence, willful misconduct, gross negligence, or unlawful behavior; (d) any harassment, discrimination or violation of any laws or regulations or any other unlawful, tortious or otherwise actionable treatment of Consultant's Indemnified Parties or Merchant's customers by Merchant or Merchant's Indemnified Parties; and (e) Merchant's failure to pay over to the appropriate taxing authority any taxes required to be paid by Merchant during the Sale Term in accordance with applicable law.

(ii) Consultant's Indemnification

Consultant shall indemnify, defend and hold Merchant and its consultants, members, managers, partners, officers, directors, employees, attorneys, advisors, representatives, lenders, potential co-investors, principals, and affiliates (other than the Consultant or the Consultant Indemnified Parties) (collectively, "Merchant Indemnified Parties") harmless from and against all liabilities, claims, demands, damages, costs and expenses (including reasonable attorneys' fees) arising from or related to (a) the willful or negligent acts or omissions of Consultant or the Consultant Indemnified Parties; (b) the breach of any provision of, or the failure to perform any obligation under, this Agreement by Consultant; (c) any liability or other claims made by Consultant's Indemnified Parties or any other person (excluding Merchant Indemnified Parties) against a Merchant Indemnified Party arising out of or related to Consultant's conduct of the Sale, except claims arising from Merchant's negligence, willful misconduct, gross negligence, or unlawful behavior; (d) any harassment, discrimination or violation of any laws or regulations or any other unlawful, tortious or otherwise actionable treatment of Merchant Indemnified Parties, or Merchant's customers by Consultant or any of the Consultant Indemnified Parties and (e) any claims made by any party engaged by Consultant as an employee, agent, representative or independent contractor arising out of such engagement, including, without limitation, the Supervisors.

**I. Insurance**

(i) Merchant's Insurance Obligations

Merchant shall maintain throughout the Sale Term, liability insurance policies (including, without limitation, products liability (to the extent currently provided), comprehensive public liability insurance and auto liability insurance) covering injuries to persons and property in or in connection with the Stores, and shall, to the extent reasonably practicable, cause Consultant to be named an additional insured with respect to all such policies. At Consultant's request, Merchant shall provide Consultant with a certificate or certificates evidencing the insurance coverage required hereunder. In addition, Merchant shall maintain throughout the Sale Term, in such amounts as it currently has in effect, workers compensation insurance in compliance with all statutory requirements.

(ii) Consultant's Insurance Obligations

Consultant shall maintain (at Consultant's expense) throughout the Sale Term, liability insurance policies (including, without limitation, products liability/completed operations,



contractual liability, comprehensive public liability and auto liability insurance) on an occurrence basis in an amount of at least Two Million dollars (\$2,000,000) and an aggregate basis of at least five million dollars (\$5,000,000) covering injuries to persons and property in or in connection with Consultant's provision of services at the Stores. Consultant shall name Merchant as an additional insured and loss payee under such policy, and upon execution of this Agreement provide Merchant with a certificate or certificates evidencing the insurance coverage required hereunder. In addition, Consultant shall maintain throughout the Sale Term, workers' compensation insurance in compliance with all statutory requirements. Further, should Consultant employ or engage third parties to perform any of Consultant's undertakings with regard to this Agreement, Consultant will ensure that such third parties are covered by Consultant's insurance or maintain all of the same insurance as Consultant is required to maintain pursuant to this paragraph and name Merchant as an additional insured and loss payee under the policy for each such insurance.

**J. Representations, Warranties, Covenants and Agreements**

(i) Merchant warrants, represents, covenants and agrees that, subject to the issuance of the Sale Approval Order: (a) Merchant is a company duly organized, validly existing and in good standing under the laws of its province of organization, with full power and authority to execute and deliver this Agreement and to perform its obligations hereunder; (b) the execution, delivery and performance of this Agreement has been duly authorized by all necessary actions of Merchant and this Agreement constitutes a valid and binding obligation of Merchant enforceable against Merchant in accordance with its terms and conditions, and the consent of no other entity or person is required for Merchant to fully perform all of its obligations herein; (c) all ticketing of Merchandise at the Stores has been and will be done in accordance with Merchant's customary ticketing practices; (d) all normal course hard markdowns on the Merchandise have been, and will be, taken consistent with Merchant's customary practices; and (e) subject to the Sale Guidelines and this Agreement, the Stores will be operated in the ordinary course of business in all respects, except as otherwise expressly agreed to by Merchant and Consultant.

(ii) Consultant warrants, represents, covenants and agrees that: (a) Consultant is a company duly organized, validly existing and in good standing under the laws of its province of organization, with full power and authority to execute and deliver this Agreement and to perform the Consultant's obligations hereunder; (b) the execution, delivery and performance of this Agreement has been duly authorized by all necessary actions of Consultant and this Agreement constitutes a valid and binding obligation of Consultant enforceable against Consultant in accordance with its terms and conditions, and the consent of no other entity or person is required for Consultant to fully perform all of its obligations herein; (c) Consultant shall comply with and act in accordance with any and all applicable federal, provincial and local laws, rules, and regulations, and other legal obligations of all governmental authorities; (d) no non-emergency repairs or maintenance in the Stores will be conducted without Merchant's prior written consent; (e) Consultant will not take any disciplinary action against any employee of Merchant; and (f) Consultant is not a non-resident of Canada pursuant to the *Income Tax Act* and shall provide the Merchant with its relevant sales tax numbers prior to the Sale.

(iii) The Merchant shall seek Court approval of this Agreement and the Sale Guidelines pursuant to the Sale Approval Order. The Parties expressly acknowledge and agree that the entering into of this Agreement by the Merchant is subject to the issuance of the Sale Approval Order

approving, among other things, this Agreement, the Sale Guidelines and the conduct of the Sale and that should the Sale Approval Order not be obtained, this Agreement shall have no force or effect.

**K. Termination**

The following shall constitute "Termination Events" hereunder:

- (a) Merchant's or Consultant's failure to perform any of their respective material obligations hereunder, which failure shall continue uncured seven (7) days after receipt of written notice thereof to the defaulting Party (an "Event of Default");
- (b) Any representation or warranty made by Merchant or Consultant is untrue in any material respect as of the date made or at any time and throughout the Sale Term; or
- (c) the Sale is terminated or materially interrupted or impaired for any reason, including but not limited to an order of the Court, other than as a result of an Event of Default by Consultant or Merchant.

If Termination Event occurs, the non-defaulting Party (in the case of an Event of Default) or either Party (if the Sale is otherwise terminated or materially interrupted or impaired, other than by reason of an order of the Court) may, in its discretion, elect to terminate this Agreement by providing seven (7) business days' written notice thereof to the other Party and, in the case of an Event of Default, in addition to terminating this Agreement, pursue any and all rights and remedies and damages resulting from such Event of Default. If this Agreement is terminated, Merchant shall be obligated to pay Consultant all amounts due and owing by Merchant to Consultant under this Agreement through and including the termination date.

**L. Notices**

All notices, certificates, approvals, and payments provided for herein shall be sent by electronic mail or by recognized overnight delivery service as follows: (a) To Merchant: at the address listed above, with a copy to Osler, Hoskin and Harcourt LLP at the address listed above; (b) To Consultant: c/o Hilco Merchant Resources, LLC, One Northbrook Place, 5 Revere Drive, Suite 206, Northbrook, Illinois 60062, Fax: 847-897-0859, Attn: Ian S. Fredericks; or (c) such other address as may be designated in writing by Merchant or Consultant, and in either case, with a copy to the Monitor at: Alvarez & Marsal Canada Inc., Royal Bank Plaza South, Suite 2900 Toronto, ON M5J 2J1, Fax: 416-847-5201, Attn: Josh Nevsky.

**M. Independent Consultant**

Consultant's relationship to Merchant is that of an independent contractor without the capacity to bind Merchant in any respect. No employer/employee, principal/agent, joint venture or other such relationship is created by this Agreement. Merchant shall have no control over the hours that Consultant or its employees or assistants or the Supervisors work or the means or manner in which the services that will be provided are performed and Consultant is not authorized to enter into any contracts

or agreements on behalf of Merchant or to otherwise create any obligations of Merchant to third parties, unless authorized in writing to do so by Merchant.

**N. Non-Assignment**

Neither this Agreement nor any of the rights hereunder may be transferred or assigned by either Party without the prior written consent of the other Party. No modification, amendment or waiver of any of the provisions contained in this Agreement, or any future representation, promise or condition in connection with the subject matter of this Agreement, shall be binding upon any Party to this Agreement unless made in writing and signed by a duly authorized representative or agent of such Party. This Agreement shall be binding upon and inure to the benefit of the Parties and their respective legal representatives, successors and permitted assigns.

**O. Severability**

If any term or provision of this Agreement, as applied to either Party or any circumstance, for any reason shall be declared by a court of competent jurisdiction to be invalid, illegal, unenforceable, inoperative or otherwise ineffective, that provision shall be limited or eliminated to the minimum extent necessary so that this Agreement shall otherwise remain in full force and effect and enforceable. If the surviving portions of the Agreement fail to retain the essential understanding of the Parties, the Agreement may be terminated by mutual consent of the Parties.

**P. Governing Law, Venue, Jurisdiction and Jury Waiver**

This Agreement, and its validity, construction and effect, shall be governed by and enforced in accordance with the internal laws of the Province of Ontario (without reference to the conflicts of laws provisions therein) and the laws of Canada applicable therein. Merchant and Consultant waive their respective rights to trial by jury of any cause of action, claim, counterclaim or cross-complaint in any action, proceeding and/or hearing brought by either Consultant against Merchant or Merchant against Consultant on any matter whatsoever arising out of, or in any way connected with, this Agreement, the relationship between Merchant and Consultant, any claim of injury or damage or the enforcement of any remedy under any law, statute or regulation, emergency or otherwise, now or hereafter in effect.

**Q. Entire Agreement**

This Agreement, together with all additional schedules and exhibits attached hereto, constitutes a single, integrated written contract expressing the entire agreement of the Parties concerning the subject matter hereof. No covenants, agreements, representations or warranties of any kind whatsoever have been made by any Party except as specifically set forth in this Agreement. All prior agreements, discussions and negotiations are entirely superseded by this Agreement.

**R. Execution**

This Agreement may be executed simultaneously in counterparts (including by means of electronic mail, facsimile or portable document format (pdf) signature pages), any one of which need not contain the signatures of more than one party, but all such counterparts taken together shall

constitute one and the same instrument. This Agreement, and any amendments hereto, to the extent signed and delivered by means of electronic mail, a facsimile machine or electronic transmission in portable document format (pdf), shall be treated in all manner and respects as an original thereof and shall be considered to have the same binding legal effects as if it were the original signed version thereof delivered in person.

\* \* \*

If this Agreement is acceptable to you, kindly execute a copy in the space provided, and return a countersigned version to the undersigned. Thank you again for this opportunity -- we look forward to working with you.

Very truly yours,


MERCHANT RETAIL SOLUTIONS, ULC

\_\_\_\_\_  
By:  
Its:

**AGREED AND ACCEPTED as of the 3<sup>rd</sup> day  
of May, 2017:**

EXPRESS FASHION APPAREL CANADA INC.

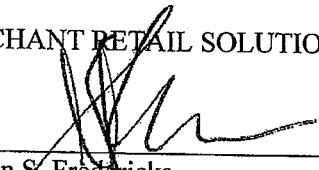
\_\_\_\_\_  
By:  
Its:

  
Todd Painter  
VP International

If this Agreement is acceptable to you, kindly execute a copy in the space provided, and return a countersigned version to the undersigned. Thank you again for this opportunity -- we look forward to working with you.

Very truly yours,

MERCHANT RETAIL SOLUTIONS, ULC



---

By: Ian S. Fredericks  
Its: Vice President

**AGREED AND ACCEPTED as of the 3<sup>rd</sup> day  
of May, 2017:**

EXPRESS FASHION APPAREL CANADA INC.

---

By:  
Its:

## Exhibit "A"

## Stores

Center Name	Store Address	City	Province	Postal Code
Lime Ridge	999 Upper Wentworth Street, Store No. 0272A	Hamilton	ON	L9A 4X5
Fairview Mall	1800 Sheppard Avenue East, Store No. 1008A	North York	ON	M2J 5A7
Southcentre Mall	100 Anderson Road SE, Store No. 79	Calgary	AB	T2J 3V1
Square One Shopping Centre	100 City Centre Drive, Space Store No. 2-710	Mississauga	ON	L5B 2C9
Market Mall	3625 Shaganappi Trail NW, Store No. P023B	Calgary	AB	T3A 0E2
Pacific Centre	701 West Georgia Street, Store No. D030	Vancouver	BC	V7Y 1G5
Chinook Centre	6455 Macleod Trail SW, Store No. 236D	Calgary	AB	T2H 0K8
Richmond Centre	6551 No. 3 Road, Store No. 1722	Richmond	BC	V6Y 2B6
West Edmonton Mall	8882 170 Street, Unit E-222, Store 2115	Edmonton	AB	T5T 4J2
Toronto Eaton Centre	220 Yonge Street, Store No. A042	Toronto	ON	M5B 2H1
Bramalea City Centre	25 Peel Centre Drive, Store No. 635	Brampton	ON	L6T 3R5
First Canadian Place	100 King Street West, Store No. CN1025, Concourse Level	Toronto	ON	M5X 1A9
Sherway Gardens	25 The West Mall, Store No. 1702A	Etobicoke	ON	M9C 1B8
Masonville Place	1680 Richmond Street, Store No. U038B	London	ON	N6G 3Y9
Markville Mall	5000 Highway 7 East, Unit Number 2145	Markham	ON	L3R 4M9
Rideau Centre	50 Rideau Street, Store No. 293	Ottawa	ON	K1N 9J7
Bayshore Shopping Centre	100 Bayshore Drive, Premises No. C9	Nepean	ON	K2B 8C1

**Exhibit "B"**  
**Sale Guidelines**



## SALE GUIDELINES

The following procedures shall apply to any Sales to be held at Express Canada's retail stores (the "**Stores**"). Terms capitalized but not defined in these Sale Guidelines have the meanings ascribed to them in the Consulting Agreement (as defined below).

1. Except as otherwise expressly set out herein, and subject to: (i) the Order of the Ontario Superior Court of Justice (Commercial List) (the "**Court**") dated May 10, 2017 approving the Consulting Agreement between Merchant Retail Solutions ULC (the "**Consultant**") and Express Fashion Apparel Canada Inc. ("**Express Canada**") dated May 3, 2017 (the "**Consulting Agreement**") and the transactions contemplated thereunder (the "**Approval Order**"); or (ii) any further Order of the Court; or (iii) any subsequent written agreement between Express Canada and its applicable landlord(s) (individually, a "**Landlord**" and, collectively, the "**Landlords**") and approved by the Consultant, the Sale shall be conducted in accordance with the terms of the applicable leases/or other occupancy agreements for each of the affected Stores (individually, a "**Lease**" and, collectively, the "**Leases**"). However, nothing contained herein shall be construed to create or impose upon Express Canada or the Consultant any additional restrictions not contained in the applicable Lease or other occupancy agreement.
2. The Sale shall be conducted so that each of the Stores remain open during their normal hours of operation provided for in the respective Leases for the Stores until the applicable premises surrender date for each Store under the Consulting Agreement (the "**Vacate Date**"), and in all cases no later than the Sale Termination Date. For greater certainty, the Sale at the Stores shall end by no later than June 15, 2017. Rent payable under the respective Leases shall be paid as provided in the Initial Order of the Court dated May 4, 2017 (the "**Initial Order**").
3. The Sale shall be conducted in accordance with applicable federal, provincial and municipal laws, unless otherwise ordered by the Court.
4. All display and hanging signs used by the Consultant in connection with the Sale shall be professionally produced and all hanging signs shall be hung in a professional manner. Notwithstanding anything to the contrary contained in the Leases, the Consultant may advertise the Sale at the Stores as a "everything on sale", "everything must go", "store closing" or similar theme sale at the Stores (provided however that no signs shall advertise the Sale as a "bankruptcy", a "liquidation" or a "going out of business" sale, it being understood that the French equivalent of "clearance" is "liquidation" and is permitted to be used). Forthwith upon request, the Consultant shall provide the proposed signage packages along with proposed dimensions by e-mail or facsimile to the applicable Landlords or to their counsel of record and the applicable Landlord shall notify the Consultant of any requirement for such signage to otherwise comply with the terms of the Lease and/or the Sale Guidelines and where the provisions of the Lease conflicts with these Sale Guidelines, these Sale Guidelines shall govern. The Consultant shall not use neon or day-glow signs (save that handwritten "you pay" or "topper" signs may be used). If a Landlord is concerned with "Store Closing" signs being placed in the front window of a Store or with the number or size of the signs in the front window, Express Canada, the Consultant and the Landlord will work together to resolve the dispute. Furthermore, with respect to enclosed mall Store locations without a separate entrance from the exterior of the enclosed mall, no exterior

- 2 -

signs or signs in common areas of a mall shall be used unless permitted by the applicable Lease. In addition, the Consultant shall be permitted to utilize exterior banners/signs at stand alone or strip mall Stores or enclosed mall Store locations with a separate entrance from the exterior of the enclosed mall; provided, however, that where such banners are not explicitly permitted by the applicable Lease and the Landlord requests in writing that the banners are not to be used, no banners shall be used absent further Order of the Court, which may be sought on an expedited basis on notice to the Service List. Any banners used shall be located or hung so as to make clear that the Sale is being conducted only at the affected Store and shall not be wider than the premises occupied by the affected Store. All exterior banners shall be professionally hung and to the extent that there is any damage to the facade of the premises of a Store as a result of the hanging or removal of the exterior banner, such damage shall be professionally repaired at the expense of the Consultant.

5. The Consultant shall be permitted to utilize sign walkers and street signage; provided, however, such sign walkers and street signage shall not be located on the shopping centre or mall premises.
6. Conspicuous signs shall be posted in the cash register areas of each Store to the effect that all sales are "final" and customers with any questions or complaints are to call Express' hotline number.
7. The Consultant shall not distribute handbills, leaflets or other written materials to customers outside of any of the Stores on Landlord's property, unless permitted by the applicable Lease or, if distribution is customary in the shopping centre in which the Store is located. Otherwise, the Consultant may solicit customers in the Stores themselves. The Consultant shall not use any giant balloons, flashing lights or amplified sound to advertise the Sale or solicit customers, except as permitted under the applicable Lease or agreed to by the Landlord.
8. At the conclusion of the Sale in each Store, the Consultant and Express Canada shall arrange that the premises for each Store are in "broom-swept" and clean condition, and shall arrange that the Stores are in the same condition as on the commencement of the Sale, ordinary wear and tear excepted. No property of any Landlord of a Store shall be removed or sold during the Sale. No permanent fixtures (other than Express FF&E (as defined below) for clarity) may be removed without the Landlord's written consent unless otherwise provided by the applicable Lease and in accordance with the Initial Order and the Approval Order. Any trade fixtures or personal property left in a Store after the applicable Vacate Date in respect of which the applicable Lease has been disclaimed by Express Canada shall be deemed abandoned, with the applicable Landlord having the right to dispose of the same as the Landlord chooses, without any liability whatsoever on the part of the Landlord. Nothing in this paragraph shall derogate from or expand upon the Consultant's obligations under the Consulting Agreement.
9. Subject to the terms of paragraph 8 above, the Consultant may sell furniture, fixtures and equipment owned by Express Canada ("**Express FF&E**") and located in the Stores during the Sale. Express Canada and the Consultant may advertise the sale of Express FF&E consistent with these Sale Guidelines on the understanding that the Landlord may require such signs to be placed in discreet locations within the Stores reasonably acceptable to the Landlord. Additionally, the purchasers of any Express FF&E sold during the Sale shall

only be permitted to remove the Express FF&E either through the back shipping areas designated by the Landlord or through other areas after a given Store has closed and, after regular Store business hours or, through the front door of the Store during Store business hours if the Express FF&E can fit in a shopping bag, with Landlord's supervision as required by the Landlord and in accordance with the Initial Order and the Approval Order. The Consultant shall repair any damage to the Stores resulting from the removal of any Express FF&E by Consultant or by third party purchasers of Express FF&E from Consultant.

10. The Consultant shall not make any alterations to interior or exterior Store lighting, except as authorized pursuant to the affected Lease. The hanging of exterior banners or other signage shall not constitute an alteration to a Store.
11. The Consultant and its agents and representatives shall have the same access rights to the Stores as Express Canada under the terms of the applicable Lease, and the Landlords shall have the rights of access to the Stores during the Sale provided for in the applicable Lease (subject, for greater certainty, to any applicable stay of proceedings).
12. Express Canada and the Consultant shall not conduct any auctions of Merchandise or Express FF&E at any of the Stores.
13. The Consultant shall designate a party to be contacted by the Landlords should a dispute arise concerning the conduct of the Sale. The initial contact person for Consultant shall be Jane Dietrich who may be reached by phone at (416)-860-5223 or email at [jdietrich@casselsbrock.com](mailto:jdietrich@casselsbrock.com). If the parties are unable to resolve the dispute between themselves, the Landlord or Express Canada shall have the right to schedule a "status hearing" before the Court on no less than two (2) days written notice to the other party or parties, during which time the Consultant shall cease all activity in dispute other than activity expressly permitted herein, pending determination of the matter by the Court; provided, however, if a banner has been hung and is the subject of a dispute, the Consultant shall not be required to take any such banner down pending determination of any dispute.
14. Nothing herein or in the Consulting Agreement is, or shall be deemed to be a consent by any Landlord to the sale, assignment or transfer of any Lease, or shall, or shall be deemed to, or grant to the Landlord any greater rights than already exist under the terms of any applicable Lease.
15. These Sale Guidelines may be amended by written agreement between the Consultant, Express Canada and the applicable Landlord.

**Exhibit "C"**  
**Expense Budget**

**Express (CAD)**  
**Exhibit C**

<b>Expense Budget</b>	
<i>(\$CAD)</i>	
<b><u>Advertising</u></b>	
Media	15,979
Signs	34,506
Subtotal Advertising	<u>50,485</u>
<b><u>Supervision</u></b>	
Fees / Wages / Expenses (1)	98,868
Subtotal Supervision	<u>98,868</u>
 Total Expenses	 <u><u>149,353</u></u>

**Note(s):**

*1. Includes Deferred Compensation and Insurance.*

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

Court File No: CV-17-11785-00CL

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT  
OF **EXPRESS FASHION APPAREL CANADA INC.** and **EXPRESS**  
**CANADA GC GP, INC.**

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

PROCEEDING COMMENCED AT TORONTO

**AFFIDAVIT OF TODD PAINTER**  
**(SWORN MAY 4, 2017)**

**OSLER, HOSKIN & HARCOURT LLP**  
100 King Street West  
1 First Canadian Place  
Suite 6200, P.O. Box 50  
Toronto ON M5X 1B8

Tracy Sandler (LSUC #: 32443N)  
Jeremy Dacks (LSUC #: 41851R)  
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Tel: 416.362-2111  
Fax: 416.862.6666

Lawyers for the Applicants