

**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

TARGET CANADA CO., TARGET CANADA HEALTH CO., TARGET
CANADA MOBILE GP CO., TARGET CANADA PHARMACY (BC) CORP.,
TARGET CANADA PHARMACY (ONTARIO) CORP., TARGET CANADA
PHARMACY CORP., TARGET CANADA PHARMACY (SK) CORP. and
TARGET CANADA PROPERTY LLC

Applicants

AIDE MEMOIRE OF THE RESPONDENT KINGSETT CAPITAL INC.

1. The Respondent KingSett Capital Inc. (“KingSett”) and other former landlords of Target Canada requested an appointment to address scheduling issues in regards to the Applicants’ motion for approval to file a plan and call a meeting for the purpose of voting on its plan (the “Plan Filing Motion”). The purpose of this aide memoire is to inform the Court of some of the issues and disputes that will be raised at the hearing by KingSett and other landlords.
2. KingSett has serious concerns about the terms of and the filing of the Applicants’ proposed Joint Plan of Compromise and Arrangement (the “Plan”). The Plan Filing Motion will deal with several important issues; it will not simply deal with procedural issues. The motion seeks to affect substantive rights of the parties.

Issue One: The Plan Violates the Amended and Restated Initial Order

3. At the time the Amended and Restated Initial Order was sought by the Applicants in February 2015, the Applicants’ affiant, Mark Wong, stated in his sworn evidence:

A component of obtaining the consent of the Landlord Group for approval of the Real Property Portfolio Sales Process [“RPPSP”] was the agreement of the Target Canada Entities to seek approval of certain changes to the Initial Order in the form of an Amended and Restated Initial Order. [...] **These proposed changes were the subject of significant negotiation between the Landlord Group and the Target Canada Entities, with the assistance and input of the Monitor and Target Corporation.**¹

4. The proposed changes incorporated into the Amended and Restated Initial Order added new paragraph 19A, which provides that the claims of any landlord against Target Corporation (“Target US”) pursuant to any guarantee relating to a lease of real property (“Landlord Guarantee Claims”) **shall not be determined in this CCAA proceeding and shall not be released or affected in any way in any Plan filed by the Applicants.**²

5. As the Monitor stated in its Second Report:

3.4 Counsel for the Landlord Group advised that the Real Property Portfolio Sales Process proceeding on a consensual basis as described below is conditional on the proposed changes to the Initial Order.

3.5 The Monitor recommends approval of the Amended and Restated Initial Order as it reflects: (a) revisions negotiated as among the Target Canada Entities, the Landlord Group and Target US (in conjunction with revisions to the Real Property Portfolio Sales Process), with the assistance of the Monitor; and **(b) a fair and reasonable balancing of interests.**³

6. Target US’s agreement to paragraph 19A of the Amended and Restated Initial Order was not just a condition of the Landlord Group’s agreement to the RPPSP – it was also a condition of

¹ Affidavit of Mark Wong, sworn February 9, 2015, p. 13-14, ¶22 (emphasis added), enclosed at **Tab 1**. Remarkably, Mr. Wong omits any mention of this affidavit in his recap of the proceedings in his most recent affidavit.

² Amended and Restated Initial Order, ¶19A, enclosed at **Tab 2**.

³ Second Report of the Monitor, dated February 9, 2015, p. 11, ¶3.4-3.5 (emphasis added), enclosed at **Tab 3**.

the Landlord Group withdrawing its opposition to the CCAA process and its intention to petition the Applicants into bankruptcy at the comeback hearing.⁴

7. In clear breach of their heavily negotiated agreement with the Landlord Group and paragraph 19A of the Amended and Restated Initial Order, which the Applicants sought and the Monitor supported, the Applicants now seek to file a Plan that determines the value of and compromises and releases Landlord Guarantee Claims.⁵ This violates the terms of the Amended and Restated Initial Order.

Issue Two: The Plan Violates the Claims Procedure Order and the CCAA

8. The Claims Procedure Order, which too was only settled after prolonged negotiations between the Applicants and their creditors, including the landlords,⁶ sets out a comprehensive claims process for determining all claims, including landlords' claims. However, paragraph 55 of the Claims Procedure Order expressly **excludes** Landlord Guarantee Claims and provides that nothing in the Claims Procedure Order shall prejudice, limit, or otherwise affect any claims, including under any guarantee, against Target US or any predecessor tenant. The paragraph ends with the explicit proviso that "[f]or greater certainty, this Order is subject to and shall not derogate from paragraph 19A of the Initial Order".⁷

9. In clear breach of paragraph 55, and of the Claims Procedure Order generally, the Plan provides for a set formula to determine landlord claims, including claims against Target US under its guarantees.⁸ This set formula not only purports to determine landlords' claims for distribution purposes, it also purports to determine their claims for voting purposes, with no ability to challenge

⁴ Outline of Submissions of RioCan and Kingsett dated February 10, 2015, ¶2-8, enclosed at **Tab 4**.

⁵ The Plan, p. 39, s. 7.1(c).

⁶ See the Endorsement of Regional Senior Justice Morawetz dated June 11, 2015, enclosed at **Tab 5**.

⁷ Claims Procedure Order, ¶55, enclosed at **Tab 6**.

⁸ The Plan, pp. 8-9, s. 1.1 (Definitions), p. 21, s. 2.4 and p. 23, s. 3.6(a).

the value of the validity of the set formula to determine landlords' claims for voting purposes.⁹ This violates the terms of the Claims Procedure Order that was sought by the Applicants and supported by the Monitor.

10. In addition to violating this Court's Orders, the use of a set formula to determine an entire class of claims breaches subsection 22(a)(iii) of the CCAA, which provides that if the amount of a claim is not admitted by the company, the amount is to be determined by the court on summary application by the company or by the creditor.¹⁰

11. These first two issues require this Court to determine whether it can accept a Plan for filing if that Plan allows the Applicants to renege on their agreements with creditors, violate Court Orders and the CCAA. KingSett submits that these are crucial threshold issues, and not merely "procedural" questions.

Issue Three: The Plan Classification Scheme Improperly Confiscates Rights

12. The Plan groups creditors who do not have guarantees from Target US ("Non-guaranteed Creditors") with landlords who do have guarantees with Target US ("Guaranteed Creditors") in the same class.

13. The way the Plan is currently structured, it will compromise and release Target US's guarantees in return for Target US's agreement to subordinate its intercompany claims to the unsecured creditors' claims. Target US is adamant it will un subordinate all of its claims, including

⁹ All other creditors retain their rights to contest the value of their claims for voting and disbursement purposes.

¹⁰ CCAA, s. 22(b)(iii).

the \$3 billion debt it subordinated prior to this CCAA proceeding, if the Plan the does not compromise and release its guarantees to the landlords.¹¹

14. Target US's position creates a clear conflict of interest between the Non-guaranteed Creditors, who it is said will benefit from the Plan's success as compared to a bankruptcy, and the Guaranteed Creditors, who lose considerable rights under the Plan. Simply put, the Plan confiscates the Guaranteed Creditors' rights to benefit the Non-Guaranteed Creditors.

15. KingSett and other landlords will argue at the Plan Filing Motion that the current classification scheme does not comply with subsection 22(2) of the CCAA, in that the class as currently constituted does not have a commonality of interest.

16. Pursuant to subsection 22(1) of the CCAA, classification is a threshold issue that must be determined by the Court before a meeting to vote on a Plan is held.¹²

Issue Four: Crucial Information is Being Withheld from the Landlords

17. On November 23, 2015, four days before the Plan Filing Motion record was served, Target US settled RioCan REIT's claims against it with respect to its guarantees of RioCan's leases to Target Canada.¹³ It is apparent that Target US settled RioCan's Landlord Guarantee Claims on better terms than are offered to the other landlords with Landlord Guarantee Claims under the Plan.

18. If Target US is paying RioCan more than what is offered to the other landlords, this would undermine the Applicants' position that the Plan as currently structured achieves a "fair and equitable balance between all affected creditors". The landlords have asked the Monitor and

¹¹ Affidavit of Mark Wong, sworn November 27, 2015, pp. 13-14, ¶33.

¹² CCAA, s. 22(1).

¹³ RioCan Press Release, Exhibit "D" to the Affidavit of Mark Wong sworn November 27, 2015.

Target US to provide them with an analysis of the difference in these terms so as to be able to determine whether the Plan offers them a fair settlement of their Landlord Guarantee Claims. This request has been refused. This information is required **before** any vote on the Plan can take place.

19. The landlords have also asked Target US whether RioCan has committed itself to vote in favour of the Plan. If RioCan is so committed, then its claim would be treated as a “Plan Sponsor Subrogated Claim”, which cannot vote on the Plan. This information has not been provided.

Conclusion

20. We look forward to discussing these issues with the parties and the Court at this afternoon’s appointment.

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TO: Service List

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Court File No. CV-15-10832-00CL

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PROCEEDING COMMENCED AT
TORONTO

**AIDE MEMOIRE OF THE RESPONDENT
KINGSETT CAPITAL INC.**

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