

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

APPLICANT

FACTUM OF THE APPLICANTS

**(Motion for the Granting of the
Sanction and Vesting Order)**

September 20, 2017

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PART I - NATURE OF THIS MOTION

1. Express Fashion Apparel Canada Inc. ("**Express Canada**") and Express Canada GC GP, Inc. (collectively, the "**Applicants**") obtained relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") by an Initial Order dated May 4, 2017, as amended (the "**Initial Order**"). Pursuant to the Initial Order, the stay of proceedings and other benefits of the Initial Order were extended to Express Canada GC, LP (together with the Applicants, the "**Express Canada Entities**"). Alvarez & Marsal Canada Inc. was appointed pursuant to the Initial Order to act as the Monitor in this CCAA proceeding (in this capacity and not in its personal or corporate capacity, the "**Monitor**"). The Initial Order granted a stay of proceedings until June 3, 2017. The Stay Period, as defined in the Initial Order, was extended on May 29, 2017 to September 29, 2017.

2. This factum is filed in support of the Applicants' motion for this Court's sanction of their Joint Plan of Compromise and Arrangement (the "**Plan**"), and to obtain an order in the form of the proposed Sanction and Vesting Order. This Order would, among other things, extend the Stay Period until December 15, 2017, to allow for the implementation of the Plan and winding-down of the CCAA proceedings.

3. The Plan provides timely and favourable outcomes for all Affected Creditors. Under the Plan, all Unsecured Creditors of the Express Canada Entities (other than the Landlords, as discussed below), will recover 100% of the value of their proven claims. This includes Third-Party Creditors and Employee Creditors. The Plan also reflects a consensual solution for distribution of the remaining liquidation proceeds to the Landlord Creditors after the Unsecured Creditors have been paid in full. The Landlord Creditors, whose claims are being compromised, unanimously support the Plan and the granting of the Sanction and Vesting Order.

4. These timely and favourable recoveries for Affected Creditors have been achieved, in part, because the Plan does not contemplate any cash distribution with respect to the only secured claim against the Applicants: Express US's Secured Intercompany Claim against Express Canada. Moreover, the Plan does not contemplate any cash distribution with respect to any subrogated claims that Express US might have against Express Canada pursuant to certain Landlord Guarantee Claims. In recognition of these contributions to the success of the Plan, Express US is among those parties released from all claims arising out of the business of the Express Canada Entities and of this proceeding (except for the Landlord Guarantee Claims, which are in no way affected by the Plan). The Applicants submit that the release of Express US provided for in the Plan meets the well-established test for third party releases in CCAA jurisprudence.

5. The Plan, if sanctioned by this Court and implemented, would result in the controlled and orderly wind-down of the Express Canada Entities and the CCAA proceedings in a timely and cost-efficient manner. It represents an outcome very favourable to the Affected Creditors. The Express Canada Entities put forward the Plan with the expectation that stakeholders will derive a greater benefit from implementation of the Plan than would result from an immediate bankruptcy of the Express Canada Entities.

6. Based on these considerations and the submissions below, as well as the Monitor's recommendation, the Applicants submit that the Plan should be sanctioned by this Court.

PART II - FACTS

7. The facts with respect to this motion are more fully set out in the Sanction Affidavit of Todd Painter.¹ Additional facts, including the history of these proceedings and of the Express Canada Entities' wind-down efforts, are described in the Initial Order Affidavit of Todd Painter and the Monitor's Third Report.² Capitalized terms in this Factum not otherwise defined have the same meanings as in the Sanction Affidavit.

Key Features of the Plan and Sanction and Vesting Order

8. The features of the Plan and the Sanction and Vesting Order are summarized in detail in the Sanction Affidavit and the Monitor's Third Report. The following are some of the significant features of the Plan and the Sanction and Vesting Order:

¹ Affidavit of Todd Painter sworn September 20, 2017 [Sanction Affidavit].

² Affidavit of Todd Painter, sworn May 4, 2017 [Initial Order Affidavit]; Third Report of the Monitor, dated September 20, 2017 [Monitor's Third Report].

- (a) Affected Creditors will be divided into two groups to vote on the Plan: Unsecured Creditors (comprised of Third Party Creditors and Employee Creditors) and Landlord Creditors.³
- (b) All Unsecured Creditors will be paid the full amount of their Proven Claims.⁴
- (c) Landlord Creditors, whose claims are the only claims compromised under the Plan, support the granting of the Approval and Vesting Order and have unanimously agreed to support the Plan. As described below, it is anticipated that the Landlords will collectively recover approximately 56% to 59% of their proven claims, distributed on a *pro rata* basis.⁵ Each Landlord Creditor has delivered to the Monitor a form of proxy directing the Monitor to vote in favour of a resolution approving the Plan.⁶
- (d) In the interests of expediency and cost-reduction, the Unsecured Creditors' Meeting and the Landlord Creditors' Meeting will be deemed to have been held on September 27, 2017.⁷ All Unsecured Creditors will be deemed to have voted in favour of approving the Plan. The Monitor, as proxy-holder for all Landlord Creditors, will be deemed to have voted all Landlord Proxies in favour of a

³ Sanction Affidavit at para 41.

⁴ Sanction Affidavit at para 38.

⁵ Sanction Affidavit at para 30.

⁶ Sanction Affidavit at para 39.

⁷ Monitor's Third Report at para 6.2.

resolution approving the Plan in accordance with the instructions contained therein.⁸

- (e) Certain claims are excluded from the scope of the Plan. These Unaffected Claims will not be compromised in any way, and the creditors holding those claims will not receive cash distributions with respect to such Unaffected Claims. These Unaffected Claims include (i) Express US's Secured Intercompany Claim against the Express Canada Entities, discussed in more detail below,⁹ and (ii) Claims enumerated in Section 5.1(2) and Section 19(2), of which none were filed in the Claims Process.¹⁰
- (f) Landlord Guarantee Claims against Express US are not affected by the Plan. Any subrogated claims Express US would have had against Express Canada as a result of the Landlord Guarantee Claims are not going to be paid under the Plan.¹¹
- (g) If the Plan and the Sanction and Vesting Order are approved, all of the Express Canada Entities' Available Funds will be divided into the following three categories, held in separate interest-bearing accounts:
 - (i) the Administrative Reserve in the amount of \$1.465 million, which will be used to pay all costs related to the implementation of the Plan, post-filing trade payables, winding-down the CCAA proceedings, and any dissolution or bankruptcy of any one or more of the Express Canada Entities;¹²

⁸ Monitor's Third Report at para 6.3.

⁹ Sanction Affidavit at para 42; Monitor's Third Report at para 5.7.

¹⁰ Monitor's Third Report at para 6.3.

¹¹ Sanction Affidavit at paras 44 and 48.

¹² Monitor's Third Report at paras 5.13-5.14.

- (ii) the Unsecured Creditor Cash Pool, containing an amount sufficient to satisfy in full all claims of the Unsecured Creditors; and
 - (iii) the Landlord Cash Pool, comprising all of the remaining Available Funds after the Administrative Reserve and the Unsecured Creditor Cash Pool are created, in an amount not less than \$16.643 million.¹³
- (h) The Plan contemplates two distributions. The initial distribution is to take place no later than October 31, 2017, and at such initial distribution, Express Canada will pay all Unsecured Creditors the full amount of their proven claims out of the Unsecured Creditor Cash Pool, and pay to each Landlord Creditor an amount equal to its *pro rata* share of the monies in the Landlord Cash Pool.¹⁴
- (i) The final distribution will take place on a later date determined by the Monitor in consultation with Express Canada, or as otherwise ordered by this Court. At that time, Express Canada would pay any final Administrative Reserve Costs. Thereafter, any remaining funds in the Administrative Reserve or the Unsecured Creditor Cash Pool (on account of Undelivered Distributions to Unsecured Creditors) would be transferred to the Landlord Cash Pool and then distributed *pro rata* to the Landlords.¹⁵
- (j) The Plan complies with Section 6(3) by requiring Express Canada, on behalf of the Express Canada Entities, to pay in full, all amounts on account of Government Priority Claims (if any) and Employee Priority Claims (if any), within six (6) months from the Plan Sanction Date.

¹³ Monitor's Third Report at para 5.18.

¹⁴ Sanction Affidavit at para 54; Monitor's Third Report at para 5.20.

¹⁵ Monitor's Third Report at paras 5.19 and 5.26.

- (k) There are no registered pension plans or stock option plans for the managers or other employees of Express Canada¹⁶ and therefore, no possible claims in respect of contributions. Further, the Monitor is not aware of the existence of any outstanding Government Priority Claims or Employee Priority Claims which have already been paid in their entirety by the Express Canada Entities.
- (l) Express US has made significant contributions to the Express Canada Entities' wind-down throughout these CCAA proceedings and under the Plan, including:
- (i) No Cash Distribution for the Secured Intercompany Claim – the Plan does not contemplate Express US, the Express Canada Entities' only secured creditor, receiving a cash distribution in respect of its secured claim. Rather, Express US would only receive title to an Express-branded promotional trailer (the “**Airstream**”) and related marketing merchandise contained therein, with a corresponding reduction in the value of the Secured Intercompany Claim.¹⁷ The vesting of the Airstream in Express US is discussed more fully below.
 - (ii) No Subrogated Landlord Guarantee Claims – the Plan does not affect any Landlord Guarantee Claims that the Landlord Creditors may have against Express US. However, the Plan does not provide for any distribution to Express US in respect of any subrogated claim that Express US might have against Express Canada for amounts paid to the Landlords under these indemnities. That is, Express US will not attempt to reach back into the estate of Express Canada to recover any of the amounts it pays to the Landlord Creditors.
 - (iii) Support Services Through CCAA Proceedings – Express US has provided and will continue to provide the Express Canada Entities with essential support services through these CCAA proceedings.

As consideration for these significant contributions to Express Canada's CCAA proceedings, Express US is among those third parties that will be released and

¹⁶ Initial Order Affidavit at para 67.

¹⁷ Sanction Affidavit at para 45.

discharged from all Claims, except for the Landlord Guarantee Claims, under the Plan.¹⁸

9. As laid out in more detail below, the proposed Sanction and Vesting Order and Plan provide that both the Unsecured Creditors' Meeting and the Landlord Creditors' Meeting shall be deemed to have been duly called and held on September 27, 2017 for the purpose of voting on a resolution to approve the Plan.¹⁹

PART III - ISSUES AND THE LAW

10. The issue on this motion is:

- (a) Should this Honourable Court order deemed meetings of the Affected Creditors, a deemed vote by the Unsecured Creditors, and a deemed vote by the Monitor of the Landlord Proxies, and approve the Plan and the Sanction and Vesting Order as fair and reasonable?

Test for Sanctioning a Plan

11. Section 6(1) of the CCAA provides that the Court has discretion to sanction a plan of compromise or arrangement if the Plan has achieved the requisite "double majority" vote: a majority of creditors in number representing two-thirds in value.²⁰ The effect of the Court's approval is to bind the company and its creditors.

¹⁸ Sanction Affidavit at para 49; Monitor's Third Report at para 5.6.

¹⁹ Monitor's Third Report at para 5.28.

²⁰ CCAA s. 6(1).

12. The criteria that a debtor company must satisfy in seeking the Court's approval for a plan of compromise or arrangement under the CCAA are well established:

- (a) there must be strict compliance with all statutory requirements;
- (b) all materials filed and procedures carried out must be examined to determine if anything has been done or purported to be done which is not authorized by the CCAA and prior Orders of the Court in the CCAA proceedings; and
- (c) the plan must be fair and reasonable.²¹

Deemed Meetings Comply with Statutory Requirements

13. To determine whether there has been strict compliance with all statutory requirements, the Court typically considers factors such as whether: (a) the applicant(s) come within the definition of "debtor company" under section 2 of the CCAA; (b) the applicant(s) or affiliated debtor companies have total claims in excess of \$5 million; (c) the notice of meeting was sent in accordance with the Court's Order; (d) the creditors were properly classified; (e) the creditors' meeting was properly constituted; (f) the voting was properly carried out; and (g) the plan was approved by the requisite majority.²² The Applicants submit that they have satisfied all of these requirements.

14. In particular, the Plan and the proposed Sanction and Vesting Order provide that both the Unsecured Creditors' Meeting and the Landlord Creditors' Meeting shall be deemed to have been duly called and held on September 27, 2017 for the purpose of voting on a resolution to

²¹ *Re Target Canada Co*, 2016 ONSC 316 [*Target*] at para 70 and cases cited therein.

²² *Re Canadian Airlines Corp.*, 2000 ABQB 442 [*Canadian Airlines*] at para 62. See also *Re Canwest Global Communications Corp.*, 2010 ONSC 4209 [*Canwest*] at para 15.

approve the Plan. The Applicants submit that, if the Sanction and Vesting Order is granted, the meetings would be properly constituted, the deemed voting would be properly carried out, and together the deemed meetings would provide the requisite majority for plan approval.

15. All the Express Canada Entities' Affected Creditors will either be paid in full or have already consented to the Plan. All Unsecured Creditors will have their proven claims satisfied in full; accordingly, the Sanction and Vesting Order provides that all Unsecured Creditors shall be deemed to have voted to approve the Plan. The Landlord Creditors unanimously support the Plan. To that end, each Landlord Creditor has already provided the Monitor with a form of proxy directing the Monitor to vote in favour of a resolution approving the Plan.

16. In these circumstances, physically holding the Unsecured Creditors' Meeting and the Landlord Creditors' Meeting would be a mere formality. To maximize recoveries for all Affected Creditors and to facilitate an expedited distribution, the Plan and the Sanction and Vesting Order provide that these meetings and the requisite plan approval votes shall be deemed.

17. All Affected Creditors will be given notice of the proposed Plan and Sanction and Vesting Order, and the efficient and cost-saving process described above.²³

18. The CCAA permits the Court to order a meeting of creditors to be summoned in such a manner as the Court directs.²⁴ For example, a deemed meeting of creditors has been ordered in appropriate circumstances, and the deemed voting for plan approval at such meetings has been binding upon all affected creditors.²⁵ In addition, courts customarily order a convenience class of

²³ Monitor's Third Report at para 5.10.

²⁴ CCAA s. 4 and 5.

²⁵ See *Re Arctic Glacier Income Fund* [Plan Sanction Order], 2014 CarswellMan 825 (MBQB) at paras 20-24.

creditors to be deemed to vote in favour of CCAA plans because their claims are satisfied in full.²⁶ Deeming a convenience class to vote in favour of a plan is analogous to deeming all Unsecured Creditors in this case to vote in favour of the Plan because the Unsecured Creditors will be paid in full.

19. The Monitor supports the proposed deemed meetings and deemed voting, because this process will allow the Express Canada Entities to maximize recoveries while avoiding additional costs and delay to achieve the same result.²⁷ The Monitor is of the view that the Plan complies with the statutory requirements of the CCAA and the prior Orders of the Court in the CCAA proceedings.²⁸

20. The Express Canada Entities submit that: (i) it is neither appropriate nor necessary to expend resources on an Unsecured Creditors' meeting at which Unsecured Creditors attend and vote on the Plan, given that they are all being treated equally and their proven claims are being paid in full; (ii) it is neither appropriate nor necessary to expend resources on a Landlord Creditors' Meeting at which Landlord Creditors attend and vote on the Plan, given that each of the Landlords has delivered a form of proxy to the Monitor that irrevocably directs the Monitor to vote in favour of the Plan; (iii) the statutory prerequisites to the sanction of the Plan have been satisfied; and (iv) the Plan complies with the prior Orders of the Court in the CCAA proceedings.

²⁶ See for example *Re Target Canada Co* [Meeting Order], 2016 CarswellOnt 5922 at para 25; *Re Nelson Financial Group Ltd.*, 2011 ONSC 2750 at para 14; *Re Angiotech Pharmaceuticals Inc*, 2011 BCSC 450 at para 6; *Canwest*, above, at paras 4 and 13.

²⁷ Monitor's Third Report at para 6.5.

²⁸ Monitor's Third Report at para 5.16.

The Plan is Fair and Reasonable

21. The Applicants further submit that this Court should exercise its discretion to sanction the Plan as fair and reasonable.

22. Courts have emphasized that when considering whether a plan is fair and reasonable, the court will consider whether the plan represents a reasonable and fair balancing of interests, in light of the other commercial alternatives available.²⁹ The meaning of “fairness” and “reasonableness” are “necessarily shaped by the unique circumstances of each case, within the context of the [CCAA] ...”.³⁰

23. In assessing whether a proposed plan is fair and reasonable, the Court will consider factors including: (a) whether the claims were properly classified and whether the requisite majority of creditors approved the plan; (b) what creditors would receive on bankruptcy or liquidation as compared to the plan; (c) alternatives available to the plan and bankruptcy; (d) oppression of the rights of creditors; (e) unfairness to shareholders; and (f) the public interest.³¹

24. These factors strongly support approval of the Plan by this Court. In particular:

- (a) Classification and Creditor Approval: As noted above, Affected Creditors will be deemed to have voted in two classes: Unsecured Creditors, whose proven claims are being paid in full; and Landlord Creditors, who have expressed unanimous support for the Plan. As Paperny J. noted in *Canadian Airlines*, creditor support creates an inference that the plan is fair and reasonable because the assenting

²⁹ *Canadian Airlines*, above, at para 3; *Canwest*, above, at para 19.

³⁰ *Canadian Airlines*, above, at para 94.

³¹ *Canwest*, above, at para 21.

creditors believe that their interests are treated equitably under the plan.³² The unanimous approval of the Plan by the Landlords, the only Affected Creditors whose claims will be compromised, reflects the fact that it is a product of dialogue, negotiation, and communication among stakeholders.³³

- (b) Recovery on Bankruptcy: Under the Plan, all Unsecured Creditors are being made whole for the full value of their proven claims, and all Landlord Creditors are anticipated to receive between 56-59% of the value of their claims. The Express Canada Entities' sole secured creditor, Express US, has agreed not to receive a cash distribution for its Secured Intercompany Claim. The Plan therefore reflects a materially improved recovery for Unsecured Creditors and Landlord Creditors that would not be available outside a Plan.

For example, a bankruptcy would lead to reduced recoveries, increased costs, and significant delay:

- Unsecured Creditors and Landlord Creditors would be paid *pari passu*, meaning that Unsecured Creditors would not have their claims satisfied in full;
- The Secured Intercompany Claim would be paid in priority to other claims, reducing the total funds available for distribution;
- Any subrogated claims held by Express US would be paid, diluting recoveries for other stakeholders; and
- Landlords would have to provide detailed support for their claims, which would have to be assessed by a trustee in bankruptcy, materially increasing costs through increase professional fees and significantly delaying distributions.

³² *Canadian Airlines*, above, at para 97.

³³ See, for example, *Re Skylink Aviation*, 2013 ONSC 2519 [*Skylink*] at para 29.

- (c) Alternatives to the Plan: When this CCAA proceeding was commenced, there was no prospect for the future business of the Express Canada Entities. The Plan is the only alternative to a bankruptcy. The Monitor is of the view that the Plan is fair and reasonable and recommends that the Court sanction the Plan according to the terms of the proposed Sanction and Vesting Order.³⁴

The Releases are Fair and Reasonable

25. Article 7.1 of the Plan provides for full and final releases (the “**Releases**”) for:

- (a) The Express Canada Released Parties (the Express Canada Entities and their respective Directors, Officers, employees, legal counsel, agents and advisors);
- (b) The Third Party Released Parties (the Monitor, A&M and its affiliates, their respective directors, officers, employees, legal counsel, agents and advisors); and
- (c) The Express US Released Parties (Express US, its current and former affiliates excluding the Express Canada Entities, and their members, shareholders, directors, officers, employees, legal counsel, agents and advisors), except in respect of Landlord Guarantee Claims.

26. It is well-accepted that Canadian courts have jurisdiction to sanction plans containing releases in favour of third parties. In *Metcalfe*, the Ontario Court of Appeal held that the CCAA Court has the jurisdiction to approve a plan of compromise or arrangement that includes third-party releases, stating that a release negotiated in favour of a third party as part of the

³⁴ Monitor’s Third Report at para 6.16.

“compromise” or “arrangement” that reasonably relates to the proposed restructuring falls within the objectives and flexible framework of the CCAA.³⁵

27. There must be a reasonable connection between the third-party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third-party release in the plan.³⁶

28. In determining whether to approve third-party releases the court will consider:

- (a) Whether the parties to be released from claims were necessary and essential to the restructuring of the debtor;
- (b) Whether the claims to be released were rationally connected to the purpose of the plan and necessary for it;
- (c) Whether the plan could succeed without the releases;
- (d) Whether the parties being released were contributing to the plan;
- (e) Whether the release benefitted the debtors as well as the creditors generally;
- (f) Whether the creditors voting on the plan had knowledge of the nature and effect of the releases; and
- (g) Whether the releases were fair and reasonable and not overly broad.³⁷

³⁵ *Re Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587[*Metcalfe*] at para 61.

³⁶ *Metcalfe*, above, at para 70.

³⁷ *Metcalfe*, above, at paras 71 and 113.

29. Courts have approved releases that benefit affiliates of the debtor company where the *Metcalfe* criteria are satisfied. In *Sino-Forest*, for example, the subsidiaries of the debtor company were entitled to benefit from the release under the plan as they were contributing their assets to satisfy the obligations of the debtor company for the benefit of affected creditors.³⁸

30. Each of the Released Parties has contributed in tangible and material ways to the development of the Plan and to the orderly wind down of the Express Canada Entities' businesses. Without the Releases, it is unlikely that all of the Released Parties would have been prepared to support the Plan.

31. In particular, the contributions by Express US in support of the Plan have increased the net recoveries available for Affected Creditors.³⁹ Express Corporation's material contributions to the Plan include:

- (a) Secured Intercompany Claim – Express US will not receive a cash distribution under the Plan with respect to its Secured Intercompany Claim for \$188,267.97. Express US will accept a reduction in the value of that Secured Intercompany Claim in exchange for receiving title to the Airstream trailer, and after Plan implementation the Secured Intercompany Claim will remain in place;⁴⁰
- (b) Express US Subrogated Claims – Under the Plan, Express US may still be liable to certain Landlords pursuant to certain Landlord Guarantee Claims (described more fully in the Initial Order Affidavit). However, the Plan does not provide for any

³⁸ *Re Sino-Forest Corp.*, 2012 ONSC 7050 [*Sino-Forest*] at paras 72 and 73.

³⁹ Monitor's Third report at paras 5.6 and 5.37(ii); see also Sanction Affidavit at para 49.

⁴⁰ Sanction Order Affidavit at para 45.

payments in respect of any subrogated claim that Express US might have had against Express Canada for any funds paid pursuant to those Landlord Guarantee Claims, essentially waiving Express US's right of subrogation for those funds;⁴¹ and

- (c) Essential Support Services – Express US has provided and will continue to provide essential shared services to the Express Canada Entities to facilitate the orderly wind-down of these CCAA proceedings.⁴²

32. The Releases are appropriately narrow and rationally connected to the overall purposes of the Plan. The Express US Released Parties are not released from the Landlord Guarantee Claims, and any Landlord Creditors may still pursue existing legal avenues to obtain indemnity from Express US.⁴³ Full disclosure of the Releases will be made to Affected Creditors in the Sanction Affidavit and the Monitor's Report. Finally, the Monitor is of the view that the releases contained in the Plan are fair and reasonable in the circumstances.⁴⁴

The Airstream Asset Transfer should be Authorized

33. Article 6.2(c) of the Plan provides that as part of the Plan implementation, Express Canada shall transfer the Airstream trailer and related marketing materials contained therein to

⁴¹ Monitor's Third Report at para 5.6; Sanction Affidavit at para 44.

⁴² Sanction Affidavit at para 49.

⁴³ Sanction Affidavit at para 48.

⁴⁴ Monitor's Third Report at para 5.37.

Express US in exchange for a reduction in the amount of the Secured Intercompany Note equal to the value of the Airstream and payment by Express US of any applicable transfer taxes.⁴⁵

34. The Initial Order permits the disposition of redundant or non-material assets not exceeding \$50,000 in any one transaction or \$250,000 in the aggregate.

35. High-level market research carried out by the Monitor supports the view that the sale of the Airstream and related marketing materials to Express US is fair and reasonable and should be explicitly authorized as part of the Plan. The Airstream has been reconfigured and branded to market Express branded products.⁴⁶ The market for this asset is correspondingly slim. Moreover, with the completion of the store liquidations, Express Canada no longer has a license to sell or distribute the related marketing merchandise to any third parties, making Express US the only potential buyer.

36. Express US's support of the Plan, including permitting the Secured Intercompany Claim and any Express US Subrogated Claims to be Unaffected Claims (which will not be paid under the Plan), is conditional upon the Airstream and related marketing merchandise being acquired by Express US pursuant to the Sanction and Vesting Order.⁴⁷

37. A third-party valuator has advised the Monitor that the Airstream is worth considerably less than the amount of the Secured Intercompany Claim. The Monitor is of the view that the net benefit to Affected Creditors if the Airstream is transferred to Express US and the Secured Intercompany Claim is treated as an Unaffected Claim is greater than if the Airstream

⁴⁵ Monitor's Third Report at para 6.7.

⁴⁶ Monitor's Third Report at para 6.8.

⁴⁷ Monitor's Third Report at para 6.8.

were otherwise monetized and the Secured Intercompany Claim was not an Unaffected Claim. Accordingly, the Monitor supports the Applicants' request for approval of the Airstream transfer because this transaction is in the best interest of the Express Canada Entities' creditors.⁴⁸

38. The Monitor is of the view that the Plan as a whole is fair and reasonable.⁴⁹ Accordingly, the Express Canada Entities submit that the Plan is fair and reasonable, represents significantly greater recoveries for creditors than they might achieve in a bankruptcy, and should be sanctioned.

The Stay should be Extended

39. The Stay Period is currently set to expire on September 29, 2017. Should this Court grant the Sanction and Vesting Order, the Applicants seek to extend the Stay Period to December 15, 2017 in order to implement the Plan and complete the wind-down of the CCAA proceedings.

40. Pursuant to section 11.02 of the CCAA, the Court may extend a Stay Period where circumstances exist that make the order appropriate, and where the debtor companies are acting in good faith and with due diligence.⁵⁰

41. The Stay Period is required to provide the Express Canada Entities with the stability and certainty necessary to implement the Plan and to complete the orderly wind-down of these

⁴⁸ Monitor's Third Report at paras 6.9-6.10.

⁴⁹ Monitor's Third Report at paras 6.16 and 10.1.

⁵⁰ CCAA s. 11.02.


CCAA proceedings. The Express Canada Entities have sufficient liquidity until December 15, 2017, should the proposed Plan be approved by the Court.⁵¹

42. The Monitor has confirmed that in its view the Express Canada Entities continue to act in good faith and with due diligence.⁵² The Express Canada Entities submit that in these circumstances, it is appropriate for the Court to extend the Stay Period to December 15, 2017.


PART IV - NATURE OF THE ORDER SOUGHT

43. For all of the reasons above, the Applicants submit that this Honourable Court should grant the requested Sanction and Vesting Order and related relief requested by the Applicants.

ALL OF WHICH IS RESPECTFULLY SUBMITTED:



per Tracy Sandler



per Jeremy Dacks

⁵¹ Monitor's Third Report at para 8.2.

⁵² Monitor's Third Report at para 8.2.

SCHEDULE "A"
LIST OF AUTHORITIES

Case Law

1. *Re Angiotech Pharmaceuticals Inc*, 2011 BCSC 450
2. *Re Arctic Glacier Income Fund*, 2014 CarswellMan 825 (MBQB)
3. *Re Canadian Airlines Corp.*, 2000 ABQB 442
4. *Re Canwest Global Communications Corp.*, 2010 ONSC 4209
5. *Re Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587
6. *Re Nelson Financial Group Ltd.*, 2011 ONSC 2750
7. *Re Sino-Forest Corp.*, 2012 ONSC 7050
8. *Re Skylink Aviation*, 2013 ONSC 2519
9. *Re Target Canada Co*, 2016 ONSC 316
10. *Re Target Canada Co*, 2016 CarswellOnt 5922 (ONSC)

SCHEDULE "B"

COMPANIES' CREDITORS ARRANGEMENT ACT

R.S.C. 1985, c. C-36, as amended

Compromise with unsecured creditors

4 Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

Compromise with secured creditors

5 Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

Compromises to be sanctioned by court

6 (1) If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be — other than, unless the court orders otherwise, a class of creditors having equity claims, — present and voting either in person or by proxy at the meeting or meetings of creditors respectively held under sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court and, if so sanctioned, is binding

(a) on all the creditors or the class of creditors, as the case may be, and on any trustee for that class of creditors, whether secured or unsecured, as the case may be, and on the company; and

(b) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act or is in the course of being wound up under the Winding-up and Restructuring Act, on the trustee in bankruptcy or liquidator and contributories of the company.

Stays, etc. — other than initial application

11.02 (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.

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

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

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

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

PROCEEDING COMMENCED AT TORONTO

FACTUM
(Motion for the Granting of the Sanction and Vesting Order)

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