

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

IN THE MATTER OF *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

**FACTUM OF THE APPLICANT**

(Sale Approval and Stay Extension, Returnable July 29, 2016)

July 27, 2016

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**FACTUM OF THE APPLICANT**

**PART I - NATURE OF THIS MOTION**

1. On May 18, 2016, Ben Moss Jewellers Western Canada Ltd. ("**Ben Moss**" or the "**Applicant**"), sought and received protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") pursuant to an initial order of this Court, as amended and restated on May 26, 2016 (the "**Initial Order**"). In the Initial Order, the Court appointed Alvarez & Marsal Canada Inc. to act as the monitor in this CCAA proceeding (the "**Monitor**") and FAAN Advisors Group Inc. as Chief Restructuring Officer of Ben Moss (the "**CRO**"). The Court also directed Ben Moss to commence a refinancing, investment and/or sale solicitation process (the "**RISP**") to seek out qualified purchasers or investors for Ben Moss's business and property.

2. This Factum is filed in support of Ben Moss's motion for an Order, substantially in the form of the draft Order attached as Schedule "A" to the Notice of Motion (the "**Approval Order**"), among other things:

- (a) approving the Agency Agreement entered into between Ben Moss and a contractual joint venture composed of Gordon Brothers Canada ULC and Merchant Retail Solutions ULC (the “**Liquidator**”) on July 22, 2016 (the “**Liquidation Agreement**”), for the liquidation of certain of Ben Moss’s inventory, furniture, fixtures and equipment and authorizing and directing Ben Moss to enter into and complete the transactions contemplated by the Liquidation Agreement (the “**Transaction**”);
- (b) authorizing the Liquidator to conduct the sale in accordance with applicable Orders, the Liquidation Agreement and the sale guidelines attached to the Liquidation Agreement as Schedule “G” (the “**Liquidation Guidelines**”);
- (c) approving the Liquidation Guidelines;
- (d) granting the a charge in favour of the Liquidator (the “**Liquidator’s Charge**”);
- (e) approving certain distributions from the proceeds of the Transaction to (i) J.S.N. Jewellery Inc. (“**JSN Inc.**”) and (ii) Salus Capital Partners, LLC (“**Salus Capital**”);
- (f) approving certain modifications to the Cash Management System (defined below);
- (g) granting an extension of the Stay Period to December 30, 2016;
- (h) approving the activities of the CRO;
- (i) approving the activities of the Monitor; and
- (j) approving the fees and disbursements of the Monitor and its counsel.

3. The Transaction is the culmination of the Court-approved RISP and should be approved on the basis that the criteria set out in s. 36(3) of the CCAA are clearly satisfied. The RISP, which was designed as an inherently flexible process and involved a broad canvass of the market, was approved by this Court in the Initial Order on the basis that it was fair and reasonable. The RISP was implemented in accordance with the terms approved by the Court, with the objective of securing the highest value for Ben Moss's business and property and maximizing the benefits to all of Ben Moss's stakeholders.

4. The terms of the Liquidator's bid (the "**Successful Bid**") were evaluated by the Monitor, in consultation with the CRO and Ben Moss. Ben Moss, the CRO, the Monitor and Salus Capital agree that the Successful Bid qualified in accordance with the RISP and the Transaction represents the best available economic outcome for Ben Moss and its stakeholders.

5. The Transaction is not anticipated to allow for the payment of Ben Moss's senior secured lenders, Salus Capital and Salus CLO 2012-1 Ltd. ("**Salus CLO**", and collectively the "**Senior Secured Creditors**"), in full, and will not yield additional proceeds for distribution to Ben Moss's other creditors. Nonetheless, it is the best possible transaction in the circumstances.

6. If the Liquidation Agreement and Transaction are approved by this Court and completed, Ben Moss's business will continue to operate during the implementation of the Transaction, which will benefit, among others, employees customers and landlords. Landlords will benefit from the good working relationship between the Liquidator and many of the landlords. Based on the foregoing considerations, and the submissions below, the Applicant submits this Court should grant the proposed Approval Order.

7. The requested stay extension is appropriate and necessary in the circumstances because it is necessary to implement the Transaction contemplated by the Liquidation Agreement. Ben Moss has been working with due diligence and in good faith. It has been working diligently with the Monitor and the CRO to complete the RISP, to continue operations of the business, and to engage in ongoing discussions with its various stakeholders, all in an effort to maximize enterprise value for all of its stakeholders.

## **PART II - FACTS**

8. The facts with respect to this Application are more fully set out in the Affidavit of Naveed Z. Manzoor sworn July 25, 2016 (the “**Fourth Manzoor Affidavit**”) and in the Third Report of the Monitor (the “**Third Report**”). Capitalized terms in this Factum that are not otherwise defined have the same meanings as in the Fourth Manzoor Affidavit or the Third Report.

### **A. Background**

9. On May 18, 2016, Ben Moss sought and received Court protection pursuant to the CCAA in the form of the Initial Order, which, among other things: (i) granted a stay of proceedings in favour of the Applicant until and including June 15, 2016, or such later date as the Court may order; (ii) authorized Ben Moss to obtain and borrow up to CAD\$8 million under the DIP Facility from Salus CLO; (iii) approved a comprehensive RISP; and (iv) appointed the Monitor.<sup>1</sup>

10. At the comeback hearing on May 26, 2016, Ben Moss sought and was granted an amended and restated Initial Order, which, among other things: (i) established the treatment of Consignment Goods (as defined in the amended and restated Initial Order); (ii) clarified the rights of real property landlords as against JSN Inc. during the Stay Period and as against Gordon Brothers

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<sup>1</sup> Fourth Manzoor Affidavit, at para 4.

Canada ULC (“**GBC**”); and (iii) required that GBC conduct sales at the Applicant’s stores in accordance with sale guidelines to be agreed to between Ben Moss, GBC, Salus Capital and certain landlords (the “**GBC Sale Guidelines**”), which sale guidelines were to be consistent with standard Court-approved sale guidelines and which the Applicant would seek approval of at its next motion before the Court.<sup>2</sup>

11. On June 15, 2016, this Court granted an order which, among other things: (i) extended the Stay period to July 15, 2016; (ii) approved the Sale Guidelines; and (iii) approved an amendment to the DIP Agreement whereby the Repayment Waterfall was revised such that Ben Moss’s cash from business operations would, from and after the date of the Order, only be applied to obligations under the DIP Facility, without any application to the Permitted Overadvance.<sup>3</sup>

12. On July 7, 2016, this Court granted an Order (the “**July 7 Order**”) which, among other things: (i) extended the stay period to August 30, 2016; and (ii) replaced phase two of the RISP with the Revised Phase 2 Process (the “**Process**”).<sup>4</sup>

13. On July 14, 2016, Salus Capital sought and was granted an Order (the “**July 14 Order**”) which, among other things, amended and expedited the Process, such that final bids were due on July 15, 2016 with the auction scheduled for July 19, 2016.<sup>5</sup>

## **B. The RISP**

14. The Court-approved RISP was comprised of two phases. The RISP provided that Ben Moss would pursue the following restructuring alternatives under the supervision of the Monitor: (i) a

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<sup>2</sup> Fourth Manzoor Affidavit, at para 5.

<sup>3</sup> Fourth Manzoor Affidavit, at para 6.

<sup>4</sup> Fourth Manzoor Affidavit, at para 7.

<sup>5</sup> Fourth Manzoor Affidavit, at para 8.

refinancing of all or part of the Credit Facilities of the JSN Group (a “**JSN Group Refinancing Proposal**”); (ii) an equity investment in JSN Inc. and/or Ben Moss (a “**Reinvestment Proposal**”); and/or (iii) 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**”).<sup>6</sup>

15. During Phase 1 of the RISP, the Monitor and Ben Moss received a number of non-binding letters of intent (“**LOIs**”) and, in consultation with Salus Capital, Monitor recommended to the CRO that certain LOIs received with respect to BM Sale Proposals be accepted as Qualified LOIs.<sup>7</sup> On June 22, 2016, Salus Capital exercised its right, pursuant to the RISP, to terminate the RISP with respect to transactions involving affiliates of Ben Moss, given that no Qualified LOIs were received for a JSN Group Refinancing Proposal or a Reinvestment Proposal.<sup>8</sup>

16. The Monitor, in consultation with the CRO and Salus Capital, concluded that there was value in soliciting interest in a transaction involving the liquidation of the inventory, furniture, equipment and fixtures located in and/or forming part of the property of Ben Moss, excluding property currently being liquidated at the Initial Liquidation Stores (“**Liquidation Proposals**”) in order to establish a floor price that could be used to compare against Qualified LOIs in respect of BM Sale Proposals.<sup>9</sup> The Monitor specifically notified the parties that submitted the Qualified LOIs that the Applicant would be seeking modifications to Phase 2 of the RISP to, among other things, permit the submission and consideration of Liquidation Proposals.<sup>10</sup>

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<sup>6</sup> Fourth Manzoor Affidavit, at para 26.

<sup>7</sup> Fourth Manzoor Affidavit, at para 27.

<sup>8</sup> Fourth Manzoor Affidavit, at para 28.

<sup>9</sup> Fourth Manzoor Affidavit, at paras 29-30.

<sup>10</sup> Fourth Manzoor Affidavit, at para 31.

17. The Monitor, exercising its reasonable business judgment and following consultation with Salus Capital, recommended to the CRO that the RISP be continued into Phase 2, subject to the amendments provided for in the Process, which was approved in the July 7 Order.<sup>11</sup>

18. Subsequent to the granting of the July 7 Order, Salus Capital advised that it became aware of certain defaults under Ben Moss's credit facilities and determined that it was no longer willing to extend credit under the DIP Facility unless the RISP was accelerated. Salus Capital therefore sought and obtained the July 14 Order, which expedited the deadline for submitting final bids ("**Final Bids**") from July 22, 2016, to July 15, 2016 (the "**Phase 2 Bid Deadline**") and moved the intended date of the auction from August 4, 2016 to July 19, 2016.<sup>12</sup>

19. The acceleration of the RISP was made on notice to all participants in Phase 2 of the RISP.<sup>13</sup> Despite the Monitor's concerns regarding the expedited timing of the RISP, the Court found that there were no viable alternatives. Proceeding on an expedited basis was preferable to any remaining options.<sup>14</sup>

20. In accordance with Phase 2 of the RISP and the expedited deadline established by the July 14 Order, a total of four Final Bids, including two Liquidation Proposals and two BM Sale Proposals for only a portion of the Applicant's assets, were submitted to the Monitor.<sup>15</sup>

21. Following the Phase 2 Bid Deadline, the Monitor concluded that it would proceed with the auction (the "**Auction Process**") to determine the Successful Bid.<sup>16</sup>

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<sup>11</sup> Fourth Manzoor Affidavit, at para 32.

<sup>12</sup> Fourth Manzoor Affidavit, at paras 33-34, 37.

<sup>13</sup> Fourth Manzoor Affidavit, at para 34.

<sup>14</sup> Endorsement of Justice Hainey, dated July 14, 2016; Fourth Manzoor Affidavit, at para 36.

<sup>15</sup> Fourth Manzoor Affidavit, at paras 37-38.

<sup>16</sup> Fourth Manzoor Affidavit, at para 39.

**C. The Auction Process**

22. The following timeline outlines the key developments and steps taken before and during the Auction Process:

<b>July 14, 2016</b>	The Monitor sent a letter to Qualified Bidders outlining bidding procedures. <sup>17</sup>
<b>July 18, 2016</b>	The Monitor met with auction participants and discussed the auction process. <sup>18</sup>
	The Monitor and Ben Moss, in consultation with Salus Capital, determined which of the Qualified Bids would be used as the opening bid (the “ <b>Initial Opening Bid</b> ”) in the Auction Process. The determination criteria included, among other things, the estimated value of the bid and the terms of the draft agreement submitted in connection with the bid. <sup>19</sup>
<b>Auction Date: July 19, 2016</b>	Despite extensive discussions to settle outstanding terms of the Initial Opening Bid, the Initial Opening Bidder advised the Monitor that it was not able to confirm whether or not it would be prepared to move forward with the headline price it had provided for in its Qualified Bid. <sup>20</sup>
	An alternative bid was selected as the opening bid (the “ <b>Opening Bid</b> ”) and the Auction Process commenced.
	After the announcement of the Opening Bid, a Qualified Bidder requested an adjournment. During the adjournment, the Initial Opening Bidder decided to leave the auction. <sup>21</sup>
	Salus Capital, exercising its permitted discretion under the RISP, determined that the Opening Bid was not acceptable and therefore rejected it. <sup>22</sup>
	Following the adjournment, the Liquidator submitted a Liquidation Proposal which the Monitor, following review and consultation with the CRO and Salus Capital, recommended be selected as the Successful Bid. <sup>23</sup>

<sup>17</sup> Fourth Manzoor Affidavit, at para 40.

<sup>18</sup> Fourth Manzoor Affidavit, at para 39.

<sup>19</sup> Fourth Manzoor Affidavit, at para 41.

<sup>20</sup> Fourth Manzoor Affidavit, at paras 43-44.

<sup>21</sup> Fourth Manzoor Affidavit, at para 45.

<sup>22</sup> Fourth Manzoor Affidavit, at para 45.

<sup>23</sup> Fourth Manzoor Affidavit, at para 46.

#### **D. The Proposed Transaction**

23. The Liquidation Agreement provides that the Liquidator will serve as the exclusive liquidator for the purpose of disposing of the Merchandise and FF&E by conducting store closings or similar themed sales commencing by no later than July 30, 2016 and ending no later than December 30, 2016.<sup>24</sup>

24. The Merchandise includes, among other things, certain goods that JSN Inc. had consigned to Ben Moss and certain other inventory (collectively, the “**JSN Goods**”). To facilitate the inclusion of the JSN Goods in the Merchandise, JSN Inc. and Ben Moss are in the process of finalizing an asset purchase agreement (the “**JSN APA**”), pursuant to which JSN Inc. will sell the JSN Goods to Ben Moss.<sup>25</sup>

25. The Sale is subject to the sale guidelines attached to the Liquidation Agreement as Schedule “G” (the “**Liquidation Guidelines**”), which are substantially similar to the Court-approved GBC Sale Guidelines that were previously negotiated with applicable landlords. The Liquidation Guidelines provide that, among other things, the Liquidation shall be conducted in accordance with the terms of the applicable leases or other occupancy agreements for each of the Locations.<sup>26</sup>

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<sup>24</sup> Fourth Manzoor Affidavit, at paras 50, 52(a) and (c). A copy of the Liquidation Agreement is found at Exhibit H to the Fourth Manzoor Affidavit.

<sup>25</sup> Fourth Manzoor Affidavit, at para 50.

<sup>26</sup> Fourth Manzoor Affidavit, at para 56.

26. The members of the contractual joint venture that comprise the Liquidator have extensive experience in conducting retail liquidations, having substantial prior experience handling retail liquidations in Canada and elsewhere.<sup>27</sup>

27. The Liquidator has guaranteed that Ben Moss will receive a net minimum amount (the “**Guaranteed Amount**”) equal to 71.5% of the aggregate Cost Value (as defined in the Liquidation Agreement) of the Merchandise. The Liquidation Agreement provides that the Liquidator shall pay Ben Moss an amount equal to 80% of the estimated Guaranteed Amount (the “**Initial Guaranty Payment**”) on the first day following entry of the Order being sought on this motion. The balance of the Guaranteed Amount, if any, shall be paid by the Liquidator to Ben Moss on the second business day following the issuance of a report of the aggregate Cost Value of the Merchandise included in the Sale.<sup>28</sup>

28. The Liquidation Agreement also entitles Ben Moss to receive a share of the proceeds from the sale of the FF&E after payment of a 20% commission to the Liquidator.<sup>29</sup>

29. Pursuant to the Liquidation Agreement, the Liquidator has the right to supplement the Merchandise in the Sale with additional merchandise in the amount of up to \$10 million at cost in the aggregate sold. This additional merchandise must be distributed among the stores such that no store will receive more than 20% of such additional merchandise. These thresholds are consistent with the thresholds provided for in the Court-approved GBC Sale Guidelines.<sup>30</sup>

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<sup>27</sup> Fourth Manzoor Affidavit, at para 49.

<sup>28</sup> Fourth Manzoor Affidavit, at para 51.

<sup>29</sup> Fourth Manzoor Affidavit, at para 52(p).

<sup>30</sup> Fourth Manzoor Affidavit, at para 52(d).

30. Additionally, the Liquidator has the exclusive right to direct Ben Moss to designate a transferee of each of Ben Moss's Leases and Intellectual Property rights (collectively, the "**Designated Assets**") during the specified Designation Rights Period (as defined in the Liquidation Agreement). The proceeds from such a transaction would be retained by the Liquidator.<sup>31</sup> The Liquidator has had ongoing discussions with one of the Qualified Bidders that submitted a BM Sale Proposal in the RISP regarding the transfer of certain Designated Assets.<sup>32</sup>

31. The Liquidation Agreement contemplates the creation of a first ranking Court-ordered charge (the "**Liquidator's Charge**") in favour of the Liquidator on, among other things, all of the Merchandise and the Sale proceeds, provided that until payment in full to Ben Moss of all amounts owing to Ben Moss under the Liquidation Agreement, the Liquidator's Charge shall be junior to all Encumbrances (but solely to the extent of such unpaid amounts).<sup>33</sup> The granting of the Liquidator's Charge is a condition precedent to the Liquidation Agreement and is supported by the Monitor and Salus Capital.<sup>34</sup>

32. Further details regarding the terms of the Transaction are set out in the Fourth Manzoor Affidavit.<sup>35</sup> The Liquidation Agreement will benefit Ben Moss's stakeholders and represents the best possible transaction in the circumstances for the benefit of Ben Moss and its stakeholders.<sup>36</sup>

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<sup>31</sup> Fourth Manzoor Affidavit, at para 52(n).

<sup>32</sup> Fourth Manzoor Affidavit, at para 58.

<sup>33</sup> Fourth Manzoor Affidavit, at para 61.

<sup>34</sup> Liquidation Agreement, at Articles 13-14, Exhibit H to the Fourth Manzoor Affidavit

<sup>35</sup> Fourth Manzoor Affidavit, at paras 51-52.

<sup>36</sup> Fourth Manzoor Affidavit, at paras 53-54, 60.

**E. The Proposed Distribution**

33. The draft Order contemplates that, immediately following receipt of the Initial Guaranty Payment, the Applicant shall, without further Order of the Court, distribute:

- (a) an amount equal to the purchase price under the JSN APA (the “**JSN APA Purchase Price**”) from the Initial Guaranty Payment to J.S.N. Inc.; and
- (b) the balance of the Initial Guaranty Payment, less \$2.5 million (the “**Operating Reserve**”), to Salus Capital, in the maximum amount of Salus Capital’s secured claim, to be applied against the Applicant’s liabilities, first under the DIP Facility, and second under the Amended and Restated Credit Agreement dated July 18, 2013, as amended.<sup>37</sup>

34. As of July 22, 2016, CAD\$48.1 million remains outstanding under the Salus Revolving Credit Facility and CAD\$5.7 million remains outstanding under the DIP Facility.<sup>38</sup>

35. Pursuant to the DIP Lender’s Charge granted by the Initial Order in respect of the interim financing provided by Salus CLO under the DIP Facility, Salus Capital has priority over all other creditors other than holders of a properly perfected purchase money security interest, and the other Court-ordered charges in the Initial Order.<sup>39</sup>

36. In addition, all of the obligations of Ben Moss under the Salus Credit Agreement are secured by all of Ben Moss’s assets. The Monitor sought and obtained an opinion from its counsel

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<sup>37</sup> Fourth Manzoor Affidavit, at para 62; Draft Order, at para 28.

<sup>38</sup> Fourth Manzoor Affidavit, at para 25.

<sup>39</sup> Fourth Manzoor Affidavit, at para 65.

which confirmed the validity and enforceability of the security in connection with the Salus Credit Agreement.<sup>40</sup>

37. Given that: (i) there is no foreseeable scenario where the indebtedness of Ben Moss to Salus Capital can be repaid from the proceeds of the estates of Ben Moss and other obligors under any permutation or combination of going concern and/or liquidation sales; and (ii) given that the Operating Reserve will be used to pay Ben Moss's post-filing expenses until the Sale Termination Date (as defined in the Liquidation Agreement), no other party's claims against Ben Moss are impacted by the proposed distribution.<sup>41</sup>

#### **F. Modifications to the Cash Management System**

38. The Court authorized the continued operation of the Cash Management System (as defined in the amended and restated Initial Order) during the CCAA proceedings.<sup>42</sup> Under the Cash Management System, funds deposited into certain blocked accounts are automatically transferred to Salus Capital each day.<sup>43</sup>

39. Pursuant to the Liquidation Agreement, certain of Ben Moss's deposit accounts are to be deemed to be held in trust for Ben Moss and the Liquidator, and therefore excluded from the automatic fund transfer to Salus Capital.<sup>44</sup> Additionally, the Liquidation Agreement requires that Ben Moss and the Liquidator establish a reconciliation process pursuant to which certain proceeds

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<sup>40</sup> Fourth Manzoor Affidavit, at para 65.

<sup>41</sup> Fourth Manzoor Affidavit, at para 67.

<sup>42</sup> Fourth Manzoor Affidavit, at para 68.

<sup>43</sup> Fourth Manzoor Affidavit, at para 68.

<sup>44</sup> Fourth Manzoor Affidavit, at para 68.

are paid over from Ben Moss to the Liquidator daily.<sup>45</sup> Accordingly, Ben Moss is seeking that the Cash Management System be modified in accordance with the Liquidation Agreement.

**G. The Stay Period**

40. As noted above, the Court extended the Stay Period to August 30, 2016.<sup>46</sup> Ben Moss seeks an extension of the Stay Period up to and including December 30, 2016.<sup>47</sup> Extending the Stay Period will allow the parties to focus on the closing of the Transaction and will be cost-effective in that the parties would only return to Court before the expiry of the extended Stay Period if circumstances arise that require Court direction.<sup>48</sup>

41. As set out in Ben Moss's updated cash flows, with the DIP Facility and the Operating Reserve, Ben Moss will have access to sufficient liquidity to fund operations through the proposed extended Stay Period.<sup>49</sup>

**PART III - ISSUES AND THE LAW**

**A. Approval of the Transaction**

**(a) Jurisdiction and Discretion to Approve the Transaction**

42. This Court has the power to approve a sale pursuant to section 36 of the CCAA. Section 36(3) of the CCAA sets out a list of factors for the Court to consider when determining whether to

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<sup>45</sup> Fourth Manzoor Affidavit, at para 68.

<sup>46</sup> Fourth Manzoor Affidavit at para 70.

<sup>47</sup> Fourth Manzoor Affidavit at para 71; Draft Order, at para 32.

<sup>48</sup> Fourth Manzoor Affidavit at para 71.

<sup>49</sup> Fourth Manzoor Affidavit at para 73.

approve a sale of assets by the debtor outside the ordinary course of business during a CCAA proceeding. Section 36 provides:

**36(1) Restriction on disposition of business assets** – A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

**36(2) Notice to creditors** – A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

**36(3) Factors to be considered** – In deciding whether to grant the authorization, the court is to consider, among other things,

- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (b) whether the monitor approved the process leading to the proposed sale or disposition;
- (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
- (d) the extent to which the creditors were consulted;
- (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
- (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

...

**36(6) Assets may be disposed of free and clear** – The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

**36(7) Restriction – employers** – The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(a) and (5)(a) if the court had sanctioned the compromise or arrangement.

43. In discussing section 36 of the CCAA, this Honourable Court has stated:

The CCAA is remedial legislation designed to enable insolvent companies to restructure. As mentioned by me before in this case, the amendments do not detract from this objective. In discussing section 36, the Industry Canada Briefing Book on the amendments states that “The reform is intended to provide the debtor company with greater flexibility in dealing with its property while limiting the possibility of abuse.”<sup>50</sup>

44. It is well-established that the factors listed in section 36(3) are not intended to be exhaustive, nor are they intended to be a formulaic checklist that must be followed in every sale transaction under the CCAA.<sup>51</sup>

45. The factors listed in section 36(3) overlap, to a certain degree, with the *Soundair* factors that were applied in approving sale transactions under pre-amendment CCAA case law. Under the *Soundair* test, it was necessary to consider:

- (a) whether sufficient efforts had been made to obtain the best price and that the debtor had not acted improvidently;
- (b) whether the interests of all parties had been considered;
- (c) the integrity and efficacy of the process for obtaining offers; and

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<sup>50</sup> *Canwest Global Communications (Re)*, 2009 CarswellOnt 7169 at para. 32 (Sup. Ct. J.) [Commercial List] [*Canwest Global*], Book of Authorities, Tab 3.

<sup>51</sup> *White Birch Paper Holding Co. (Re)*, 2010 QCCS 4915 at para. 48, leave to appeal refused 2010 QCCA 1950 [*White Birch*], Book of Authorities, Tab 9; *Target Corp. (Re)*, 2015 ONSC 2066 at para. 15 [Commercial List] [*Target*], Book of Authorities, Tab 7.

(d) whether there was any unfairness in working out the process.<sup>52</sup>

46. Taking into account the factors listed in section 36(3) of the CCAA, and the general interpretative principles underlying the CCAA, this Honourable Court should grant the Approval Order. According to the informed business judgment of Ben Moss, which is supported by the expert advice of the CRO and the Monitor, the Liquidation Agreement is in the best interests of Ben Moss and its stakeholders.<sup>53</sup> In the absence of any indication that Ben Moss has acted improvidently or that the RISP was unfair, that judgment should be entitled to deference by this Court.<sup>54</sup>

**(b) The RISP was Reasonable in the Circumstances**

47. Whether the process for achieving a sale transaction under the CCAA is fair and reasonable must be examined contextually and by looking at the transaction as a whole, in light of the particular circumstances existing at the time.<sup>55</sup>

48. Assessing the reasonableness of a sale process does not require the Court to examine in minute detail all of the circumstances leading up to the acceptance of a particular offer. The Court must be satisfied overall that the debtor has not acted improvidently. As the Courts have held, by reference to the principles in *Soundair*, the decision to accept a particular offer is a matter of

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<sup>52</sup> *Canwest Publishing Inc. (Re)*, 2010 ONSC 2870 at para. 13 [Commercial List], Book of Authorities, Tab 4, citing *Royal Bank v. Soundair Corp.*, [1991] O.J. No. 1137 at para. 16 (C.A.) [*Soundair*], Book of Authorities, Tab 6; *Target*, *supra* note 51 at para. 15, Book of Authorities, Tab 7.

<sup>53</sup> Fourth Manzoor Affidavit at paras. 53-54, and 60.

<sup>54</sup> *AbitibiBowater Inc. (Re)*, 2010 QCCS 1742 at paras. 70-72, Book of Authorities, Tab 2.

<sup>55</sup> See *White Birch*, *supra* note 51 at para. 49, Book of Authorities, Tab 9.

business judgment on the part of the debtor that should not lightly be interfered with in the absence of evidence of imprudence or unfairness.<sup>56</sup>

49. As described above, the Transaction is the product of the RISP, as approved by this Court in the Initial Order and as modified by subsequent Court Orders. The RISP was developed by the Applicant, the CRO and Salus Capital, and the Monitor assisted and supervised its implementation.<sup>57</sup>

50. The Monitor has reported to this Honourable Court on the progress of the RISP in each of its First, Second and Third Reports. The Fourth Manzoor Affidavit describes the steps taken in carrying out the RISP, including the efforts of Ben Moss and the CRO in engaging the interest and participation of prospective bidders, conducting an auction and negotiating a transaction that would maximize benefits for Ben Moss's stakeholders. As described above in paragraphs 14 to 22, the CRO and Ben Moss, under the supervision and with the assistance of the Monitor, took steps to solicit interest in the RISP, to obtain and review LOIs, to obtain and review Qualified Bids, and ultimately to select a Successful Bid and negotiate the Liquidation Agreement.

51. In its Third Report, the Monitor confirmed its view that the Auction Process was conducted in accordance with the RISP, and that the resulting Transaction and Liquidation Agreement are fair and reasonable in the circumstances and represent the best available transaction for the benefit of Ben Moss and its stakeholders, given the RISP.<sup>58</sup>

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<sup>56</sup> *Soundair*, *supra* note 52 at para. 48-49, Book of Authorities, Tab 6; *Terrace Bay Pulp Inc. (Re)*, 2012 ONSC 4247 at paras. 45 and 51-52 [Commercial List] [*Terrace Bay*], Book of Authorities, Tab 8, citing *Soundair*, *supra* note 52 at paras. 21 and 30-31, Book of Authorities, Tab 6.

<sup>57</sup> Third Report at para. 4.1(h); Second Report of the Monitor dated July 5 2016, at para 6.25; Fourth Manzoor Affidavit, at para 59(c).

<sup>58</sup> Third Report, at paras 10.5-10.6.

52. While the timing of the RISP was accelerated, the Court recognized in granting the July 14 Order that expedited process was the best available option in the circumstances.<sup>59</sup>

53. In summary, the Transaction was the result of a fair, efficient and transparent process which followed the terms of the Court-approved RISP. There is no basis on which the fairness of the process by means of which the Successful Bid was selected can be impugned.

**(c) The Monitor Supports the Transaction**

54. As required by section 36 of the CCAA and the RISP, the Monitor has been involved at every stage related to the RISP and the selection and negotiation of the Transaction. The Monitor has supervised the CRO and Ben Moss and has been involved in the RISP since its commencement. In particular, the Monitor participated in the evaluation of the bids received both before and during the Auction Process and in subsequent discussions and negotiations to settle the definitive documentation. Accordingly, the Monitor is of the view that the process was conducted in accordance with the RISP, as amended.<sup>60</sup>

55. In its Third Report, the Monitor has provided its opinion that the Transaction is more beneficial to Ben Moss's creditors and other stakeholders than a sale or disposition under a bankruptcy, and has confirmed its support for this Court's approval of the Transaction and the granting of the proposed Approval Order.<sup>61</sup> The Monitor's views are entitled to considerable deference from this Court.<sup>62</sup>

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<sup>59</sup> Endorsement of Justice Hainey, dated July 14, 2016; Fourth Manzoor Affidavit, at para 36.

<sup>60</sup> Fourth Manzoor Affidavit, at paras. 59(b), 41-47; Third Report, at para. 10.6.

<sup>61</sup> Fourth Manzoor Affidavit, at para. 55; Third Report, at paras. 10.8, 10.12.

<sup>62</sup> J. Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd Ed. (Toronto: Carswell, 2013) at p. 573, Book of Authorities, Tab 13.

**(d) The Consideration is Fair and Reasonable**

56. Ben Moss, the Monitor and the CRO are all of the view that the consideration to be received by Ben Moss under the Transaction is reasonable. CCAA case law both prior to and subsequent to the enactment of section 36 has applied the test from *Soundair* in evaluating this criterion. The debtor must demonstrate that sufficient effort has been made to obtain the best price and that it has not acted improvidently. This requirement is evaluated based on the information available at the time the offer is accepted. It requires deference to the debtor's business judgment (which is supported by the Monitor) in order to avoid turning the process into an auction conducted by the Court.<sup>63</sup>

57. The consideration contemplated by the Liquidation Agreement is the result of the comprehensive and competitive marketing process undertaken by the CRO and the Monitor under the RISP. This process began with a broad canvass of interested parties and was a competitive bid process that generated multiple Qualified LOIs. The CRO, the Monitor and Ben Moss took further steps to ensure a robust process, including soliciting Liquidation Proposals and conducting an Auction Process. Throughout, the CRO, the Monitor and Ben Moss engaged in robust discussions and negotiations with interested parties with a view to generating Qualified Bids, thereby seeking to ensure that the bids accepted represented the highest value to the stakeholders of Ben Moss.<sup>64</sup>

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<sup>63</sup> See for example, *Terrace Bay*, *supra* note 56 at paras. 50-55, Book of Authorities, Tab 8.

<sup>64</sup> Fourth Manzoor Affidavit at paras. 59(e), 60.

58. The anticipated consideration to be received pursuant to the Liquidation Agreement is the greatest of what was offered by any of the participants in the Auction.<sup>65</sup> The consideration contemplated under the Liquidation Agreement is fair and reasonable.<sup>66</sup>

59. In addition to the significant benefits represented by the anticipated consideration to be received pursuant to the Liquidation Agreement, there are certain other benefits conferred under the Transaction that support the reasonable, informed business judgment of Ben Moss, supported by the CRO and the Monitor, that the Transaction is in the best interests of Ben Moss and its stakeholders. These include the potential for a transfer of certain of Ben Moss's Leases (as described above in paragraph 30) as well as the fact that business will continue during the implementation of the Transaction, which will benefit employees, customers and landlords.

**(e) Compliance with Additional Requirements Under Section 36**

60. Ben Moss submits that all of the other statutory requirements for obtaining relief under section 36 of the CCAA have been satisfied:

- (a) With respect to section 36(2) of the CCAA, all parties who have registered security interests against Ben Moss's interest in the properties to be transferred under the Liquidation Agreement and who might be affected by the relief requested in this motion have been notified.<sup>67</sup>

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<sup>65</sup> Third Report, at para 10.10.

<sup>66</sup> Third Report, at para 10.5.

<sup>67</sup> Affidavit of Naveed Manzoor, sworn May 15, 2016, at para. 70, Exhibit A to the Fourth Manzoor Affidavit; Affidavit of Service of Francesca Del Rizzo, sworn July 25, 2016.

- (b) With respect to section 36(4) of the CCAA, Ben Moss and the Liquidator are not related parties and therefore the mandatory criteria in section 36(4) are not relevant for the purposes of this motion.
- (c) Section 36(6) of the CCAA permits this court to authorize a sale or disposition free and clear of any security, charge or other restriction.
- (d) The Transaction would provide sufficient proceeds to pay any amounts that would have been required under paragraphs 6(5)(a) and (6)(a) of the CCAA, as required by section 36(7) of the CCAA.<sup>68</sup> The amounts referred to under these subsections are amounts owing by a debtor company to its employees and former employees for unpaid wages that these employees would have been entitled to receive under the *Bankruptcy and Insolvency Act*, in addition to amounts that are owing for post-filing services to the debtor company. Given that Ben Moss has been paying employees for all post-filing services and will continue to do so, the requirements of section 36(7) of the CCAA are satisfied. Similar facts were accepted by this Court as satisfying the test under section 36(7) of the CCAA in *Target*.<sup>69</sup>

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<sup>68</sup> Fourth Manzoor Affidavit, at para 59(d). Section 36(7) provides that relief under section 36 can only be granted if the Court is satisfied that the debtor company can and will make the payments that would have been required under paragraphs 6(4)(a) and (5)(a) if the Court had sanctioned the compromise or arrangement. Section 36(7) appears to contain a drafting error, as it references amounts that would be required to be paid under section 6(4)(a) of the CCAA. Section 6(4) of the CCAA does not have any subparagraphs. It may be inferred that the intention was to require payments under section 6(5)(a) and 6(6)(a).

<sup>69</sup> *Target*, supra note 12 at para. 21, Book of Authorities, Tab 11.

**B. The Court Should Approve the Liquidator's Charge**

61. Ben Moss is seeking this Court's approval to grant the Liquidator's Charge to secure all Ben Moss's obligations to the Liquidator under the Liquidation Agreement.<sup>70</sup> It is a condition precedent to the Transaction contemplated by the Liquidation Agreement that the Liquidator's Charge shall have been granted.<sup>71</sup>

62. Similar orders appointing a professional liquidator and granting a charge in favour of the liquidator have been granted in a number of insolvency proceedings involving Canadian retailers, including the *Bargain Shop*<sup>72</sup> and the *Target Canada*<sup>73</sup> proceedings under the CCAA and the *Danier*<sup>74</sup> proceeding under the BIA.

63. Ben Moss believes that conducting the Transaction with the professional assistance of the Liquidator will allow it benefit from the extensive experience of the Liquidator in conducting large-scale retail liquidations.<sup>75</sup>

64. Ben Moss does not believe that any party would be prejudiced if the Liquidator's Charge was granted for the following reasons:

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<sup>70</sup> Draft Order, at para 20.

<sup>71</sup> Fourth Manzoor Affidavit, at para 61.

<sup>72</sup> In the Matter of a Plan of Compromise or Arrangement of TBS Acquireco Inc., Bargain Shop Holdings Inc. and TBS Stores Inc., Approval Order (Court File No. CV-13-10018-00CL, dated March 27, 2013), Book of Authorities, Tab 12.

<sup>73</sup> In the Matter of a Plan of Compromise or Arrangement of Target Canada Co. et al., Approval Order – Agency Agreement (Court File No. CV-15-10832-00C, dated February 4, 2015), Book of Authorities, Tab 11.

<sup>74</sup> In the Matter of the Notice of Intention to Make a Proposal of Danier Leather Inc., Approval Order (Court File No. 31-2084381, dated March 7, 2016), Book of Authorities, Tab 10.

<sup>75</sup> Fourth Manzoor Affidavit at paras. 49 and 53.

- (a) the quantum of the Liquidator's Charge is reasonable and is limited to the extent of Ben Moss's obligations under the Liquidation Agreement;
- (b) Ben Moss continues to pay its obligations in the ordinary course of business; and
- (c) Any claims that Ben Moss's creditors may have will attach to the Guaranteed Amount and other consideration payable to Ben Moss under the Liquidation Agreement.

65. In light of all of the circumstances, it is appropriate for the Court to approve the Liquidator's Charge.

### **C. Jurisdiction and Discretion to Approve Distribution**

66. Ben Moss seeks approval to make a distribution to Salus Capital in the amount of Initial Guaranty Payment, less the \$2.5 million Operating Reserve and the JSN APA Purchase Price, to pay Ben Moss's Senior Secured Creditors, Salus Capital and Salus CLO, up to the maximum amount of their secured claim under the DIP Facility and the Salus Credit Agreement. Ben Moss also seeks approval of a distribution in an amount equal to the JSN APA Purchase Price to JSN Inc.

67. Pursuant to section 11 of the CCAA, this Court has the discretion to make any order it considers appropriate in the circumstances.

68. Orders granting interim distributions are routinely granted by Canadian courts. In *Re AbitibiBowater Inc.*, the Honourable Justice Gascon approved an interim distribution, noting that

nothing in the CCAA prevents such relief and that it is not unusual to proceed with an interim distribution of net proceeds in the context of a sale of assets in a CCAA.<sup>76</sup>

69. As noted above, in respect of the DIP Facility, Salus Capital has priority over all other creditors other than holders of a properly perfected purchase money security interest, and the other charges created by the Initial Order. The Monitor has conducted an independent review and confirmed the validity and enforceability of the Senior Secured Creditors' security with respect to the Salus Credit Agreement, which exists over all of Ben Moss's assets.<sup>77</sup>

70. There is no scenario where the indebtedness of Ben Moss to Salus Capital, whether as borrower or guarantor, can be repaid from the proceeds of the estates of Ben Moss and the other Obligors under any permutation or combination of going concern and/or liquidation sales. Accordingly, and given that the Operating Reserve will be used to pay the Applicant's post-filing expenses until the sale ends, no other party's claims against Ben Moss are impacted by the proposed distribution.<sup>78</sup>

71. Pursuant to the JSN APA, Ben Moss will purchase the JSN Goods, which are included as Merchandise that the Liquidator will sell pursuant to the Liquidation Agreement. The JSN APA Purchase Price represents: (i) the aggregate purchase price payable for such JSN Consigned Goods under consignment arrangements between JSN Inc. and Ben Moss; and (ii) prices consistent with the transfers of the subject inventory made between JSN Inc. and Ben Moss in the ordinary course, which will not be less than 100% of the cost value of such inventory. Ben Moss must be permitted

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<sup>76</sup> *Re AbitibiBowater Inc.*, 2009 QCCS 6461 at para. 71, Book of Authorities, Tab 1; *Re Northstar Aerospace, Inc.*, 2012 ONSC 4423 at paras. 82 and 87 [Commercial List], Book of Authorities, Tab 5.

<sup>77</sup> Third Report, at para. 12.3.

<sup>78</sup> Fourth Manzoor Affidavit, at para 67.

to pay the purchase price contemplated by the JSN APA in order to procure the JSN Goods and satisfy the corresponding obligations under the Liquidation Agreement.<sup>79</sup>

72. The proposed distributions are supported by the Monitor.<sup>80</sup>

73. For the above reasons, the Applicant respectfully submits that it is fair and appropriate for this Court to grant the distribution to Salus Capital.

**D. Requested Stay Extension Is Appropriate**

74. Pursuant to Section 11.02 of the CCAA, the Court has discretion to extend a stay of proceedings against debtor companies for any period that it considers necessary. Section 11.02(2) applies when a stay of proceedings is requested other than on an initial application.

75. Section 11.02(3) of the CCAA provides that the Court must be satisfied that: (a) circumstances exist that make the order appropriate; and (b) the Applicant has acted and is acting in good faith and with due diligence.

76. Ben Moss has worked closely with the Monitor and Salus Capital to carry out the RISP, which has successfully resulted in the selection of the proposed Transaction. In addition, Ben Moss has continued to operate the business and pay for goods and services within the terms and operating limits of the DIP Facility and to engage in discussions with its various stakeholder groups.<sup>81</sup>

77. In the present case, an extension of the Stay Period to December 30, 2016, is appropriate and necessary in order to allow for the continued operations of Ben Moss's business and for Ben

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<sup>79</sup> Fourth Manzoor Affidavit, at para 63.

<sup>80</sup> Third Report, at para. 12.6; Fourth Manzoor Affidavit at para. 74.

<sup>81</sup> Fourth Manzoor Affidavit, at paras. 11-18, 26-47.

Moss to complete the Transaction, subject to the approval of the this Court. Extending the Stay Period will allow the parties to focus on the closing of the Transaction and conducting the Sale during the Sale Term. Furthermore, this extension will be cost-effective in that the parties would only return to Court before the expiry of the extended Stay Period if circumstances arise that require Court direction.<sup>82</sup>

78. Ben Moss has sufficient liquidity to fund operations and proceed to close the Transaction during the requested extension of the Stay Period.<sup>83</sup>

79. The extension of the Stay Period is supported by the Monitor and Salus Capital.<sup>84</sup>

#### PART IV - NATURE OF THE ORDER SOUGHT

80. The Applicant therefore respectfully requests an Order substantially in the form of the draft Order attached as Schedules "A" to the Notice of Motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27<sup>th</sup> day of July, 2016.

  
\_\_\_\_\_  
per / Marc Wasserman

  
\_\_\_\_\_  
per / Michael De Lellis

  
\_\_\_\_\_  
Karin Sachar

<sup>82</sup> Fourth Manzoor Affidavit, at para. 71.

<sup>83</sup> Fourth Manzoor Affidavit, at para. 73.

<sup>84</sup> Fourth Manzoor Affidavit, at para. 74; Third Report, at para. 15.1

## Schedule “A”

### LIST OF AUTHORITIES

#### Tab Case Law

1. *AbitibiBowater Inc. (Re)*, 2009 QCCS 6461
2. *AbitibiBowater Inc. (Re)*, 2010 QCCS 1742
3. *Canwest Global Communications (Re)*, 2009 CarswellOnt 7169 (Sup. Ct. J.) [Commercial List]
4. *Canwest Publishing Inc. (Re)*, 2010 ONSC 2870 [Commercial List]
5. *Northstar Aerospace, Inc. (Re)*, 2012 ONSC 4423 [Commercial List]
6. *Royal Bank v. Soundair Corp.*, [1991] OJ No 1137 (C.A.)
7. *Target Corp. (Re)*, 2015 ONSC 2066 [Commercial List]
8. *Terrace Bay Pulp Inc. (Re)*, 2012 ONSC 4247 [Commercial List]
9. *White Birch Paper Holding Co (Re)*, 2010 QCCS 4915; leave to appeal refused, 2010 QCCA 1950

#### Court Orders

10. In the Matter of the Notice of Intention to Make a Proposal of Danier Leather Inc., Approval Order (Court File No. 31-2084381, dated March 7, 2016)
11. In the Matter of a Plan of Compromise or Arrangement of Target Canada Co. et al., Approval Order – Agency Agreement (Court File No. CV-15-10832-00C, dated February 4, 2015)
12. In the Matter of a Plan of Compromise or Arrangement of TBS Acquireco Inc., Bargain Shop Holdings Inc. and TBS Stores Inc., Approval Order (Court File No. CV-13-10018-00CL, dated March 27, 2013)

#### Secondary Sources

13. J. Sarra, *Rescue! The Companies’ Creditors Arrangement Act, 2nd Ed.* (Toronto: Carswell, 2013)

## Schedule “B”

### *Companies’ Creditors Arrangement Act, RSC 1985, c C-36*

#### Restriction — default of remittance to Crown

6. (4) If an order contains a provision authorized by section 11.09, no compromise or arrangement is to be sanctioned by the court if, at the time the court hears the application for sanction, Her Majesty in right of Canada or a province satisfies the court that the company is in default on any remittance of an amount referred to in subsection (3) that became due after the time of the application for an order under section 11.02.

#### Restriction — employees, etc.

- (5) The court may sanction a compromise or an arrangement only if
- (a) the compromise or arrangement provides for payment to the employees and former employees of the company, immediately after the court’s sanction, of
    - (i) amounts at least equal to the amounts that they would have been qualified to receive under paragraph 136(1)(d) of the Bankruptcy and Insolvency Act if the company had become bankrupt on the day on which proceedings commenced under this Act, and
    - (ii) wages, salaries, commissions or compensation for services rendered after proceedings commence under this Act and before the court sanctions the compromise or arrangement, together with, in the case of travelling salespersons, disbursements properly incurred by them in and about the company’s business during the same period; and
  - (b) the court is satisfied that the company can and will make the payments as required under paragraph (a).

#### Restriction — pension plan

- (6) If the company participates in a prescribed pension plan for the benefit of its employees, the court may sanction a compromise or an arrangement in respect of the company only if
- (a) the compromise or arrangement provides for payment of the following amounts that are unpaid to the fund established for the purpose of the pension plan:
    - (i) an amount equal to the sum of all amounts that were deducted from the employees’ remuneration for payment to the fund,
    - (ii) if the prescribed pension plan is regulated by an Act of Parliament,
      - (A) an amount equal to the normal cost, within the meaning of subsection 2(1) of the Pension Benefits Standards Regulations, 1985, that was required to be paid by the employer to the fund, and
      - (B) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the Pension Benefits Standards Act, 1985,
      - (C) an amount equal to the sum of all amounts that were required to be paid by the employer to the administrator of a pooled registered pension plan, as defined in subsection 2(1) of the Pooled Registered Pension Plans Act, and
    - (iii) in the case of any other prescribed pension plan,
      - (A) an amount equal to the amount that would be the normal cost, within the meaning of subsection 2(1) of the Pension Benefits Standards

- Regulations, 1985, that the employer would be required to pay to the fund if the prescribed plan were regulated by an Act of Parliament, and  
(B) an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the Pension Benefits Standards Act, 1985, if the prescribed plan were regulated by an Act of Parliament,  
(C) an amount equal to the sum of all amounts that would have been required to be paid by the employer in respect of a prescribed plan, if it were regulated by the Pooled Registered Pension Plans Act; and  
(b) the court is satisfied that the company can and will make the payments as required under paragraph (a).

[...]

**General power of court**

**11.** Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

R.S., 1985, c. C-36, s. 11; 1992, c. 27, s. 90; 1996, c. 6, s. 167; 1997, c. 12, s. 124; 2005, c. 47, s. 128.

[...]

**Stays, etc. — initial application**

**11.02** (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

- (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act;  
(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and  
(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

**Stays, etc. — other than initial application**

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

- (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);  
(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and  
(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

**Burden of proof on application**

(3) The court shall not make the order unless

- (a) the applicant satisfies the court that circumstances exist that make the order appropriate; and
- (b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

[...]

**Restriction on disposition of business assets**

**36.** (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

**Notice to creditors**

(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

**Factors to be considered**

(3) In deciding whether to grant the authorization, the court is to consider, among other things,

- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (b) whether the monitor approved the process leading to the proposed sale or disposition;
- (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
- (d) the extent to which the creditors were consulted;
- (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
- (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

**Additional factors — related persons**

(4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

- (a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and
- (b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

**Related persons**

- (5) For the purpose of subsection (4), a person who is related to the company includes
- (a) a director or officer of the company;
  - (b) a person who has or has had, directly or indirectly, control in fact of the company; and
  - (c) a person who is related to a person described in paragraph (a) or (b).

**Assets may be disposed of free and clear**

(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

**Restriction — employers**

(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(a) and (5)(a) if the court had sanctioned the compromise or arrangement.  
2005, c. 47, s. 131; 2007, c. 36, s. 78.

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

Court File No.: CV-16-11397-00CL

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF  
BEN MOSS JEWELLERS WESTERN CANADA LTD.

**Applicant**

*Ontario*  
**SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

Proceeding commenced at Toronto

**FACTUM OF THE APPLICANT**

(Sale Approval and Stay Extension, Returnable July 29, 2016)

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