

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 BEN MOSS JEWELLERS WESTERN  
CANADA LTD.

APPLICANT

**AFFIDAVIT OF NAVEED Z. MANZOOR  
(Sworn May 16, 2016)**

I, Naveed Z. Manzoor, of the Town of Oakville, in the Province of Ontario, the Chief Restructuring Officer (“CRO”) of the Applicant, Ben Moss Jewellers Western Canada Ltd. (“Ben Moss” or the “Applicant”), MAKE OATH AND SAY:

1. This Affidavit is made in support of an application by Ben Moss for an Initial Order and related relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “CCAA”), including the following:

- (a) appointing Alvarez & Marsal Canada Inc. as Monitor pursuant to s. 11.7 of the CCAA to monitor Ben Moss’s business and financial affairs (the “Proposed Monitor”);
- (b) appointing FAAN Advisors Group Inc. as CRO;
- (c) staying all proceedings taken or that might be taken in respect of Ben Moss, its directors and officers, the CRO, and/or the Proposed Monitor;

- (d) staying all proceedings taken or that might be taken in respect of Ben Moss's parent company, J.S.N. Jewellery Inc. ("JSN Inc."), to the extent that these proceedings arise as a result of cross-default provisions related to agreements between Ben Moss and third parties, provided that such stay applies only with respect to amounts owing that are currently not in arrears and that are contemplated in the cash flows as being paid in the ordinary course;
- (e) authorizing Ben Moss to file with this Court a plan of compromise or arrangement between Ben Moss and, *inter alia*, one or more of its classes of secured and/or unsecured creditors pursuant to the provisions of the CCAA;
- (f) authorizing Ben Moss to obtain, and borrow pursuant to, a debtor-in-possession ("DIP") credit facility in order to finance its working capital requirements and other general corporate purposes as well as its post-filing expenses and costs;
- (g) granting the following charges over the property of the Applicant, listed in order of priorities:
  - (i) a charge (1) in favour of counsel to Ben Moss, the Proposed Monitor, counsel to the Proposed Monitor and the CRO, and (2) in favour of counsel to Joseph Shilon with respect to amounts incurred before the date of the Initial Order;
  - (ii) a charge in favour of the DIP Lender (as defined below); and
  - (iii) a charge in favour of the directors and officers of Ben Moss;
- (h) ordering that the CRO shall not have any liability with respect to any losses, claims, damages, or liabilities, of any nature or kind, except to the extent that such result from the gross negligence or wilful misconduct on the part of the CRO;

- (i) authorizing Ben Moss to make pre-filing payments to certain “critical” suppliers;  
and
- (j) approving a refinancing, investment and/or sale solicitation process.

2. I am the managing director of FAAN Advisors Group Inc. (“FAAN”). FAAN was retained by Ben Moss on April 18, 2016 to act as Interim CFO of Ben Moss. On May 13, 2016, FAAN was retained by Ben Moss and certain related companies to act as CRO for the duration of these proceedings. Pursuant to the terms of FAAN’s engagement letters, I led the Ben Moss Interim CFO engagement and am now leading the CRO engagement in respect of Ben Moss and certain related companies. A copy of the redacted Ben Moss CRO Engagement Letter is attached to this affidavit at Exhibit “A”. Although my engagement as Interim CFO lasted only a few weeks, my responsibilities as Interim CFO included, among other things, assessing Ben Moss’s business, identifying cost reduction and operations improvement opportunities, and exploring restructuring alternatives. In addition to the forgoing, my mandate as CRO includes the authority to direct the operations, management, restructuring and refinancing of Ben Moss, including any refinancing, investment and/or sale solicitation process. The senior management of Ben Moss now report directly to me. 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 other members of Ben Moss’s senior management team, senior management of certain of Ben Moss’s affiliated companies, and reviewed certain information provided by Ben Moss’s financial and legal advisors.

3. This Affidavit is divided into the following sections:

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## A. Introduction

4. Ben Moss is a jewellery retailing business with 66 stores across Canada. It is headquartered in Winnipeg, Manitoba and is incorporated under the laws of Manitoba. Ben Moss employs approximately 549 hourly and salaried employees in Canada. Other stakeholder groups (discussed in greater detail below) include unrelated suppliers, customers, landlords, certain affiliated companies that supply goods to Ben Moss, and the Applicant's senior secured lenders, Salus Capital Partners, LLC ("Salus Capital") and Salus CLO 2012-1 Ltd. ("Salus CLO", and collectively with Salus Capital the "Senior Secured Lenders").

5. The Applicant is part of the JSN group of affiliated companies (collectively, the "JSN Group" or the "Companies"), which is principally comprised of two separate operating businesses: the Ben Moss jewellery retail business and the JSN jewellery wholesale business. In 2013, the JSN Group acquired Ben Moss to provide the wholesale business with an additional sales outlet. At the time of the acquisition, the JSN Group's management recognized an opportunity to vertically integrate manufacturing, wholesale and retail activities across the Companies. In order to finance the acquisition, the Companies utilized equity from the founder of the JSN Group and debt financing provided by Salus Capital.

6. Since the acquisition, there has been a significant decrease in Ben Moss's net sales and profitability, as a result of, *inter alia*, softness in western Canada due to declining energy prices and the appreciation of the U.S. dollar relative to the Canadian dollar, which has caused difficulties with inventory levels, merchandising and product mix at Ben Moss's stores. Furthermore, certain poorly performing stores, the expense of certain economically unviable leases and fixed overhead costs that are out of line with the level of total sales have consumed much needed capital. As a result of the foregoing, Ben Moss has impaired cash flow and is

experiencing a severe liquidity crisis. As described in detail below, these challenges have necessitated a restructuring under the CCAA. Without the relief sought in this application, Ben Moss will not be able to continue as a going concern. Notwithstanding the foregoing, I am advised by the President of the JSN Group's parent company that the wholesale business, which has a diversified group of top-tier customers in addition to Ben Moss, would be adversely affected by a filing and accordingly, without Salus Capital's objection, is not included as part of the proposed restructuring.

7. As described in greater detail below, Ben Moss and certain other members of the JSN Group are financed through a revolving credit facility (the "Revolving Credit Facility") and three term loan credit facilities (collectively with the Revolving Credit Facility, the "Credit Facilities") under a Credit Agreement dated as of July 18, 2013, as amended pursuant to the First Amending Agreement dated September 25, 2014 and as will be amended by an Accommodation Agreement substantially in the form described below (the "Accommodation Agreement"), between, the Applicant and certain other members of the JSN Group, as co-borrowers, Salus Capital, as administrative agent, collateral agent and lender and Salus CLO as lender (the "Salus Credit Agreement"). As at May 16, 2016, there was approximately CAD\$68.1 million outstanding under the Credit Facilities.

8. As a result of the financial challenges currently facing Ben Moss, an overadvance of USD\$855,048 (the "Overadvance") was requested under the Revolving Credit Facility on March 30, 2016. Salus Capital, in its capacity as administrative agent under the Salus Credit Agreement, granted the Overadvance on April 4, 2016. The Overadvance was used to make certain rent payments that had been due on April 1, 2016, along with payments relating to other general operating and working capital amounts. Since the Overadvance, the Senior Secured Lenders have

continued to fund the Borrowers (as defined below) notwithstanding the overadvance position under the Credit Facilities. In total there have been 21 additional permitted funding requests totalling approximately \$12 million in aggregate.

9. Since receiving the Overadvance, Ben Moss has continued to face financial difficulty and the Credit Facilities have remained in an overadvance position under the Salus Credit Agreement. As a result of the Overadvance, the total amount drawn down on the Revolving Credit Facility exceeds the maximum amount available by approximately \$7.5 million. Neither Ben Moss, the other Borrowers, nor the Guarantors (defined below) are able to repay the excess amount and this constitutes an Event of Default (as defined in the Salus Credit Agreement). In addition, Ben Moss and the other Borrowers breached the Collateral Coverage Ratio covenant (as defined in the Salus Credit Agreement), which also constitutes an Event of Default.

10. Salus Capital consequently issued to each of the Borrowers and Guarantors (i) demands for repayment (the “Demands”) and (ii) Notices of Intention to Enforce Security (collectively, the “BIA Notices”) pursuant subsection 244(1) of the *Bankruptcy and Insolvency Act*, all dated May 16, 2016. The Demands terminated the Borrowers’ rights to access any further credit under the Salus Credit Agreement and all amounts outstanding under the Credit Facilities have become due and payable.

11. Pursuant to the Accommodation Agreement, Salus Capital agreed to forbear from exercising its rights and remedies under the Salus Credit Agreement until the earlier of (a) July 29, 2016; and (b) the occurrence of certain forbearance termination events, or such later date that the Proposed Monitor, Salus Capital, the Borrowers and the Guarantors so agree; on certain conditions. These conditions include, *inter alia*, compliance with a restructuring plan that involves Ben Moss filing for CCAA protection. Per the JSN Group’s request, Salus Capital does

not require that the other Companies file for CCAA protection at this time, given the concern that such a filing would potentially jeopardize sensitive aspects of the JSN Group's global operations. Consequently, without a stay of proceedings and the Senior Secured Lenders' support for Ben Moss's restructuring, the Senior Secured Lenders would be in a position to enforce their security over the assets and property of Ben Moss.

12. As described in further detail below and subject to certain conditions, including the granting of the proposed Initial Order, the Accommodation Agreement provides that Salus Capital will provide the Applicant and the other Borrowers with continued access to the existing Credit Facilities (on the terms and conditions and subject to the limitations as specified in the Salus Credit Agreement, as amended by the Accommodation Agreement), and Salus CLO will provide the Applicant with an interim financing facility (the "DIP Facility") of up to \$8 million. The renewed access to the Credit Facilities, along with the proposed DIP Facility, are intended to provide the Applicant and the other Borrowers with adequate liquidity to satisfy their working capital requirements and for the Applicant to seek to complete a restructuring as part of this CCAA proceeding. The Applicant is unable to continue going concern operations to preserve enterprise value without access to the Credit Facilities and the DIP Facility.

13. Ben Moss is also seeking approval for a comprehensive refinancing, investment and/or sale solicitation process (the "RISP"), to be conducted with the assistance, and under the supervision, of the Proposed Monitor. The RISP has been reviewed and approved by Salus Capital and the Proposed Monitor and is described in greater detail below.

14. Ben Moss is facing immediate and serious challenges to its continued operations, including the threat of a demand for repayment from the Senior Secured Lenders, decreased sales levels, increasing costs due to the appreciation of the U.S. dollar relative to the Canadian dollar,



a number of severely underperforming stores and a misaligned fixed overhead cost structure. The Applicant is unable to sustain adequate liquidity to fulfill current business objectives and maintain going concern operations without commencing a CCAA process. The Applicant is unable to meet its liabilities as they become due and is therefore insolvent.

15. Over the course of the past several months, Ben Moss and the Companies engaged in significant efforts to pursue a restructuring outside of a formal insolvency proceeding. These efforts include the commencement of a process to seek a lender to refinance the Credit Facilities, hiring legal and financial restructuring advisors, continuing to optimize store operations and implement procurement strategies to maximize efficiencies, changing merchandising strategy, evaluating underperforming stores, developing strategies to improve profitability and conducting an overhead structure review to identify potential synergies and cost savings.

16. Based on my knowledge of the Applicant's business and my discussions with Ben Moss's senior management and the advisors to the Companies, it is my belief that the Applicant can be a viable business with significant future potential. In order to continue going concern operations and to access the only credit available to it in the circumstances, Ben Moss requires a stay of proceedings and related relief under the CCAA. A stay will enable Ben Moss to evaluate restructuring options concurrently with a potential sale of all or a portion of its business, with the ultimate goal of developing a plan of arrangement or compromise to restructure the business in a manner designed to maximize value to the greatest extent possible for its stakeholders.

17. I am advised by the President of the JSN Group's parent company and I believe that including the JSN Group's wholesale business in this CCAA Application would have a significant detrimental impact on the viability of its overseas supply chain and consequently the viability of the JSN Group as a whole. Ben Moss is currently reliant on the JSN Group for a

significant portion of its inventory and accordingly, such a detrimental impact on the JSN Group would have a corresponding impact on Ben Moss. Moreover, the JSN Group's wholesale business earnings before interest, taxes, depreciation and amortization ("EBITDA") margins<sup>1</sup> are significant, even taking into account the performance of Ben Moss. Per the JSN Group's request, Salus Capital is not requiring that the other Companies which operate the wholesale business file for CCAA protection at this time. Including the wholesale business as part of these proceedings would be detrimental to the interests of Ben Moss's stakeholders.

## **B. Corporate Structure**

### **(a) Description of the Applicant**

18. Ben Moss is a Manitoba corporation that is a wholly-owned indirect subsidiary of JSN Inc. and operates the only retail component of the Companies' business. Ben Moss's President (a former owner of Ben Moss who remained in his position as President after Ben Moss's acquisition) recently resigned as a corporate officer; however, he is still retained by Ben Moss in a strategic advisory capacity. Certain senior management also remain in place, including the Senior Vice President of Operations, the Vice President of Merchandising and the Director of Finance, all of whom are working closely with me in my capacity as CRO.

19. More detailed descriptions of the affiliated Companies who are parties to the Salus Credit Agreement and/or the Accommodation Agreement are found in the following paragraphs:

(a) **JSN Inc.** is a privately-held corporation owned by Joseph Shilon. It operates the Companies' wholesale business in Canada and has 100% direct or indirect

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<sup>1</sup> The EBITDA margin is a measurement of a company's operating profitability as a percentage of its total revenue.

ownership of Ben Moss, 2373138 Ontario Inc. and JSN Jewellery UK Limited. JSN Inc. has a manufacturing and distribution facility in Toronto, Ontario. The manufacturing facility performs high margin, in-house repair and special order programs while maintaining complete control over quality. The distribution facility provides order fulfillment to the Companies' customers, including Ben Moss.

- (b) **2373138 Ontario Inc.** is a holding company and is inactive.
- (c) **JSN Jewellery UK Limited ("JSN UK")** is part of the Companies' wholesale business. It sells products manufactured by the Companies to retailers in the United Kingdom. JSN UK has no retail operations.
- (d) **Always & Forever Family Collection Incorporated ("AFFC")** is a wholesale business that specializes in jewelry that incorporates the birthstones of the customers' family.
- (e) **GMJ Corporation ("JSN US")** is part of the Companies' wholesale business. It sells products manufactured by the Companies to retailers in the United States. It has no retail operations and does not have any employees, but rather engages independent contractors to facilitate the sale of JSN product in the U.S.
- (f) **P.M.R. Inc. ("PMR")** is in the business of precious metals and stone reclamation. PMR operates and maintains specialized, leased equipment in Ben Moss stores to conduct metallurgical analysis on used jewellery, which may then be exchanged for cash or Ben Moss store credit. PMR then reclaims the raw

materials or refurbishes the jewellery in order to sell the refurbished jewellery or raw materials primarily to other members of the JSN Group.

20. Other members of the JSN Group, all of which are owned directly or indirectly by Joseph Shilon, include:

- (a) **Utopia Jewellery Co.**, a Thailand company that operates the JSN Group's jewellery manufacturing facilities in Thailand;
- (b) **Utopia Diamond Inc.**, a Thailand company that cuts and polishes raw diamonds for use in jewellery manufactured by Utopia Jewellery Co., the operations of which have currently been suspended; and
- (c) **Global Diamond (G.D.) Ltd.**, an Israeli company which acts as a diamond broker for the JSN Group in Israel.

**(b) Chief Place of Business**

21. Ben Moss's chief place of business is Ontario. There are 27 Ben Moss stores located in Ontario, which is the largest number of Ben Moss stores in any province where Ben Moss operates. Currently, Ben Moss has approximately 208 employees in Ontario, which is more people than Ben Moss employs in any other province or territory. The Ontario operations of Ben Moss accounted for approximately \$29 million in revenue for the 2015 fiscal year, representing roughly 34% of Ben Moss's total revenue, which is more revenue than any other province. Additionally, the largest number of stores that are expected to be closed as part of the restructuring are located in Ontario. As more particularly described below, the Ben Moss centralized cash management system is administered by JSN Inc., the head office of which is located in Toronto.

22. Previously, key decisions for the Ben Moss business were made out of its head office in Winnipeg, Manitoba. However, certain decision-making responsibility has been assumed recently by Ben Moss's parent company, JSN Inc., which is located in Toronto. Furthermore, I am now acting as Ben Moss's CRO and I am domiciled in the Town of Oakville. Ontario has become the "nerve centre" of the Applicant's operations.

### **C. The Business of the Applicant**

#### **(a) The Jewellery Retail Industry**

23. The jewellery and watch market includes products made from gold, silver and other precious metals such as platinum, diamonds and other precious stones (e.g. sapphires, emeralds and rubies), pearls and semiprecious stones. Global revenues from jewellery and watches totaled \$290 billion in 2014. The jewellery and watch industry is expected to experience continued growth of 7% annually over the next five years, driven by growth in per capita income and gold prices.

24. The Canadian retail jewellery industry is dominated by smaller operations, with the vast majority of establishments employing less than 100 people. Industry operators compete less on price and more on factors such as brand strength and salience, product quality and designs. Successful brands often hire knowledgeable staff and renowned designers, and enter into licensing deals with celebrities to showcase products. Since 'fast fashion' has become standard, operators also compete on relatively lower cost items designed and marketed to address prevalent fashion trends of the time.

**(b) Ben Moss Retail Business**

25. Ben Moss has strategically positioned itself to serve the middle through upper price point jewellery markets. It also has the unique ability to offer custom and special order designs. Ben Moss began sourcing more product from the JSN Group, including products manufactured by Utopia Jewellery Co., after it was acquired in 2013. Its partnership with the JSN Group's wholesale business provides an unmatched ability to respond to emerging trends by quickly delivering the latest product to stores.

26. Ben Moss offers a wide selection of product ranging from entry-level priced diamond designs to fully-certified, top-quality diamond jewellery available in 10-kt. to 14-kt. gold. Other products which are not supplied by the JSN Group include watches and gold and silver jewellery from various companies including Citizen Watch Company, Bulova Watch Company, Movado Watches, Malo, First Jewellery, and Shiny Jewellery.

27. Certain of Ben Moss's products are also available for sale via its online store at [www.benmoss.com](http://www.benmoss.com). Only 0.8% of Ben Moss's sales are completed through the online store.

**(c) Leases and Retail Stores**

28. Ben Moss leases a significant amount of office space for its corporate headquarters in Winnipeg, Manitoba.

29. Ben Moss also leases stores across Canada from third party landlords. The typical format for a Ben Moss store is a strategically located storefront in a mall. Many of Ben Moss's store leases are with large retail landlords who lease several locations to Ben Moss. A typical Ben Moss store is approximately 1,100 square feet.

30. The following chart sets out Ben Moss's current store locations by geographical region as of May 2016:

<b>Location</b>	<b>Number of Ben Moss Locations</b>
<i>Ontario</i>	27
<i>Alberta</i>	17
<i>British Columbia</i>	9
<i>Manitoba</i>	5
<i>Saskatchewan</i>	5
<i>Nova Scotia</i>	2
<i>New Brunswick</i>	1
<b>Total</b>	<b>66</b>

31. As part of Ben Moss's restructuring under these proceedings, it plans to close certain retail locations that are unprofitable or that make marginal contributions to the overall profitability of Ben Moss. Inventory reduction sales have already begun in certain locations. It is likely that a process for store closures will commence in the following provinces within the initial stay period:

<b>Location</b>	<b>Number of Store Closings</b>
<i>Ontario</i>	7
<i>British Columbia</i>	1
<i>Saskatchewan</i>	1
<i>Nova Scotia</i>	1
<i>New Brunswick</i>	1
<b>Total</b>	<b>11</b>

The likely closure of these stores and the planned disclaimer of the underlying leases during the initial stay period will improve the health of the 55 stores that remain open. In addition, it is a condition of the Accommodation Agreement that Ben Moss either undertake these and/or other store closures or otherwise take steps to significantly enhance their profitability.

32. There are also several retail locations that have been identified by Ben Moss as viable, but for the poor economic terms of the associated leases. A stay of proceedings will provide the Applicant with an opportunity to pursue consensual amendments to these leases.

33. Ben Moss, in consultation with the Proposed Monitor, is evaluating all of Ben Moss's operating expenses. Ben Moss anticipates that as part its restructuring efforts, cost-cutting initiatives will take place shortly after the commencement of these proceedings and during the initial stay period in connection with the planned closure of certain retail locations.

**(d) Employees**

34. Ben Moss employs approximately 164 full time and 385 hourly employees in Canada. A typical Ben Moss store is staffed by 8-10 employees, with additional coverage during holidays and peak selling periods. The staff includes both full and part-time sales associates and a store manager. Store managers are compensated through base salary and company-paid benefits, while sales associates are paid hourly wages. In addition, some of these individuals are eligible to receive profitability bonuses. Ben Moss has also established a group RRSP for employees, which RRSP is not company-funded. There are no registered pension plans for Ben Moss management or other employees. Ben Moss's employees are non-unionized.



**(e) Gift Cards, Store Credit and Layaway Program**

35. Ben Moss customers can purchase gift cards (“Gift Cards”) in-store or online, to be redeemed for merchandise. The Gift Cards are managed through a master service agreement with a third party. As of May 13, 2016, Ben Moss had \$167,202 of outstanding Gift Cards.

36. Customers can also obtain in-store credit (“Store Credit”) when they return merchandise, to be redeemed for other merchandise in any Ben Moss store. As of May 13, 2016, Ben Moss had \$110,820 of outstanding Store Credit.

37. Ben Moss also offers a layaway program (the “Layaway Program”) in its retail locations to allow customers to pay for products over the course of a few months. The Layaway Program requires an initial deposit of at least 20% of the total purchase price, including taxes, and allows payment to be spread out over a maximum of six consecutive months.

38. When a product is purchased as part of the Layaway Program, the product stays in the store until the purchase price is paid in full. The customer is provided with a receipt that includes the item description, layaway number and balance owing. Every time the customer pays more money against the layaway, the receipt is updated to reflect the current balance owing. If a customer cancels a layaway, his or her payments are refunded (less any special order/non-refundable fees). As of May 2016, approximately \$2.4 million of merchandise has been purchased as part of the Layaway Program, of which approximately \$1.1 million has thus far been received from various customers as deposits. Pursuant to the current Cash Management System (defined below), customer payments made under the Layaway Program are comingled with Ben Moss’s other cash receipts and deposit accounts which are then transferred to Salus Capital’s concentration accounts on a regular basis.

39. Ben Moss's Gift Cards, Store Credit program, and Layaway Program increase sales and improve the customer experience. As such, Ben Moss seeks in the Initial Order that it be authorized, with the consent of the Proposed Monitor, to continue providing and to honour Gift Cards and Store Credit during these proceedings. At this time, Ben Moss will not be accepting any new deposits with respect to the Layaway Program, either from existing Layaway Program customers or with respect to new purchases, with the exception of existing Layaway Program customers who decide to pay the remaining balance in full and who will then receive the fully paid-for merchandise.

**(f) Critical Suppliers**

40. Ben Moss works with a number of third party service providers who are essential to its business. Ben Moss is seeking authorization to make certain payments, including payments owing in arrears, to certain third parties that provide services that are critical to Ben Moss's ongoing operations during the restructuring.

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

41. Ben Moss maintains a centralized cash management system (the "Cash Management System"), which is administered from JSN Inc.'s head office. The Applicant's bank accounts are maintained and controlled by JSN Inc.'s senior management, which is based in Toronto, utilizing cash management systems established at the Royal Bank of Canada ("RBC") and certain other banks.

42. The majority of Ben Moss store sales are transacted through credit and debit cards with the related settlement receipts being deposited daily by the card processor into a blocked deposit account with RBC. Cash sales are deposited daily by each store into a "deposit only" account for

that store at the closest financial institution, including Scotiabank, CIBC, TD and RBC. Upon deposit, funds are then electronically transferred to and consolidated in an RBC blocked account at the end of each day. The funds in both of these RBC blocked accounts are automatically transferred to Salus Capital each day. Store cash deposits made to BMO accounts are automatically swept to a BMO blocked account (collectively with the RBC blocked accounts, the “Blocked Accounts”) once per week and the funds in the BMO Blocked Account are then transferred to Salus Capital automatically once per week. Other bank accounts include payroll as well as a USD and CAD operating account.

43. As discussed further below, the Revolving Credit Facility under the Salus Credit Agreement is structured as a typical asset-based loan. Advances are made based on the amount of available credit, which varies based on the value of the Borrowers’ collateral, specifically, their inventory and accounts receivable balances. Cash receipts represent a loss/replacement of the collateral which supports the indebtedness. Thus, the money deposited by Ben Moss into the Blocked Accounts from the sale of its inventory represents both a reduction in the collateral securing the Senior Secured Lenders’ outstanding loans and a corresponding reduction in the amount borrowed under the Revolving Credit Facility.

44. Since the sale of inventory constantly erodes the collateral which supports the indebtedness, asset-based lenders generally have dominion over a borrower’s cash receipts. Indeed, since the inception of the Salus Credit Agreement, Salus Capital has had cash dominion over all receipts of the Borrowers in part pursuant to a number of blocked account agreements between Salus Capital, Ben Moss and a number of banks (collectively, the “Blocked Account Agreements”), copies of which Blocked Account Agreements are attached at Exhibit “B” to this Affidavit. In accordance with the terms of the Blocked Account Agreements, all of the Ben Moss

receipts deposited to the Blocked Accounts are automatically swept to Salus Capital's collection accounts. Similarly, the other Borrowers' receipts are deposited into accounts and swept to Salus Capital's collection accounts and applied against the amounts owing under the Credit Facilities.

45. On a regular basis, Salus Capital re-advances funds to JSN Inc. in accordance with the borrowing base and the other terms of the Salus Credit Agreement. JSN Inc.'s regularly prepared borrowing base is used to determine the amount of financing availability (as supported by collateral) the Companies can draw upon in accordance with the Salus Credit Agreement. Each such borrowing base is certified by an officer of the JSN Group. In this fashion, Salus Capital's cash dominion and the Companies' borrowing base serve a collateral monitoring function that is essential to the asset-based nature of the Revolving Credit Facility and is typical and customary in all asset based lending arrangements.

46. Ben Moss provides cash flow forecasts to JSN Inc. to substantiate any requests for funding and JSN Inc. then transfers funds, upon receipt from Salus Capital, as needed and/or available to Ben Moss's USD and CAD operating accounts. Ben Moss uses its operating accounts to make payments to its vendors and landlords, through the use of cheques, pre-authorized payments, wires and credit card payments.

47. Pursuant to the Salus Credit Agreement, the JSN Group prepares a single borrowing base. Accordingly, the JSN Group's total availability is determined by its consolidated collateral (inventory at both JSN Inc. and Ben Moss as well as accounts receivable from all of its operations). On that basis, management at JSN Inc. must determine how to allocate funds received from Salus Capital among the Borrowers. To the extent that the borrowing base is insufficient to satisfy all such requirements, management must determine how best to make such an allocation or, as was the case in early April 2016 and persisting to the date hereof, request that

Salus Capital provide additional funding by way of an overadvance, which constitutes an Event of Default.

48. The Applicant intends to continue using the existing Cash Management System (including the borrowing base regime whereby a unified borrowing base for all of the Companies is regularly submitted to Salus Capital) during the CCAA Proceedings and is seeking the approval of the Court to do so. The continued use of the Cash Management System is a condition of the Accommodation Agreement and the DIP Facility. The Proposed Monitor is of the view that the continued use of the existing Cash Management System is required and appropriate in order for Ben Moss to successfully complete the CCAA Proceedings.

**D. Financial Position of Ben Moss**

49. A copy of Ben Moss's unaudited financial statements dated March 28, 2015 is attached as Exhibit "C".<sup>2</sup> A copy of Ben Moss's internal draft unaudited financial statements dated March 26, 2016 is attached as Exhibit "D". I am informed by Ellen Baranyi, the Director of Finance of Ben Moss, and I believe that although the March 26, 2016 draft financial statements are not finalized, any adjustments made would not be material.

50. The Companies' Credit Facilities are not included as part of Ben Moss's financial statements but are instead included in the combined audited financial statements of the Companies.

51. Certain information contained in Ben Moss's March 26, 2016 draft financial statements is summarized below. All amounts in this Affidavit are in Canadian Dollars.

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<sup>2</sup> Ben Moss's financial statements are in the normal course incorporated into the consolidated audited financial statements of JSN Inc., JSN US, JSN UK, Ben Moss, 2373138 Ontario Inc. and Utopia Jewellery Co.

**(a) Assets**

52. As at March 26, 2016, Ben Moss had combined total assets of \$72,249,130.

**(i) Current Assets**

53. Ben Moss's current assets (as at March 26, 2016) represented \$48,574,758 of its total assets and consisted of:

- (a) Cash – (\$550,449)
- (b) Accounts receivable – \$6,348,473
- (c) Inventories – \$41,991,146
- (d) Prepaid expenses and other assets – \$620,040
- (e) Restricted cash – \$165,548

54. The majority of Ben Moss's current assets are made up of inventories and accounts receivable. The vast majority of the accounts receivable is due from PMR.

**(ii) Non-Current Assets**

55. Ben Moss's non-current assets (as at March 26, 2016) represented \$23,674,372 of its total assets and consisted of:

- (a) Capital assets – \$11,144,237
- (b) Intangible assets – \$11,534,587
- (c) Goodwill – \$2,995,548

56. The majority of the Ben Moss's non-current assets are made up of capital assets and intangible assets.

**(b) Liabilities**

57. As at March 26, 2016, Ben Moss's total liabilities were approximately \$62,168,925. These liabilities consisted of current liabilities of approximately \$37,481,970, and non-current liabilities of approximately \$24,686,955. The Credit Facilities are not included as part of Ben Moss's financial statements, and therefore are not included in the tally of its liabilities. The Credit Facilities are instead included in the combined audited financial statements of the JSN Group.

**(i) Current Liabilities**

58. Current liabilities as at March 26, 2016 included:

- (a) Accounts payable and accrued liabilities – \$12,073,326
- (b) Government remittances payable – \$360,486
- (c) Current portion of deferred lease inducements – \$10,745
- (d) Current portion of deferred service plan revenue – \$810,757
- (e) Current portion of obligations under capital leases – \$714,334
- (f) Current portion of long-term debt – \$43,009
- (g) Due to ultimate parent company – \$23,469,313

**(ii) Non-Current Liabilities**

59. Non-current liabilities as at March 26, 2016 included:

- (a) Deferred lease inducements – \$83,538
- (b) Deferred service plan revenue – \$365,086
- (c) Unfavourable off-market leases – \$60,573
- (d) Obligations under capital leases – \$233,196
- (e) Due to parent company – \$23,944,562

**(c) Revenue**

60. Ben Moss's consolidated net sales decreased by \$6.7 million (7.8%) between its 2015 fiscal year and its 2016 fiscal year. The decline was caused by, *inter alia*:

- (a) Softness in western Canada due to declining energy prices;
- (b) Poor inventory mix; and
- (c) An inability to stock non-core products in advance of the key holiday retail season as a result of the appreciation of the U.S. dollar relative to the Canadian dollar.

61. Earnings before interest, taxes, depreciation and amortization for Ben Moss decreased from \$4.0 million in its 2014 fiscal year to \$2.0 million in its 2015 fiscal year and further decreased to (\$0.4) million in its 2016 fiscal year.

62. Ben Moss has also incurred net losses totalling approximately \$4.2 million in its 2016 fiscal year.



**(d) Secured Debt and Credit Facility**

63. As noted above, Ben Moss and certain other Companies entered into the Salus Credit Agreement, a copy of which is attached as Exhibit “E”. The parties to the Salus Credit Agreement are: (i) JSN Inc., as lead borrower; (ii) JSN UK, JSN US and Ben Moss, as co-borrowers (collectively with JSN Inc., the “Borrowers”); (iii) 2373138 Ontario Inc., FJI<sup>3</sup> and Joseph Shilon as guarantors (the “Guarantors”); (iv) Salus Capital, as administrative agent, collateral agent and lender; and (v) Salus CLO as lender.

64. The Salus Credit Agreement provides for the Credit Facilities and was entered into partly in order to finance the acquisition of Ben Moss. The Salus Credit Agreement funds the operations of Ben Moss as well as other operations of the JSN Group, including the operations of Utopia Jewellery Co., Utopia Diamond Inc. and Global Diamond (G.D.) Ltd.

65. The obligations of the Borrowers under the Salus Credit Agreement are secured by first-priority liens on substantially all of the Borrowers’ assets pursuant to a general security agreement dated July 18, 2013 (the “General Security Agreement”), a joinder to the General Security Agreement dated July 18, 2013 (the “Joinder”), a U.S. general security agreement executed by JSN US (the “U.S. General Security Agreement”), a UK guarantee and debenture executed by JSN UK (the “UK Debenture”) and certain other security documents (collectively, the “Security Documents”). Copies of the General Security Agreement, the Joinder, the U.S. General Security Agreement and the UK Debenture are attached as Exhibits “F”, “G”, “H”, and “I” to this Affidavit, respectively.

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<sup>3</sup> Forever Jewellery Inc. (“FJI”) is a separate jewellery wholesaling business. It is not affiliated with the JSN Group but it purchases product from the JSN Group and the companies cooperate for advertising and sales purposes.

66. Each of the Guarantors guaranteed the performance of the Borrowers' obligations under the Salus Credit Agreement. 2373138 Ontario Inc.'s obligations as a Guarantor are secured by a first-priority lien on substantially all of its assets pursuant to the General Security Agreement. FJI's obligations as a Guarantor are secured by a first-priority lien on substantially all of its assets pursuant to the General Security Agreement; however, the recourse of the Senior Secured Lenders against FJI was limited to an amount equal to the sum of amounts due from FJI to the Borrowers and other Guarantors from time to time. Joseph Shilon's guarantee is not secured and the recourse of the Senior Secured Lenders under this guarantee was limited to \$3,000,000.

67. The Credit Facilities mature on July 18, 2016. They are comprised of the \$50 million committed Revolving Credit Facility, a \$7 million term loan credit facility (the "Term A Facility"), a \$13 million term loan credit facility (the "Term B Facility") and a U.S.\$3.5 million term loan credit facility (the "Term C Facility").

68. The applicable interest rate and the amounts outstanding under each of the respective Credit Facilities is as outlined below:

	<b>Current Facility</b>	<b>Amount Outstanding</b>	<b>Interest Rate on advances</b>	<b>Default Interest Rate on advances</b>
<b>Revolving Credit Facility</b>	\$50 million	\$53.9 million	Canadian Prime Rate <sup>4</sup> plus 3.5%	Canadian Prime Rate plus 6.5%
<b>Term A Facility</b>	\$7 million	\$4.8 million	Canadian Prime Rate plus 7.75%	Canadian Prime Rate plus 10.75%
<b>Term B Facility</b>	\$13 million	\$4.9 million	Canadian Prime Rate plus 9.75%	Canadian Prime Rate plus 12.75%
<b>Term C Facility</b>	U.S.\$3.5 million	U.S.\$3.5 million	U.S. Base Rate <sup>5</sup> plus 9.75%	U.S. Base Rate plus 12.75%

<sup>4</sup> Royal Bank of Canada prime rate for Canadian dollar commercial loans in Canada (the "Canadian Prime Rate").

<sup>5</sup> Royal Bank of Canada base rate for U.S. dollar commercial loans in Canada ("U.S. Base Rate").

69. In the event that the amount drawn under the Revolving Credit Facility is greater than the Maximum Revolving Loan Amount (as defined in the Salus Credit Agreement), the amount of such discrepancy must be immediately paid by the Borrowers to the Senior Secured Lenders. Salus Capital may exercise its discretion to establish reserves that it determines are appropriate to, *inter alia*: (i) reflect the impediments of the Senior Secured Lenders' ability to realize upon the security granted pursuant to the Security Documents (the "Security"); or (ii) reflect claims and liabilities that will need to be satisfied in connection with the realization of the Security.

**(e) Other Creditors**

70. Ben Moss has six secured creditors in addition to the Senior Secured Lenders: 4770693 Manitoba Limited, 4770715 Manitoba Limited and 4770685 Manitoba Limited (the "Numbered Companies"), National Leasing Group Inc. ("National Leasing"), HSBC Bank Canada ("HSBC"), and Xerox Canada Ltd. ("Xerox", and collectively the "Other Secured Creditors").

71. As part of the 2013 Ben Moss sale transaction, the Numbered Companies paid out a lease agreement with Wells Fargo, since Wells Fargo was not willing to assign the lease agreement as part of the sale. In return, Ben Moss provided the Numbered Companies with a promissory note and a purchase money security agreement. The Numbered Companies are still owed approximately \$29,000 by Ben Moss as of May 2016.

72. National Leasing financed the acquisition of certain equipment for use in the Ben Moss stores pursuant to a Master Lease Agreement dated July 7, 2010 (the "2010 Master Lease Agreement"). The 2010 Master Lease Agreement was subsequently assigned to HSBC. The 2010 Master Lease Agreement provides, *inter alia*, that in the event that Ben Moss files for protection

under the CCAA, all rent and any other payments to the end of the lease term (as of May 2016, approximately \$675,000) become due and payable on HSBC's demand. Additionally, JSN Inc. has agreed to indemnify HSBC in the event that Ben Moss is unable to make its rent payments to HSBC.

73. National Leasing also financed the acquisition of certain equipment for use in the Ben Moss stores pursuant to a Master Lease Agreement dated September 12, 2011.

74. Xerox financed the acquisition of certain equipment for use in the Ben Moss head office.

75. As at the date of filing, no amounts are outstanding under the agreements with the Other Secured Creditors. Additionally, the cash flows (discussed below) provide for the continued payment of the amounts owing under all of these agreements going forward. As such, it is anticipated that the Other Secured Creditors will remain unaffected by Ben Moss's filing for protection under the CCAA.

#### **E. Accommodation Agreement**

76. Ben Moss has continued to face financial difficulty since receiving the Overadvance. As a result of the Overadvance, the total amount drawn down on the revolver exceeds the Maximum Revolving Loan Amount provided for in the Salus Credit Agreement by approximately \$7.5 million.<sup>6</sup> Neither Ben Moss, the other Borrowers, nor the Guarantors are able to repay the excess amount, which constitutes an Event of Default.<sup>7</sup> As a result, Salus Capital issued the BIA

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<sup>6</sup> The Maximum Revolving Loan Amount is effectively the lesser of \$50 million and the borrowing base.

<sup>7</sup> As noted above, Ben Moss and the other Borrowers breached the Collateral Coverage Ratio covenant, which constitutes an Event of Default. As a result of the Events of Default, the default interest rates outlined in the chart above are now in effect.

Notices and the Demands for repayment pursuant to which the Companies' rights to access any further credit under the Salus Credit Agreement were terminated.

77. Pursuant to the Accommodation Agreement Salus Capital agreed to forbear from exercising its rights and remedies under the Salus Credit Agreement, to take no further action or proceedings in further of the Demands or the BIA Notices, and to continue to provide the Credit Facilities until the earlier of (a) July 29, 2016; and (b) the occurrence of certain forbearance termination events, or such later date that the Proposed Monitor, Salus Capital, the Borrowers and the Guarantors so agree; on certain conditions. These conditions include, *inter alia*:

- (a) Execution of the DIP Facility;
- (b) Compliance in all material respects, as determined by Salus Capital in the exercise of its reasonable business judgment, with a restructuring plan that involves Ben Moss filing for CCAA protection;
- (c) Compliance with the Cash Flows (as defined in the Accommodation Agreement);
- (d) Ben Moss obtaining an order from the Court commencing CCAA proceedings, in form and substance satisfactory to Salus Capital, providing for, among other things:
  - (i) A stay of proceedings;
  - (ii) The approval of the DIP Facility;
  - (iii) A charge in favour of Salus Capital as agent under the DIP Facility to secure obligations under the DIP Facility;
  - (iv) Approving and providing for the continuation of Ben Moss's current cash management system; and
  - (v) Approving the RISP; and

- (e) The appointment of FAAN as chief restructuring officer of Ben Moss, JSN Inc., JSN UK, JSN US, 2373138 Ontario Inc., AFFC and PMR.

78. Pursuant to the Accommodation Agreement, in consideration for Salus Capital's commitment to forbear and to provide the DIP Facility, *inter alia*:

- (a) AFFC and PMR have provided (or will provide) an unlimited, secured guarantee of all obligations to the agent under the Credit Facilities and to the DIP Lender;
- (b) JSN UK has agreed to provide such additional guarantee and/or debenture documents as required by the Senior Secured Lenders;
- (c) Joseph Shilon amended his personal guarantee of the Credit Facilities to also guarantee all obligations to the DIP Lender and increased the value of the guaranteed amount thereunder to \$11,000,000;
- (d) JSN Inc. agreed that, unless otherwise agreed to by Salus Capital, should no qualifying LOI be received by the Phase 1 LOI Deadline (defined below), JSN Inc. and/or the Applicant will, within two days, seek an Order of the Court adding JSN Inc. and certain other members of the JSN Group as applicants in Ben Moss's CCAA proceedings; and
- (e) JSN Inc., JSN UK, JSN US, 2373138 Ontario Inc., AFFC and PMR provided secured guarantees of the Applicant's obligations under the DIP Facility.

79. For the reasons previously described, per the JSN Group's request, Salus Capital did not require that the other Companies file for CCAA protection at this time.

80. Without a stay of proceedings and the Senior Secured Lenders support for Ben Moss's restructuring, the Senior Secured Lenders would be in a position to enforce their security over the assets and property of Ben Moss. Therefore, Ben Moss is insolvent and has commenced this CCAA proceeding.

#### **F. Urgent Need for Relief**

81. Ben Moss is facing multiple challenges to its continued operations, including immediate liquidity challenges due to Salus Capital's decision to make the Demands for repayment and accelerate Ben Moss's debt.

82. Additionally, the appreciation of the U.S. dollar relative to the Canadian dollar has resulted in Ben Moss paying more Canadian dollars in 2016 for less product, causing significant liquidity constraints. This has resulted in a suboptimal product mix and a lack of ability to replenish the best-selling, non-core products (watches, gold, etc.), causing significant sales declines and serious underperformance by certain retail locations.

83. Without access to the incremental borrowings that had previously been available under the Credit Facilities from September to November, Ben Moss's liquidity and availability was constrained and it was unable to properly stock its non-core product lines for the important holiday selling season. Ben Moss's non-core product offerings performed very poorly with sales declining by \$3.1 million (14%) over prior year due to the lack of available inventory (down over 18% from prior year). Despite accounting for only 25% of total sales, the non-core product categories at Ben Moss accounted for over 50% of the sales decline over the prior year.

84. While there seems to be an increase in Ben Moss's inventory balances over the past year, this is largely due to the appreciation of the U.S. dollar relative to the Canadian dollar. The core

input costs (gold and diamonds) are sourced in U.S. dollars, and while the input costs in U.S. dollars have not changed substantially, when translated into Canadian dollars the cost appreciation is substantial. Therefore while the Ben Moss balance sheet reflects an increase in the value of inventory, the actual number of units on hand has decreased significantly: the average number of non-core product units declined by 20,000 units (23.5%) and the average number of non-core units per store have declined by 26.9%.

85. Without the stay of proceedings contemplated herein, which would provide Ben Moss with the opportunity to restructure its operations, Ben Moss will not be able to address the challenges described above that have put the business in peril. It is my view that these CCAA proceedings will give Ben Moss the ‘breathing room’ it requires to make the necessary changes to its cost structure and either (i) obtain new capital; or (ii) pursue a sale transaction pursuant to the RISP which would allow the business an opportunity to continue.

#### **G. Restructuring Efforts to Date**

86. JSN Inc. has been exploring the possibility of refinancing the Credit Facilities as well as restructuring the Ben Moss retail business. To that end, JSN Inc. engaged Osler, Hoskin & Harcourt LLP as its legal advisor and Alvarez & Marsal Canada ULC as its financial advisor in March 2016 to assist it in its strategic alternatives review process.

##### **(a) Efforts to Refinance Credit Facilities**

87. In August 2015, Alvarez & Marsal Canada Securities ULC (“A&M Corporate Finance”) was engaged by JSN Inc. to initiate a process to effectuate a refinancing of the Credit Facilities. A&M Corporate Finance commenced active solicitation of potential lenders in January 2016 and contacted numerous parties, including financial institutions based in both Canada and the U.S.



88. Many of the lenders that were contacted have been provided with information on the business and have requested the execution of non-disclosure agreements (“NDAs”). As of March 7, 2016, 37 parties had executed NDAs and received a Confidential Information Memorandum in connection with a refinancing of the Credit Facilities. A&M Corporate Finance provided parties who executed NDAs with additional information related to Ben Moss, including historical financial information, financial forecasts and recent inventory appraisals and a letter requesting proposals on February 26, 2016. To date, this process has not resulted in an acceptable refinancing proposal.

89. In March 2016, JSN Inc. engaged Alvarez & Marsal Canada ULC to assist with JSN Inc.’s strategic review process. The engagements of A&M Corporate Finance and Alvarez & Marsal Canada ULC will be terminated upon the appointment of the Proposed Monitor.

**(b) Efforts to Improve Profitability of Ben Moss Stores**

90. Since the acquisition of Ben Moss, significant efforts have been made to derive operational synergies and performance enhancements for the business. Management continues to implement a plan to transform Ben Moss into a more nimble, responsive and profitable company. Some steps that have been or continue to be taken include:

- (a) Selecting key external vendors to become category managers of non-core product lines (watches, gold jewellery, etc.) to ensure efficient inventory spending and maximize inventory turns;
- (b) Maximizing sell-through with an updated and refreshed merchandising strategy and ensuring an optimal product mix tailored to specific stores based on local demographics and trends;

- (c) Examining store operations to identify opportunities for savings, including efficient staffing policies and direct-to-store shipping capabilities;
- (d) Investing in Ben Moss's ecommerce business to help drive traffic to its retail locations;
- (e) Conducting a store-by-store profitability analysis to identify possible store closures;
- (f) Reviewing overhead structure to identify synergies and cost savings; and
- (g) Soliciting interest and selecting a liquidator to commence inventory reduction in selected underperforming stores.

## **H. Relief Sought**

91. The Applicant has made efforts to pursue a restructuring outside of a formal insolvency proceeding. However, Ben Moss is not able to honour its debt obligations to the Senior Secured Lenders and its liquidity position continues to significantly deteriorate. Ben Moss cannot pursue a restructuring or maintain going concern operations without the protection of CCAA proceedings. The Applicant is unable to meet its liabilities as they become due and is therefore insolvent.

### **(a) Stay of Proceedings**

92. In order to prevent a fast erosion of enterprise value and to permit Ben Moss to continue to operate as a going concern, the Applicant requires a stay of proceedings. Ben Moss is concerned about its inability to make payments owing under the Salus Credit Agreement, as well as the potential termination of contracts by key suppliers and the inability to force suppliers to

provide future product. It would be detrimental to Ben Moss's ability to restructure if proceedings were commenced or continued or rights and remedies were executed against Ben Moss.

93. The Applicant requests that the benefit of the stay of proceedings be extended to JSN Inc. in relation to any claims brought against JSN Inc. as a result of cross-default provisions in respect of amounts owing by Ben Moss to third parties (for instance, claims pursuant to the indemnity granted by JSN Inc. with respect to the 2010 Master Lease Agreement). The stay would be limited to amounts owing that are currently not in arrears and that are contemplated in the cash flows as being paid in the ordinary course. As at the date of filing, no amounts are outstanding under Ben Moss's agreements with the Other Secured Creditors. Additionally, the cash flows (discussed below) provide for the continued payment of the amounts owing under Ben Moss's agreements with the Other Secured Creditors going forward. It is anticipated that the Other Secured Creditors will not be negatively impacted by the extension of the stay of proceedings to JSN Inc.

94. The operations of Ben Moss and JSN Inc. are intertwined and the extension of the stay is necessary to maintain stability and value in the CCAA process. Any proceedings commenced against JSN Inc. would necessarily require the participation of key personnel of the Applicant – for example, to provide evidentiary support for the claim through witnesses or documents. The need to provide such support could be a very significant distraction for the Applicant's key personnel during the restructuring and would materially detract from the paramount goal of achieving the timely restructuring of the business.

95. The stay will provide management with the breathing space it needs to develop and oversee an orderly restructuring of the business with minimal disruptions to current business

operations, as well as to consider any operational restructuring initiatives. This, in turn, will help to protect the interests of the Applicant's stakeholders, including employees, suppliers, landlords, customers and lenders. Having regard to the circumstances, and in an effort to preserve the value of the Applicant's business, the granting of a stay of proceedings is in the best interests of the Applicant and its stakeholders.

96. If granted CCAA protection, Ben Moss plans to aggressively pursue a restructuring of its business. Among other things, Ben Moss plans to:

- (a) close those retail locations that are unprofitable or that make marginal contributions to the overall profitability of Ben Moss (the "Closed Locations");
- (b) renegotiate the terms of certain economically unviable leases;
- (c) liquidate inventory currently held at the Closed Locations and disclaim the leases in connection with the Closed Locations to obtain much needed cash flow;
- (d) evaluate opportunities to reduce other operating costs;
- (e) implement changes to optimize inventory management; and
- (f) continue seeking an investor to refinance the Credit Facilities.

**(b) Debtor In Possession Financing and DIP Charge**

97. As a result of its current liquidity challenges, Ben Moss requires interim financing over and above the current Overadvance and authorized credit limits on an urgent basis to continue as a going concern. As demonstrated in the cash flow forecast (discussed below), Ben Moss is in

need of funding for working capital, general corporate purposes, and for post-filing expenses and costs in order to successfully restructure its business during this CCAA proceeding.

98. As discussed above, subject to certain terms and conditions, Salus Capital has agreed to allow Ben Moss to continue to access the existing Credit Facilities pursuant to and in accordance with the Accommodation Agreement. Salus CLO has agreed, subject to certain terms and conditions, to act as DIP lender (the “DIP Lender”) and to provide interim financing through the availability of drawdowns under the Super Priority DIP Credit Agreement (again, the “DIP Facility”) of \$8 million to Ben Moss. A copy of the draft DIP Facility, which is expected to be executed in substantially the same form, is attached hereto as Exhibit “J”.

99. Access to the DIP Facility is subject to compliance with the Accommodation Agreement, as well as a budget, restructuring plan and RISP. Ben Moss would only be permitted to access the DIP Facility in the event that the existing Credit Facilities are fully drawn down, which is currently the situation as there is no availability under the existing Credit Facilities. As discussed above, execution of the DIP Facility is a condition of entering into the Accommodation Agreement. The DIP Facility is guaranteed by JSN Inc., JSN UK, JSN US, 2373138 Ontario Inc., FJI, AFFC, PMR and Joseph Shilon.

100. The DIP Facility expressly provides that Ben Moss may not draw down any advances under the DIP Facility to be used to repay any indebtedness outstanding prior to the date of the commencement of this proceeding, except in accordance with the Initial Order.

101. In accordance with the requirements of the DIP Facility, and consistent with the current Cash Management System in effect, Ben Moss’s cash, credit, and debit receipts from business operations are required to be deposited into the Blocked Accounts, swept to Salus Capital’s collection accounts and applied by Salus Capital in order to reduce first, the obligations

classified as a “Permitted Overadvance” under the Credit Facilities, second, the obligations under the DIP Facility and third, the outstanding obligations under the Credit Facilities.

102. The maintenance of the pre-existing Cash Management System, as modified by the DIP Facility, means that the Senior Secured Lenders’ secured collateral from before the filing date which is sold subsequent to the filing date will continue to be used to reduce pre-petition amounts owing to the Senior Secured Lenders, in accordance with the ‘waterfall’ described in the paragraph above. The proposed DIP Facility preserves the current structure of the existing asset based loan with the Senior Secured Lenders where advances under the Revolving Credit Facility are determined based on the value of the Borrowers’ collateral. The maintenance of the existing Cash Management System is a condition precedent to the availability of the DIP Facility.

103. Ben Moss is seeking approval of the proposed DIP Facility to accommodate its anticipated liquidity requirements during this CCAA proceeding. The proposed DIP Facility will provide additional assurances to Ben Moss’s employees, critical suppliers, creditors and other stakeholders that Ben Moss will be able to continue going concern operations while pursuing the implementation of a restructuring.

104. It is a condition precedent to the availability of the DIP Facility that the Initial Order be in form and substance satisfactory to the DIP Lender, including in respect of the granting of the DIP Lender’s Charge (as defined below).

105. The DIP Facility is proposed to be secured by a Court-ordered security interest, lien and charge (the “DIP Lender’s Charge”) on all of the present and future assets, property and undertaking of Ben Moss, including any cash on hand at the day of the filing (the “Property”) that will secure all post-filing advances. The DIP Lender’s Charge is to have priority over all

other security interests, charges, and liens other than the Administration Charge (as defined below) up to an amount of \$ 600,000 and any properly perfected purchase money security interest under the *Personal Property Security Act* (Ontario) or such other applicable provincial legislation. The DIP Lender's Charge will not secure any obligation that exists before the Initial Order.

106. Ben Moss has agreed to pay the DIP Lender:

- (a) a DIP Arrangement Fee of \$80,000;
- (b) a Collateral Monitoring Fee of \$5,000 per month;
- (c) a Commitment Fee of 0.675% per annum of the unused portion of the DIP Facility;
- (d) interest of 20% per annum of the outstanding revolving loans under the DIP Facility; and
- (e) other fees and interest payable in certain circumstances.

107. Because the proposed DIP Facility is being provided by Salus CLO with Salus Capital as agent and with Salus Capital's consent, and these entities are Ben Moss's senior secured creditors, Ben Moss is of the view that there will be no material prejudice to any of its existing creditors. Additionally, no amounts are past due under Ben Moss's agreements with the Other Secured Creditors and the cash flows anticipate continuing to pay them in the ordinary course.

108. Further, I am advised that Salus Capital will oppose any other DIP financing arrangement which seeks to prime the Senior Secured Lenders and would immediately demand that the other Borrowers (which operate the JSN Group's wholesale business) seek protection under the CCAA

to the detriment of the JSN Group as a whole, including Ben Moss. Accordingly, the DIP Facility provided by Salus CLO is the only realistic means for Ben Moss to keep operating while it attempts to restructure its business and continue as a going concern.

109. The DIP Facility is critical to the successful restructuring of Ben Moss, as it will provide Ben Moss with the necessary liquidity to operate as a going concern during these proceedings and, absent an injection of cash at this time, Ben Moss will be forced to shut down its operations, with a significant loss of employment and disruption to those who rely on its services.

110. I have been advised by the Proposed Monitor that while the pricing structure, including the fees and interest costs, as described above, are high, there are certain comparable precedents for arrangements in similar such proceedings. In addition, the Proposed Monitor has advised me, and I believe it to be true, that in the circumstances, it would be either impractical or impossible to obtain an alternate DIP lender. Accordingly, it is my view that the DIP Facility from the DIP Lender is the only viable source of funding currently available to Ben Moss on an expedited basis.

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

111. During the course of this proceeding, Ben Moss intends to make payments for goods and services supplied post-filing in the ordinary course, as set out in the cash flow projections described below and as permitted by the draft Initial Order.

112. Ben Moss is also proposing in the draft Initial Order that it be authorized to make certain payments to certain third parties, including payments owing in arrears, where the CRO determines, with the consent of the Proposed Monitor, that those third parties provide services



that are critical to the Applicant's ability to operate during, and implement its restructuring under, these proceedings.

**(d) RISP**

113. Subject to approval by this Court, Ben Moss has agreed to pursue the following restructuring alternatives under the supervision of the Proposed Monitor, as described in the RISP:

- (a) a refinancing of all or part the Credit Facilities of the JSN Group (a "JSN Group Refinancing Proposal");
- (b) an equity investment in JSN Inc. and/or Ben Moss (a "Reinvestment Proposal");  
and/or
- (c) a sale of all or a portion of the business and property of Ben Moss (a "BM Sale Proposal", and together with a JSN Group Refinancing Proposal, and a Reinvestment Proposal, the "Potential Transactions")

114. I believe that the RISP will help Ben Moss identify the best opportunities for optimizing returns for its stakeholders and creditors. A copy of the RISP is attached as Schedule "A" to the draft Initial Order.

115. Ben Moss and the JSN Group have agreed that the RISP will be conducted in two phases. In the first phase ("Phase 1"), for a period of 30 days following the date of the Initial Order, the Proposed Monitor will solicit non-binding indications of interest in the form of non-binding letters of intent ("LOIs"). During Phase 1, the Proposed Monitor will provide qualified interested parties that have executed a non-disclosure agreement ("Qualified Bidders") with a confidential

information memorandum and access to an electronic data room of preliminary due diligence information.

116. Qualified Bidders that wish to pursue a refinancing, sale or investment proposal must deliver an LOI to the Proposed Monitor by 5:00 PM (Eastern Daylight Time) 30 days following the date of the Initial Order (unless that date is not a business day, in which case the next business day) (the “Phase 1 LOI Deadline”). The requirements of a qualifying LOI are set out in the RISP. At the end of Phase 1, the Proposed Monitor, in consultation with the CRO and Salus Capital, will assess the qualifying LOIs received, if any, and determine whether there is a reasonable prospect of obtaining an offer or combination of offers that may amount to a Qualified Bid (as defined in the RISP).

117. The following factors will be considered in the assessment of the qualifying LOIs, *inter alia*: (i) the form and amount of consideration being offered, including any purchase price adjustments and/or any non-cash considerations; (ii) the demonstrated financial capability of the Qualified Bidder(s) to consummate the proposed transaction; (iii) the conditions to closing of the proposed transaction; and (iv) the estimated time required to complete the proposed transaction and whether, in the Proposed Monitor’s reasonable business judgment, it is likely to close on or before July 29, 2016.

118. If one or more qualifying LOIs are received, the Proposed Monitor, exercising its reasonable business judgment and if appropriate to do so, following consultation with Salus Capital, will recommend to the CRO that the RISP continue into phase 2 (“Phase 2”) until a date to be determined by Salus Capital and the Proposed Monitor. If there are no qualifying LOIs, the Proposed Monitor may, subject to Salus Capital’s approval, continue the RISP into Phase 2 if

there is a reasonable prospect that one or more Potential Transaction proposals may become Qualified Bids.

119. If it is determined that no qualifying LOI has been received and there is no reasonable prospect of one resulting in a Qualified Bid, (i) the Proposed Monitor, any member of the JSN Group or Salus Capital may apply to the Court for further advice and directions including with respect to the termination of the RISP, (ii) Salus Capital may terminate the RISP; and/or (iii) Salus Capital may apply to the Court for approval of a bid. Additionally, the Accommodation Agreement provides that, unless otherwise agreement to by Salus Capital, if no qualifying LOI has been received by the Phase 1 LOI Deadline, JSN Inc. and/or the Applicant shall, within two days, seek an Order of the Court adding JSN Inc. and certain other members of the JSN Group as applicants in Ben Moss's CCAA Proceedings.

120. If the RISP continues to Phase 2, Qualified Bidders, along with their legal, financial advisors and/or lenders, would be granted further access to due diligence materials and information relating to the business and financial affairs of Ben Moss, on-site presentations by the JSN Group's senior management and the Proposed Monitor, facility tours and access to further information contained in a more robust data room. Selected due diligence materials may be withheld from certain Phase 2 Qualified Bidders if the Proposed Monitor determines such information to represent proprietary or sensitive competitive information.

121. Qualified Bidders that wish to pursue a Potential Transaction must submit a final, binding proposal (the "Final Bid") to the Proposed Monitor by the Phase 2 Bid Deadline (as defined in the RISP). In order to be considered a Qualified Bid, a Final Bid must meet the criteria set out in the RISP. Among other things, a Final Bid must include an irrevocable offer letter, written evidence of a firm, irrevocable commitment for financing, and a duly executed purchase

agreement, refinancing agreement, or investment agreement. A Qualified Bid cannot be conditional on due diligence or financing.

122. In evaluating Qualified Bids, the Proposed Monitor, in consultation with the CRO and Salus Capital, will consider, *inter alia*: (i) the ‘headline’ purchase price and estimated net proceeds or the amount of equity and debt investment; (ii) the firm, irrevocable commitment for financing the transaction; (iii) the counterparties to the transaction; (iv) the proposed treatment of employees; (v) other factors affecting the speed, certainty and value of the transaction (including any regulatory approvals required to close the transaction); (vi) planned treatment of stakeholders; (vii) the likelihood and timing of consummating the transaction; and (viii) the likelihood of the transaction resulting in the full repayment of the aggregate amount owing to the Senior Secured Lenders under the Salus Credit Agreement and the DIP Facility (in the case of a JSN Group Refinancing Proposal or a Reinvestment Proposal).

123. If one or more Qualified Bids is received, the Proposed Monitor, exercising its reasonable business judgment, and with approval from Salus Capital, may recommend to the CRO that the most favourable Qualified Bid or combination of Qualified Bids be selected (the “Successful Bid”). The applicable member(s) of the JSN Group shall have no obligation to enter into a Successful Bid, and reserves the right, after consultation with the Proposed Monitor and Salus Capital, to reject any or all Qualified Bids.

124. If it is determined that no Qualified Bid has been received at the end of Phase 2, (a) any of the Proposed Monitor, any member of the JSN Group or Salus Capital may apply to the Court for further advice and directions including with respect to termination of the RISP; (b) Salus Capital may terminate the RISP; and/or (c) Salus Capital may apply to the Court for approval of a bid.

125. Ben Moss will apply to the Court for an order approving the Successful Bid(s) and authorizing Ben Moss to enter into any and all necessary agreements with respect to such bid. All Qualified Bids other than the Successful Bid will be deemed rejected on the date of approval of the Successful Bid.

126. The RISP timelines are appropriate in light of the extensive solicitation process that was undertaken by A&M Corporate Finance in 2015 to identify potential investors/purchasers and educate them about Ben Moss's business. The Proposed Monitor is of the view that the timeframes set out in the RISP are reasonable in the circumstances. I believe it is important to start the RISP promptly to maximize opportunities to identify appropriate interested parties while preserving the enterprise value of the business.

127. A sale of or investment in the Applicant, or alternatively a refinancing of the Credit Facilities, will benefit all stakeholders and will not prejudice any creditors. Unless a refinancing of the Credit Facilities is achieved or an investment in or sale of the business is undertaken at this time, the long-term viability of Ben Moss will be in jeopardy. Proceeding with the RISP will maximize the possibility of saving as many jobs as possible and constitutes the best and most valuable proposal for Ben Moss's business.

**(e) Liquidation Consultant**

128. The Applicant has selected Gordon Brothers Canada ULC ("GBC") to act as its consultant in connection with the liquidation of the Ben Moss stores that have been (or ultimately will be) identified for closure in order to maximize the value of its inventory, furniture, fixtures and equipment (collectively, the "Merchandise & FF&E") for the benefit of Ben Moss' stakeholders. A copy of the GBC Consulting and Agency Agreement (the "GBC Agency Agreement") omitting certain schedules is attached to this affidavit as Exhibit "K".

Capitalized terms in this section that are not otherwise defined have the meaning given to them in the GBC Agency Agreement.

129. The GBC Agency Agreement provides for a process (the “Liquidation Process”) to liquidate the Merchandise & FF&E contemplated therein. The Liquidation Process was designed by GBC and Ben Moss, in consultation with the Proposed Monitor. It is my understanding that the Proposed Monitor supports the proposed Liquidation Process.

130. The sale to liquidate the Merchandise & FF&E (the “Liquidation Sale”) commenced on May 5, 2016. Some of the key terms of the GBC Agency Agreement include:

- (a) The Liquidation Sale will terminate on July 31, 2016 or such other date as provided for in the GBC Agency Agreement or mutually agreed to by GBC and Ben Moss;
- (b) GBC may, with Ben Moss’s approval, supplement the original goods in the 11 closing stores with additional inventory of similar quality on a consignment basis;
- (c) Ben Moss shall pay GBC various fees, including Sales Fees, FF&E Fees, and Sourcing Fees;
- (d) No later than 30 days following the end of the Sale Term, the parties shall complete a final reconciliation of all amounts contemplated under the GBC Agency Agreement; and
- (e) With respect to the removal of Remaining Merchandise and Remaining FF&E, GBC and Ben Moss shall come to an agreed upon FF&E Scope of Work for each Store in order for GBC to remove any Remaining Merchandise and Remaining

FF&E and vacate each closing Store, all in accordance with the terms of the GBC Agency Agreement.

131. Ben Moss is seeking the following relief with respect to GBC, as required by the GBC Agency Agreement:

- (a) Authorization to market and sell the Merchandise and FF&E free of Encumbrances;
- (b) Authorization to use the closing Store locations for the purpose of conducting the Sale;
- (c) The extension of the benefit of Ben Moss's stay of proceeding to GBC for the purposes of conducting the Sale;
- (d) An order that GBC shall not be liable for any claims against the Applicant except as provided for in the GBC Agency Agreement;
- (e) An order that the GBC Agency Agreement will not be repudiated, resiliated or disclaimed by Ben Moss, nor will the claims of GBC pursuant to the GBC Agency Agreement be compromised pursuant to any plan of arrangement;
- (f) A declaration that the transactions contemplated under the GBC Agency Agreement be exempt from application of any applicable *Bulk Sales Act* or other equivalent legislation; and
- (g) Authorization for Ben Moss to disclose to GBC all human resources and payroll information pertaining to Ben Moss's past and current employees and for GBC to

use that information in the same manner as Ben Moss while maintaining the privacy of that information.

132. Ben Moss believes that engaging a professional liquidator such as GBC to undertake a sale of the Merchandise & FF&E will produce better sale results than an attempt by Ben Moss to sell the Merchandise & FF&E without such professional assistance. The Applicant believes that it is crucial to continue the Liquidation Sale process in order to maximize the amounts available to their stakeholders.

**(f) Monitor**

133. Alvarez & Marsal Canada Inc. has consented to act as the Monitor of the Applicant under the CCAA. A copy of Alvarez & Marsal Canada Inc.'s consent to act as Monitor is attached as Exhibit "L".

**(g) Administration Charge**

134. In connection with its appointment, it is proposed that the Proposed Monitor, along with its counsel, counsel to the Applicant, counsel to Joseph Shilon with respect to amounts incurred to the date of the Initial Order, and FAAN<sup>8</sup> will be granted a Court-ordered charge on the Property as security for their respective fees and disbursements relating to services rendered in respect of the Applicant up to a maximum amount of \$600,000 (the "Administration Charge"). The Administration Charge is proposed to have first priority over all other charges.

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<sup>8</sup> Pursuant to its engagement letters with Ben Moss, FAAN will be paid certain work fees for its engagement as Ben Moss's Interim CFO and CRO as well as a success fee to be negotiated.



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

135. A successful restructuring of the Applicant will only be possible with the continued participation of the Applicant's board of directors (the "Directors"), officers (the "Officers"), management and employees. These personnel are essential to the viability of the Applicant's continuing business.

136. I am advised by Marc Wasserman of Osler, Hoskin & Harcourt LLP, counsel for the Applicant, and believe that, in certain circumstances, directors can be held liable for certain obligations of a company owing to employees as well as sales taxes. The Applicant estimates, with the assistance of the Proposed Monitor, that these obligations may include unpaid accrued wages and associated taxes which could amount to as much as approximately \$1.0 million and unpaid accrued vacation pay which could amount to as much as \$0.5 million for a total potential director liability of approximately \$1.5 million. Additionally, as of May 16, 2016, Ben Moss has approximately \$420,000 of accrued, unpaid sales taxes.

137. The amount of insurance under the Director and Officer primary and excess insurance policies is approximately \$10 million. The policy expires July 18, 2016 and there is uncertainty as to whether the policy can be renewed. The Directors and Officers have indicated that, in light of the uncertainty surrounding available Directors' and Officers' insurance, their continued service and involvement in this restructuring is conditional upon the granting of an Order under the CCAA which grants a charge in favour of the Directors and Officers of the Applicant in the amount of \$1.5 million on the Property of the Applicant (the "Directors' Charge"). The Directors' Charge would stand in priority to all other security interests, charges, and liens other than the Administration Charge up to an amount of \$600,000 and the DIP Lender's Charge up to an amount of \$8 million. The Directors' Charge would act as security for indemnification

obligations for the Directors' and Officers' liabilities that may be incurred after the commencement of proceedings under the CCAA, as set out above.

138. The Directors' Charge is necessary so that the Applicant may benefit from its Directors' and Officers' experience with the business and the retail jewellery industry, and so that the Directors and Officers can guide the Applicant's restructuring efforts.

**(i) Cash Flow Forecast**

139. Ben Moss, with the assistance of the Proposed Monitor, has prepared 13-week cash flow projections as required by the CCAA. A copy of the cash flow projections is attached as Exhibit "M". The cash flow projections demonstrate that Ben Moss can continue going concern operations during the proposed stay period should the stay of proceedings be granted and the proposed DIP Facility be approved.

140. The Applicant anticipates that the Proposed Monitor will provide oversight and assistance and will report to the Court in respect of Ben Moss's actual results relative to cash flow forecast during this proceeding. Existing accounting procedures will provide the Proposed Monitor with the ability to track the flow of funds.

141. I am confident that granting the Initial Order sought by the Applicant is in the best interests of the Applicant and all interested parties. Without the stay of proceedings and the DIP Facility, the Applicant faces a cessation of going concern operations, the liquidation of its assets and the loss of its employees' jobs. The Applicant requires an immediate and realistic dialogue with its key stakeholders under the protection of the CCAA with the goal of maximizing the ongoing value of the business and continuing employment for its employees. The granting of the requested stay of proceedings will maintain the "status quo" and permit an orderly restructuring

and analysis of the Applicant's affairs, with minimal short-term disruptions to the Applicant's business.

SWORN BEFORE ME at the City of  
Toronto, in the Province of Ontario on  
May 16, 2016.



*Commissioner for Taking Affidavits*  
Mark Sheehey



**NAVEED Z. MANZOOR**