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

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

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **TARGET CANADA CO., TARGET CANADA HEALTH CO., TARGET CANADA MOBILE GP CO., TARGET CANADA PHARMACY (BC) CORP., TARGET CANADA PHARMACY (ONTARIO) CORP., TARGET CANADA PHARMACY CORP., TARGET CANADA PHARMACY (SK) CORP.,** and **TARGET CANADA PROPERTY LLC**

APPLICANTS

# FACTUM OF THE APPLICANTS

**(Motion to Accept Filing of a Plan and Authorize Creditors' Meeting to Vote on the Plan)**

December 3, 2015

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**TO:** **SERVICE LIST**

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# FACTUM OF THE APPLICANTS

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## PART I – NATURE OF THIS MOTION

1. Target Canada Co. ("**TCC**") and the other applicants listed above (the "**Applicants**") and Partnerships listed on Schedule A obtained relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") by an Initial Order dated January 15, 2015, as amended (the "**Initial Order**"). Alvarez & Marsal Canada Inc. was appointed in the Initial Order to act as the Monitor in this CCAA proceeding. The Initial Order granted a stay of proceedings until February 13, 2015. The Stay Period, as defined in the Initial Order, was later extended four times, most recently on October 30, 2015 to December 11, 2015.

2. This factum is filed in support of the Applicants' motion to file their proposed plan of compromise and arrangement (the "**Plan**") and to obtain an order of this court (the "**Meeting Order**") authorizing the Applicants to hold a meeting of their Affected Creditors. The Applicants submit that this request for relief signals the achievement of an important milestone in the efforts of the Applicants to effect an orderly wind-down of their businesses.

3. The Plan has been the subject of numerous discussions and/or negotiations with Target Corporation (leading to a structure based on Target Corporation serving as Plan Sponsor), the Monitor and a wide variety of stakeholders. If approved by Affected Creditors at the proposed Creditors' Meeting and sanctioned by this Court, the Plan will effect a compromise, settlement and payment of all Proven Claims in the near term in a manner that maximizes and accelerates stakeholder recovery.

4. Target Corporation, as Plan Sponsor and as the largest creditor of the Target Canada Entities, has agreed to subordinate approximately $5 billion in Intercompany Claims to the claims of other Affected Creditors. Based on the Monitor's preliminary analysis, the Plan provides for recoveries for Affected Creditors generally in the range of 75% to 85% of their Proven Claims.

5. The threshold for this Court to authorize the Applicants to hold the Creditors' Meeting is low and the Applicants meet this threshold. The Target Canada Entities should therefore be entitled to place the Plan before the Affected Creditors and allow them to exercise their business judgment in determining whether to support it.

6. This Court has the jurisdiction to grant the Meeting Order at this time. In particular:

(a) If authorized by this Court, the Affected Creditors will vote on the Plan as a single unsecured class on the basis that all Affected Creditors have the required

commonality of interest (i.e. an unsecured claim) in relation to their Claims against the Target Canada Entities and the Plan will compromise and release all of their Claims. This is true regardless of whether Affected Creditors are accepting a "convenience amount", have claims that are valued in accordance with the Landlord Formula Amount (defined below), or have Guarantees from another entity. Fragmentation of these creditors into separate classes would jeopardize the ability to achieve a successful Plan in the interests of all stakeholders.

(b) In the interests of commercial certainty and of facilitating prompt distributions to Affected Creditors, the Plan values the Landlord Restructuring Period Claims of Landlords whose Leases have been disclaimed by applying a formula derived from the formula provided under section 65.2(4) of the *Bankruptcy and Insolvency Act* ("**BIA**") (the "**BIA Formula**"). The BIA Formula has been enhanced under the Plan to permit recovery (in effect) of an additional year of rent. This enhanced valuation under the Plan is referred to below as the "**Landlord Formula Amount**". The use of the BIA Formula to value landlord claims for voting and distribution has been approved in several other CCAA proceedings. The uniform application of the Landlord Formula Amount to Landlord Restructuring Period Claims will avoid protracted litigation and delay to resolve disputes, treats all Landlords consistently and, by its nature, takes into account the obligation of Landlords to mitigate their damages.

(c) This Court has the jurisdiction to modify the Initial Order on Plan implementation to permit the Target Canada Entities to address Landlord Guarantee Claims in the Plan and it is just and appropriate to do so in these circumstances. The landscape

of these proceedings has significantly altered since the filing date, particularly in light of the very material contributions that Target Corporation is prepared to make as Plan Sponsor in order to effect a global resolution of the issues arising out of the estate of the Target Canada Entities. Landlord Guarantee Creditors are appropriately compensated under the Plan for their Landlord Guarantee Claims by means of the Landlord Guarantee Creditor Top-Up Amounts, which will be funded by Target Corporation. Landlord Guarantee Creditors will be paid 100% of their Landlord Restructuring Period Claims, valued in accordance with the Landlord Formula Amount. Recent case law supports the jurisdiction of the CCAA Court to require that third party claims be addressed within the CCAA and leaves it open to a debtor company to address such claims in a plan.

(d) The releases proposed under the Plan for the benefit of Target Corporation and certain other third parties recognize the material economic contribution that has been made by Target Corporation, in its capacity as Plan Sponsor, to the success of this proceeding and to the favourable economic recoveries available to all stakeholders. These releases, *prima facie*, satisfy the well-established test for the CCAA Court to approve third party releases.

7. If the Plan is implemented, the Applicants expect that all Persons with an economic interest in the Target Canada Entities will derive a greater benefit from the estates of the Target Canada Entities than would result from a bankruptcy.

8. The Applicants have sought to achieve a fair and equitable balance in the Plan between all Affected Creditors and other stakeholders. Questions as to whether this balance has, in fact, been achieved, whether the Plan's treatment of the claims of particular stakeholders is fair

and reasonable, and whether the economic recoveries that are likely to be achieved are advantageous are all matters to be assessed by the Affected Creditors in exercising their business judgment to decide whether to vote in favour of or against the Plan. Affected Creditors should be allowed to vote and express their views. Considerations of fairness are currently premature and not matters that are required to be considered by this Court in granting the requested Meeting Order. If the Plan is approved by the requisite majorities of Affected Creditors, this Court will be in a position to fully evaluate the fairness and reasonableness of the Plan as a whole, with the benefit of the business judgment of Affected Creditors as reflected in the vote at the Creditors' Meeting.

9. Based on these considerations, and the submissions below, the Applicants submit that the proposed Meeting Order, in the form set out in the Applicants' Motion Record, should be approved.

## PART II – FACTS

10. The facts with respect to this motion are more fully set out in the Meeting Order Affidavit of Mark J. Wong.[1] Capitalized terms in this Factum not otherwise defined have the same meanings as in the Initial Order Affidavit and the Meeting Order Affidavit.

### Development of the Plan

11. Transactions implemented pursuant to the court-approved Inventory Liquidation Process and the Real Property Portfolio Sales Process (both approved by this Court in February 2015) generated net proceeds of approximately $386 million and $547.8 million, respectively. A number of smaller transactions to maximize the value of the Target Canada Entities' remaining

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[1] Affidavit of Mark J. Wong, sworn November 27, 2015 [Meeting Order Affidavit].

assets further contributed to the available proceeds for distribution to creditors. By July 2015, these processes were substantially concluded and a claims process was underway, including a process relating to intercompany claims in respect of which the Monitor served its Intercompany Claims Report on August 31, 2015.[2]

12. The Plan has been developed to distribute these total proceeds, together with any residual proceeds, in a manner that is fair and equitable and that completes the orderly wind-down of the Target Canada Entities' business. In developing the Plan, the Target Canada Entities had extensive discussions and/or negotiations with Target Corporation, the Monitor, and a wide variety of stakeholders, including members of the Consultative Committee and other stakeholders and creditors not represented on the Consultative Committee.[3]

13. Beginning in June 2015 and continuing over the course of several months, the Target Canada Entities examined a number of economic and legal structures for a Plan that would materially maximize recoveries for third party creditors. As set out in more detail below, the Target Canada Entities and Target Corporation discussed a structure whereby Target Corporation would cause certain Intercompany Claims to be subordinated for the benefit of all Creditors.[4]

14. The Target Canada Entities negotiated a term sheet for the Plan with Target Corporation over the course of August and September 2015. The draft term sheet was presented to the Monitor in early September and was further refined based on consultations with the Monitor. At a meeting in late September, subject to confidentiality restrictions, the Target Canada Entities

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2 Meeting Order Affidavit, para. 18.

3 Meeting Order Affidavit, paras. 4 and 6.

4 Meeting Order Affidavit, paras. 19-20.

gave the members of the Consultative Committee a copy of the draft term sheet and the Monitor presented the Consultative Committee with a preliminary recovery analysis.[5]

15. Further consultations between the Consultative Committee and the Monitor subsequently ensued. In early November, members of the Consultative Committee representing Landlords provided collective comments on the term sheet to the Monitor, which were then communicated to the Target Canada Entities. As described further below, the Target Canada Entities took into account feedback from a cross-section of Landlord representatives that the proposed treatment of Landlords in the term sheet was not acceptable to them from an economic point of view. In response to this feedback, the Target Canada Entities and Target Corporation agreed to enhance the formula for Landlord recovery under the Plan.[6]

16. The Plan has been drafted on the basis of the term sheet initially presented to and discussed with stakeholders. Since early November, representatives of the Target Canada Entities have been meeting with counsel for trade creditors, Landlords with guarantees, Landlords without guarantees and other stakeholders, including the Canada Revenue Agency, with a view to garnering support for the Plan and a timely consensual resolution to the CCAA Proceedings.[7]

17. As the Plan has been refined and amended, the Target Canada Entities have considered whether and how constructive comments and concerns received through these consultative processes could be addressed under the Plan.[8]

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5 Meeting Order Affidavit, paras. 21-23.

6 Meeting Order Affidavit, paras. 24-25.

7 Meeting Order Affidavit, paras. 26-27.

8 Meeting Order Affidavit, para. 28.

## Overview of the Plan

18. The Plan has been developed by the Target Canada Entities, with the support of Target Corporation as Plan Sponsor.[9] The Plan has been designed to isolate and address Claims against Propco and Property LP, on one hand, and TCC (and the remaining Target Canada Entities), on the other. The Plan provides for the consolidation for Plan purposes of the Target Canada Entities other than Propco and Property LP.[10]

19. The primary features of the Plan and the manner in which Plan distributions will occur on Plan implementation are summarized in the Meeting Order Affidavit.[11] Some of the more significant features include:

(a) The Plan contemplates that a single class of Affected Creditors will consider and vote on the Plan.[12]

(b) The Plan entitles Affected Creditors with Proven Claims that are less than or equal to $25,000 ("Convenience Class Creditors") to be paid the full amount of their Proven Claims. Affected Creditors with Proven Claims in excess of $25,000 can elect to be treated for all purposes as Convenience Class Creditors.[13]

(c) The Plan provides that all Landlord Restructuring Period Claims will be calculated using the Landlord Formula Amount. This formula is derived from the BIA Formula. As a result of stakeholder discussions, the Landlord Formula Amount has

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9 Meeting Order Affidavit, para. 3. A copy of the Plan is attached as Exhibit A to the Meeting Order Affidavit.

10 Meeting Order Affidavit, paras. 37-38(a).

11 Meeting Order Affidavit, paras. 38-47.

12 Meeting Order Affidavit, para. 5.

13 Meeting Order Affidavit, para. 38(d).

been enhanced, in effect, to allow Landlords to claim an additional full year of rent than would ordinarily be available under the BIA Formula.[14]

(d) Landlord Guarantee Creditors[15] will be paid, as a result of direct funding from Target Corporation of the Landlord Guarantee Creditor Top-Up Amounts (described further below), the full value of their Landlord Restructuring Period Claims on the Initial Distribution Date. They will not have to wait for Disputed Claims to be resolved in order to receive their distributions, nor will they be affected by the outcome of any other Claims disputes. Target Corporation will not have a subrogated claim arising as a result of the Landlord Guarantee Creditor Top-Up Amounts.[16]

(e) Intercompany Claims will be valued at the amount set out in the Monitor's Intercompany Claims Report, even where the Monitor has revised the Intercompany Claim downwards from the value at which it was submitted.[17]

(f) If approved and sanctioned by the Court, the Plan will require an amendment to Paragraph 19A of the Initial Order which provides that the Landlord Guarantee Claims are to be dealt with outside these CCAA proceedings.[18] This amendment

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14 Meeting Order Affidavit, paras. 11 and 25.

15 As of November 27, 2015, there remain 17 Landlords holding Landlord Guarantee Claims in relation to 37 Leases: Meeting Order Affidavit, para. 30.

16 Meeting Order Affidavit, para. 34. See also Meeting Order Affidavit, para. 43 for a description of the manner in which the advance of the Landlord Creditor Top-Up Amounts will be repaid to the Plan Sponsor after the Initial Distribution Date.

17 Meeting Order Affidavit, para. 34(a).

18 Meeting Order Affidavit, para. 32.

will be addressed at the Sanction Hearing once it has been determined whether Affected Creditors support the Plan. Paragraph 19A will remain in effect until then.

(g) In exchange for Target Corporation's significant economic contributions throughout these CCAA proceedings and under the Plan (as described below), Target Corporation and certain other third parties (including Hudson's Bay Company and Zellers, which have indemnities from Target Corporation) will be released, including in relation to all Landlord Guarantee Claims.[19]

## Target Corporation Has Made Material Economic Contributions as Plan Sponsor

20. An essential part of the Plan is the involvement of Target Corporation as Plan Sponsor. Target Corporation is by far the largest single creditor of the Target Canada Entities. If the Plan is approved and implemented, Target Corporation will be making significant economic contributions to the Plan and accordingly, to the estate of the Target Canada Entities.[20] In particular:

(a) In addition to the subordination of the $3.1 billion NE1 Intercompany Claim that Target Corporation agreed to subordinate at the outset of these CCAA proceedings, on the Plan Implementation Date, Target Corporation will cause Property LP to subordinate almost all of the Property LP (Propco) Intercompany Claim, which was

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[19] Meeting Order Affidavit, para. 34(c). For a description of the reasons for providing releases for Hudson's Bay and Zellers, see Meeting Order Affidavit, para. 34(c) and footnote 4.

[20] Meeting Order Affidavit, para. 12.

filed against Propco in an amount of approximately $1.4 billion (and not adjusted by the Monitor in the Intercompany Claims Report);[21]

(b) In turn, Propco will concurrently subordinate the Propco Intercompany Claim which was filed against TCC in an amount of approximately $1.9 billion (and proposed to be adjusted downwards by the Monitor to an amount of approximately $1.3 billion);[22]

(c) Target Corporation will agree to transfer any remaining Cash in the Propco Cash Pool to the TCC Cash Pool for the benefit of the Affected Creditors;[23]

(d) To avoid litigation and delay, Target Corporation has agreed that, solely for the purposes of the Plan, where the Monitor proposed in its Intercompany Claims Report to revise the amounts of Intercompany Claims, the Plan will value the Intercompany Claims for all purposes at the adjusted amounts proposed by the Monitor;[24] and

(e) Target Corporation will contribute funds necessary to pay the Landlord Guarantee Creditor Top-Up Amounts in order to facilitate the enhanced and accelerated payments to Landlord Guarantee Creditors on the Initial Distribution Date. According to the Monitor, the ultimate net quantum of this contribution is estimated

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21 Meeting Order Affidavit, para. 12(a).

22 Meeting Order Affidavit, para. 12(b).

23 Meeting Order Affidavit, para. 12(c). The method by which this transfer will occur is described in more detail in the Meeting Order Affidavit.

24 Meeting Order Affidavit, para. 12(d).

to be between $19 million and $33 million.[25] The Plan requires that Target Corporation fund significant additional amounts to facilitate the accelerated payments to Landlord Guarantee Creditors on the Initial Distribution Date.[26]

21. Target Corporation has made other important contributions to the success of this CCAA proceeding, including: (a) making available DIP financing to TCC; (b) funding the Employee Trust in the amount of $95 million (effectively removing employee termination claims from the estate); and (c) providing ongoing shared services to facilitate the orderly wind-down for which Target Corporation has not been and will not be fully compensated.[27]

22. Based on these very significant contributions that will result in materially higher economic recoveries for Affected Creditors, the Plan provides that Target Corporation will receive a full and final release of matters relating to the Target Canada Entities, including Landlord Guarantee Claims.[28] In discussions with the Applicants to establish the structure for the Plan, Target Corporation maintained that it would only consider subordinating these remaining Intercompany Claims as part of a global settlement of all issues relating to the Target Canada Entities, including the Landlord Guarantee Claims.[29] Target Corporation has made it clear that

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[25] This is after taking into account projected distributions to the Plan Sponsor on account of Landlord Restructuring Period Claims held by Landlord Guarantee Creditors after the Initial Distribution Date, as contemplated by the Plan: Meeting Order Affidavit, para. 12(e).

[26] Meeting Order Affidavit, paras. 12(e).

[27] Meeting Order Affidavit, para. 35(d).

[28] Meeting Order Affidavit, para. 28(c).

[29] Meeting Order Affidavit, paras. 20 and 35(a).

Target Corporation would not agree to subordinate these very material Intercompany Claims in bankruptcy proceedings.[30]

## Projected Plan Recoveries

23. Under the Plan:

(a) Convenience Class Creditors will be paid the lesser of: (a) 100% of their Proven Claims; and (b) $25,000 on the Initial Distribution Date.

(b) Landlord Guarantee Creditors will be paid 100% of their Landlord Restructuring Period Claims that are Proven Claims (valued in accordance with the Landlord Formula Amount) on the Initial Distribution Date. This will be accomplished by Target Corporation funding the Landlord Guarantee Creditor Top-Up Amounts.[31]

24. Based on the most up-to-date information provided by the Monitor (and subject to certain important limitations and caveats set out in the Meeting Order Affidavit and the Monitor's Report), the Target Canada Entities expect that Affected Creditors will be paid 75% to 85% of all other Affected Claims that are Proven Claims.[32]

## Proposed Creditors' Meeting

25. The Meeting Order authorizes the Target Canada Entities to convene a meeting of a single class of Creditors comprised of all Affected Creditors, the "Unsecured Creditors' Class", to consider and vote on the Plan.[33]

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30 Meeting Order Affidavit, para. 35(a).

31 Meeting Order Affidavit, para. 8.

32 Meeting Order Affidavit, paras. 9 and 10.

33 Meeting Order Affidavit, para. 48.

26. The Meeting Order provides for comprehensive notification of the Creditors' Meeting to the Affected Creditors, as set out more fully in the Meeting Order Affidavit.[34] The Target Canada Entities also intend to send a Letter to Creditors to the Affected Creditors that highlights information from the Plan to help them understand the Plan.[35]

27. Voting will be in accordance with the procedures set out in the Meeting Order, as summarized in the Meeting Order Affidavit.[36] Notably:

(a) Affected Creditors holding Disputed Claims (other than a disputed Landlord Restructuring Period Claim, which is addressed below) will be entitled to one vote at the dollar value set out in the Notice of Revision and Disallowance sent by the Monitor to the Affected Creditor. The Monitor will tabulate these votes separately for the purpose of reporting to the Court at the Plan Sanction Hearing.[37]

(b) For voting purposes, the dollar value of each Landlord Restructuring Period Claim will be the Landlord Formula Amount for that claim, as calculated by the Monitor. The Meeting Order includes a process to be followed if the Landlord disputes the Monitor's calculation.[38]

(c) Each Convenience Class Creditor is deemed to have voted in favour of the Plan.[39]

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34 Meeting Order Affidavit, para. 49.

35 Meeting Order Affidavit, para. 14.

36 Meeting Order Affidavit, para. 52.

37 Meeting Order Affidavit, para. 52(e).

38 Meeting Order Affidavit, para. 52(f).

39 Meeting Order Affidavit, para. 52(g).

(d) Persons holding Unaffected Claims or Intercompany Claims are not entitled to vote on the Plan. Furthermore, a Person who has a Claim under a Guarantee in respect of a Principal Claim which is compromised under the Plan, or who has a claim over or subrogated claim in respect of a Principal Claim will not be entitled to vote to the extent that the Person holding the Principal Claim is voting. Target Corporation is not entitled to vote in respect of its Plan Sponsor Subrogated Claims, Cash Management Lender Claims or any amounts paid pursuant to the Landlord Guarantee Creditor Top-Up Amounts.[40]

## PART III – ISSUES AND THE LAW

28. The issue on this motion is:

(a) should this Honourable Court grant the requested Meeting Order?

### This Court Has Jurisdiction to Grant the Meeting Order

29. Section 4 of the CCAA expressly contemplates the calling of a meeting of the unsecured creditors of a company to consider and vote on a plan proposing a compromise of the claims of those creditors:

> 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 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 or the company to be summoned in such manner as the court directs.[41]

30. The threshold to be satisfied in order to file a plan and call a meeting of creditors is low. As the Ontario Court of Appeal held in *Nova Metal Products*, the feasibility of a plan is a

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[40] Meeting Order Affidavit, para. 52(i).

[41] CCAA, s. 4.

relevant and significant factor to be considered in determining whether to order a meeting of creditors. However, the Court should not impose a heavy burden on a debtor company to establish the likelihood of ultimate success at the outset.[42]

31. The CCAA court should not second guess the probability of success of a proposed plan of arrangement if a creditor meeting is held. The court should order a meeting of creditors unless there is no hope that the plan will be approved by the creditors or, if approved, the plan would not for some other reason be approved by the court.[43] Thus, in *Federal Gypsum*, the Nova Scotia court ordered a meeting of creditors, dismissing the objections of two creditors who disputed their classification for voting purposes. The court confirmed that the threshold for approving a plan to be presented at a meeting of creditors is "low." The fact that certain creditors may indicate that they are objecting to the debtor's plan or do not intend to support it is not sufficient to prevent the debtor company from placing the plan before all of the creditors at a meeting.[44]

32. This Court has described the granting of a meeting order as an essentially "procedural step" that does not engage considerations of whether the debtor's plan is fair and reasonable.[45] Therefore, unless it is abundantly clear that the plan will not be approved by its creditors, the debtor company is entitled to put its plan before those creditors and to allow the creditors to exercise their business judgment in determining whether to support or reject it.

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42 *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 41 O.A.C. 282 (C.A.) at para. 88.

43 *Re ScoZinc*, 2009 NSSC 163 at para. 7.

44 *Re Federal Gypsum Co.*, 2007 NSSC 384 at para. 12.

45 See, for example, *Re Jaguar Mining Inc.*, 2014 ONSC 494 at para. 48.

33. As submitted below, the CCAA Court has the jurisdiction to grant the Meeting Order. Furthermore, the Target Canada Entities submit that there is no basis for concluding that the Plan has no hope of success. This Court should therefore exercise its discretion to order the Creditors' Meeting to consider the Plan.

## The Affected Creditors Are Appropriately Classified for Voting Purposes

34. If the Meeting Order is granted, all of the Affected Creditors will vote in the Unsecured Creditors' Class at the Creditors' Meeting.

35. Section 22(1) of the CCAA provides that:

> A debtor company may divide its creditors into classes for the purpose of a meeting to be held under section 4 or 5 in respect of a compromise or arrangement relating to a company and, if it does so, it is to apply to the court for approval of the division before the meeting is held.[46]

36. Section 22(2) of the CCAA sets out the factors that are to be taken into account in placing creditors in the same class. Creditors may be included in the same class if their interests are sufficiently similar to give them a commonality of interest, taking into account (*inter alia*) the nature of the debts, liabilities or obligations giving rise to their claims, as well as the remedies available to those creditors in the absence of the compromise or arrangement being sanctioned and the extent to which those creditors would recover their claims by exercising those remedies.[47]

37. These criteria, which were added as part of the 2009 amendments to the CCAA, codify factors considered in case law pre-dating these amendments.[48] Under this case law, it is well-established that the starting point when considering classification of creditors must be the

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[46] CCAA, s. 22(1).

[47] CCAA, s. 22(2).

[48] Houlden & Morawetz, *The 2015-2016 Annotated Bankruptcy and Insolvency Act*, N§149.

objectives of the CCAA and its purpose of facilitating the restructuring of debtor companies. This purpose must be considered at every stage of the proceeding, including classification.[49]

38. The overall objective of facilitating the debtor company's restructuring is as relevant in a so-called "liquidating" CCAA proceeding as it is in any other. This Court has recognized that the CCAA can properly be used for carrying out an orderly wind-down of a debtor company's business where the flexibility of the CCAA offers opportunities to maximize value for stakeholders that might not otherwise be available in a bankruptcy.[50] In other words, liquidation or a wind-down of the debtor's business is one of the "restructuring" solutions that is made possible, in appropriate circumstances, by the flexibility of the CCAA. Ensuring the success of a plan designed to provide a fair and equitable distribution of proceeds achieved following an orderly wind-down of the debtor's business under the CCAA clearly furthers the recognized objectives of the CCAA.

39. In *Canadian Airlines,* Paperny J., as she then was, summarized the principles applicable to the classification of creditors as follows:

> In summary, the cases establish the following principles applicable to assessing commonality of interest:
>
> 1. Commonality of interest should be viewed on the basis of the non-fragmentation test, not on an identity of interest test;
>
> 2. The interests to be considered are the legal interests the creditor holds *qua* creditor in relationship to the debtor company, prior to and under the plan as well as on liquidation;

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[49] *Re SemCanada Crude Co.*, 2009 CarswellAlta 1269 (Q.B.) [*SemCanada Crude*] at para. 16, citing *Re Canadian Airlines Corp.*, (2000), 19 C.B.R. (4th) 12 (Alta. Q.B.) [*Canadian Airlines*] at para. 14.

[50] *Re Target Canada Corp.*, 2015 CarswellOnt 303 at paras. 31 to 34. See *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div.) at para. 7. For examples of other cases in which the CCAA has been used to effect an orderly wind-down or liquidation of a debtor's business, see *Re Nortel Networks Corp.*, 2014 ONSC 5274 at para. 23; *Re First Leaside Wealth Management Inc.*, 2012 ONSC 1299 (S.C.J.) at para. 32.

> 3. The commonality of these interests are to be viewed purposively, bearing in mind the object of the C.C.A.A., namely to facilitate reorganizations if at all possible;
>
> 4. In placing a broad and purposive interpretation on the C.C.A.A., the court should be careful to resist classification approaches which would potentially jeopardize potentially viable plans.
>
> 5. Absent bad faith, the motivations of the creditors to approve or disapprove are irrelevant.
>
> 6. The requirement of creditors being able to consult together means being able to assess their legal entitlement *as creditors* before or after the plan in a similar manner.[51]

40. Classification is a fact-specific determination that must be evaluated in the unique circumstances of every case. The exercise must be approached with the flexible and remedial jurisdiction of the CCAA in mind.[52]

41. "Commonality of interest" does not mean "identity of interest".[53] "Commonality of interest" is based on the principle that a class consists of those persons whose interests are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.[54] It is a non-fragmentation test designed to further the objectives of facilitating the restructuring.

42. It is therefore permissible to include creditors with different legal rights within the same class, as long as their interests are not so dissimilar that they cannot vote with a common interest.[55] Moreover, if a proposed classification prevents the danger of a veto of a plan that

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[51] *Canadian Airlines*, para. 31.

[52] *Canadian Airlines,* para. 18.

[53] *Canadian Airlines,* para. 20, citing *Re Norcen Energy Resources Ltd.* (1988), 72 C.B.R. (N.S.) 20 (Alta. Q.B.) at p. 29.

[54] *Canadian Airlines*, para. 17, citing *Sovereign Life Assurance Co. v. Dodd* (1891), [1892] 2 Q.B.573 (Eng. C.A.) at p. 583.

[55] *Canadian Airlines*, para. 25, citing *Re Woodward's Ltd.* (1993), 84 B.C.L.R. (2d) 206 (B.C.S.C.). See also *Canadian Airlines,* para. 31.

promises some better return to creditors than a bankruptcy, it should not be interfered with absent good reason.[56] Issues of fairness can be addressed at the sanction hearing once the creditors have had an opportunity to exercise their business judgment as to whether the plan is acceptable.

43. Presumptively, the fact that all of the Affected Creditors under the Plan have unsecured claims against the Target Canada Entities favours the placement of such creditors in the Unsecured Creditors' Class. As Farley J. noted in *Stelco*:

> ...absent valid reason to have separate classes it would be reasonable, logical, rational and practical to have all this unsecured debt in the same class. Certainly that would avoid fragmentation - and in this respect multiplicity of classes does not mean that fragmentation starts only when there are many classes. Unless more than one class is necessary, fragmentation would start at two classes. Fragmentation if necessary, but not necessarily fragmentation.[57]

44. There is ample precedent for including Landlords in the same class as ordinary unsecured creditors.[58] The fact that the Landlord Restructuring Period Claims under the Plan are to be valued using the Landlord Formula Amount does not affect the conclusion that these claims are properly included in the same class as all other Affected Creditors.[59]

45. Whether or not a particular creditor will receive a different form of distribution under a plan from other creditors in the same class is not, *per se*, a reason for creating a separate class for that creditor.[60] As the Ontario Superior Court of Justice held in *SAAN Stores*, the mere

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56 *SemCanada Crude*, para. 37.

57 *SemCanada Crude,* citing *Re Stelco Inc.*, 2005 CarswellOnt 6483 at para. 13, aff'd 2005 CarswellOnt 6818 (C.A.).

58 See, for example, *Re San Francisco Gifts*, 2004 ABQB 705 at para. 16, citing *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia* , 1991 CarswellOnt 220 (Gen. Div.) and *Re Armbro Enterprises Inc.*, 1993 CarswellOnt 241 (Gen. Div.).

59 The BIA permits the debtor either to place landlords in a separate class or to include them in a class of other creditors: s. 65.2(5). By implication, the right to include landlords in the same class as other creditors applies even where the landlords are required to value their claims using the BIA formula.

60 *SemCanada Crude*, para. 25.

fact that landlord claims were to be valued in accordance with the BIA Formula did not justify creating a separate landlord class. The Court rejected the argument that this difference in valuation method would mean that the landlords lacked sufficient commonality to be classified with the other creditors whose claims were not valued in accordance with the same method.[61] Moreover, Landlord Claims other than Landlord Restructuring Period Claims will receive the same treatment under the Plan as the Claims of all other ordinary unsecured creditors.

46. Similarly, the fact that creditors within the same class may receive a higher share of distributions does not necessitate a separate class.[62] Thus, the fact that the Landlord Guarantee Creditors will receive the Landlord Guarantee Creditor Top-Up Amounts and will thereby be paid 100% of their Landlord Restructuring Period Claims does not justify placing them in a separate class. The Landlord Guarantee Creditor Top-Up Amounts are funded by Target Corporation, as guarantor and Plan Sponsor, not the Target Canada Entities.[63] Like the other Affected Creditors, Landlord Guarantee Creditors have the same legal rights against the Target Canada Entities as the other Affected Creditors – namely, an unsecured claim. Moreover, their Proven Claims are to be compromised under the Plan.

47. The proposed inclusion of the Landlord Guarantee Creditors in the same class as the other Affected Creditors does not unfairly confiscate any rights of these creditors. Assuming the Landlord Formula Amount represents a reasonable proxy for the damages arising out of the disclaimer of the Leases of the Landlord Guarantee Creditors (as the Applicants submit below that it does), no rights of the Landlord Guarantee Creditors are unfairly confiscated by placing them in

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61 *Re SAAN Stores Ltd.*, 2005 CarswellOnt 1482 at para. 3.

62 *SemCanada Crude*, para. 26.

63 Meeting Order Affidavit, para. 34(b).

the same class as other Affected Creditors. Landlord Guarantee Creditors are receiving the Landlord Guarantee Creditor Top-Up Amounts. Like any other Affected Creditor, they can consult meaningfully with other Affected Creditors, exercise their business judgment to weigh the options, (i.e. as between the recoveries provided under the Plan or the recoveries available in a bankruptcy, with the attendant costs, risks and delays of litigation to recover under their Guarantees), and determine whether to vote in favour of or against the Plan.

48. The Monitor has expressed the view that the Landlord Formula Amount is within the range of reasonableness.[64] Whether the Landlord Guarantee Creditors agree that the Landlord Formula Amount, together with the Landlord Guarantee Creditor Top-Up Amounts, provides fair recovery for their Landlord Restructuring Period Claims is a matter for them to assess at the Creditors' Meeting, in the exercise of their business judgment, in light of the overall economics of the Plan and the available alternatives. Whether this treatment is fair and reasonable is then a matter to be properly addressed at the Sanction Hearing with the benefit of information regarding the creditor vote and from the perspective of the Plan as a whole.

49. The Target Canada Entities therefore submit that this Court should approve the voting of Affected Creditors in a single unsecured Class.

## Establishing a Convenience Class of Creditors is Appropriate

50. The Plan establishes a "Convenience Class" of creditors who will receive 100% recovery of their Proven Claims and who will be deemed to vote in favour of the Plan.[65]

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64 Monitor's Twenty-Third Report, para. 6.19.

65 Meeting Order Affidavit, paras. 38(d) and 52(g).

51. Establishing a convenience class of creditors, which consists of a subset of creditors who will be paid in full, is a typical mechanism used in CCAA plans to assist small creditors. At the same time, it improves efficiencies by immediately addressing and resolving claims that have little relative importance in the overall restructuring of the debtor company. There are numerous examples in the CCAA case law in which this Court has sanctioned a CCAA plan that provides for a convenience class.[66]

52. The Convenience Class Creditors will be deemed to vote in favour of the Plan. This is also a typical and entirely appropriate provision. It does not have any material impact on the likelihood that the Plan will be approved by the requisite statutory majorities. In the aggregate, the amounts in question are proportionally extremely low in relation to claims by other creditors. As such, even if the votes of the Convenience Class Creditors will be counted towards the required numeric majority of Affected Creditors voting in favour of the Plan, they do not have any material impact on the required value majority. There is no sense in which the creation of the Convenience Class is designed to "gerrymander" the vote in favour of the Plan or to accomplish any other improper objective.

## Landlord Formula Amount Appropriately Values Landlord Restructuring Period Claims

53. Landlord Restructuring Period Claims will be valued for voting and distribution purposes at the Landlord Formula Amount, as defined under the Plan. The Landlord Formula Amount is derived from the formula that applies under section 65.2(4) of the BIA (i.e. where the

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[66] See, for example, *Re Nelson Financial Group Ltd.*, 2011 ONSC 2750 at para. 14; *Re Canwest Global Communications Corp.*, 2010 ONSC 4209 2010 ONSC 4209. The full text of the Consolidated Plan of Compromise, Arrangement and Reorganization of Canwest Global Communications Corp. is found at I.I.C. Ct. Filing 376509950013. Note that the convenience class in this plan was also deemed to vote in favour of the plan: see section 3.6 of the plan.

debtor is a commercial tenant that has disclaimed leases under the BIA proposal provisions). Section 65.2(4) of the BIA provides that a landlord claim arising out of a disclaimer of a lease is to be valued on the following basis: (a) the landlord is not entitled to claim accelerated rent; and (b) the landlord's claim will be equal to the lesser of either (i) one year's rent for the year following the disclaimer plus 15 percent of the rent for the remainder of the lease term or (ii) three years' rent.[67]

54. The term sheet for the Plan that was presented to Landlord members of the Consultative Committee in September and October 2015 informed these Landlords that their claims for voting and distribution purposes would be valued in accordance with the BIA Formula. In response to concerns about the level of economic recoveries that would be generated for Landlords using this method, the Target Canada Entities enhanced the BIA Formula for the purpose of valuing Landlord Restructuring Period Claims under the Plan.[68]

55. Roughly paraphrased, the Landlord Formula Amount under the Plan provides for, in effect, Landlord Restructuring Period Claims to be valued at the lesser of either: (i) rent payable under the lease for the two years following the disclaimer plus 15 percent of the rent for the remainder of the lease term; or (ii) four years' rent.[69] In other words, the time period over which unpaid rent can be claimed is increased by one year relative to the time periods set out under each branch of the BIA Formula. This enhancement recognizes that it may take Landlords longer to

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[67] BIA, s. 65.2(4). Note that, under the BIA, the proposal can either provide for landlords to prove their full claim for damages, or for landlords to prove using the formula amount.

[68] Meeting Order Affidavit, paras. 23-25.

[69] Plan, s. 1.1, "Landlord Formula Amount".

mitigate their damages – e.g. by locating replacement tenants – than would be provided under the basic BIA Formula.

56. The CCAA does not prescribe any particular method of valuing creditor claims. Nor is there any legal impediment to valuing the claims of one group of creditors in a manner that is different from the valuation methods used for other creditors, particularly where such valuation methodology furthers the objectives of the CCAA. In fact, subsection 65.2(4) of the BIA expressly provides for the valuation of landlord claims in a BIA proposal on a different basis from the basis on which other creditors – even creditors in the same class – have their claims valued.

57. The CCAA should not be interpreted more restrictively. In fact, in *Century Services*, the Supreme Court of Canada noted the trend towards harmonizing the BIA and the CCAA, whenever possible, while recognizing that the CCAA is the more flexible instrument.[70]

58. As the Alberta Court of Appeal has held, in the context of concluding that there is no requirement to calculate landlord claims under the CCAA in accordance with the BIA, the CCAA supports a flexible approach to the method for valuing claims in general – and landlord claims in particular. At the same time, the Alberta Court of Appeal held that the terms of a plan could provide for the same recoveries as would be available on a bankruptcy, or for lesser or greater recoveries. These would be matters for negotiation and for court approval.[71]

59. There are several examples in which the BIA Formula has been used to value landlord claims in CCAA proceedings. In the second *Eaton's* restructuring, for example, landlord

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[70] *Re Ted Leroy Trucking (Century Services) Ltd.*, 2010 SCC 60 at paras. 15, 21, and 24.

[71] *Re Alternative Fuel Systems Inc.*, 2004 ABCA 31 at para. 68. In considering these issues, the Alberta Court of Appeal confirmed that the recoveries for landlords under subsection 65.2(4) of the BIA are higher than those that would be obtained under section 136(1)(f) of the BIA, which applies in a pure bankruptcy: para. 29.

claims were valued in accordance with the BIA Formula.[72] In *Eaton's*, Houlden J. expressly rejected an objection by a landlord who argued that its claim should be based on actual losses suffered, stating that:

> Mr. Sternberg contended that the adoption of a formula for ranking the claims of creditors was in error and that the claims of the landlords should be based on the damages actually suffered by them. With respect, I do not agree. If this procedure was followed, I do not believe that Eaton's could make a successful plan of restructuring. It would take years to determine the value of claims and the uncertainty would make the plan unworkable.[73]

60. The flexibility of the CCAA therefore allows the Target Canada Entities, in the interests of ensuring expeditious distributions to all Affected Creditors, to apply a uniform formula for valuing Landlord Restructuring Period Claims for voting and distribution purposes, including Landlord Guarantee Claims. If the Landlord Restructuring Period Claims were to be calculated on an individual lease-by-lease basis, this approach would create significant risks of litigation, with associated costs and delay, to the detriment of the stakeholders of the Target Canada Entities as a whole.[74]

61. The application of the Landlord Formula Amount to value Landlord Restructuring Period Claims for voting and distribution purposes also avoids complexities associated with mitigation and other contingent claims. The BIA Formula establishes a fixed, reasonable time period over which a landlord is entitled to claim damages arising out of the disclaimer or repudiation of a lease, even if the term of a lease is longer than the time periods used in the formula.

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[72] *Amended and Restated Plan of Compromise and Arrangement Pursuant to the Companies' Creditors Arrangement Act (Canada) and the Business Corporations Act (Ontario) concerning, affecting and involving The T. Eaton Company Limited,* I.I.C. Ct. Filing 44993447021 (see s. 1.1, "Landlord Interim Period Claim"); *Consolidated Plan of Compromise and Arrangement of Extreme Retail (Canada) Inc. and Extreme Properties Inc.*, available at http://www.kpmg.com/ca/en/services/advisory/transactionrestructuring/creditorlinksites.

[73] *Re T. Eaton Co.*, 1997 CarswellOnt 5959 (Gen. Div.) at para. 2.

[74] Meeting Order Affidavit, para. 34(a).

62. Inherently, this formula involves "built-in" mitigation – in other words, even where a lease has a lengthy term, the formula caps the time period over which damages can be claimed against the insolvent debtor. This capped time period implicitly recognizes that it would be unfair for landlords to be able to claim all of their asserted prospective damages without regard for any obligation to mitigate those damages. This is particularly true where the future ability of the landlord to mitigate cannot be known at the time that the claim must be voted upon and/or resolved.

63. At the same time, the BIA Formula allows a consistent valuation approach for voting and distribution purposes to be applied, without having to undertake individual lease-by-lease calculations of the time period that would be reasonable for each Landlord to mitigate its damages and without having to resolve the inevitable disputes that would likely arise from such an exercise. The Target Canada Entities have, based on feedback from Landlords, enhanced the BIA Formula, giving Landlords an additional year's worth of damages under the Landlord Formula Amount than they would otherwise have received under the BIA, effectively allowing a longer mitigation period in the circumstances of this proceeding.[75]

64. If each Landlord Restructuring Period Claim had to be individually calculated based on the unique facts applicable to each Lease, including future prospects for mitigation and uncertain collateral damages, there is no question that the resulting disputes would embroil the disputing Landlords and the Target Canada Entities in lengthy, costly proceedings, thereby delaying the ability of the Target Canada Entities to make distributions to any creditors while the quantum of the Landlord Restructuring Period Claims remains unresolved.

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[75] Meeting Order Affidavit, para. 25.

65. While the following consideration is more properly a matter of the overall fairness and reasonableness of the Plan at the Sanction Hearing, it is worth noting that the application of the Landlord Formula Amount will be more favourable in relation to some Leases than in relation to others. Those Leases for which new tenants have been found prior to the expiration of the time periods used to calculate the Landlord Formula Amount will likely generate recoveries in excess of the actual damages experienced by the Landlord. On the other hand, those Leases for which it will take longer to find new tenants than the Landlord Formula Amount time periods allow might generate recoveries that are lower than the actual damages experienced. However, given (for example) that one Landlord might assert claims in relation to multiple Leases, some of which will generate favourable recoveries under the Landlord Formula Amount and some of which will not, it is expected that these differences will be blunted or smoothed out by the consistent application of the Landlord Formula Amount to all the Leases.

66. For the purposes of granting the requested Meeting Order, the key consideration for this Court is that the CCAA permits the Target Canada Entities to provide for a uniform formula to value the claims of particular categories of creditors (which is commonly done in retail insolvency plans) and this aspect of the Plan therefore does not represent a legal impediment to the requested relief. Any considerations of fairness and reasonableness can be thoroughly canvassed at the Sanction Hearing, with the benefit of full information regarding creditor support obtained from the vote at the Creditors' Meeting.

## Plan Can Address Third Party Claims and Provide for Third Party Releases

### i. Treatment of the Landlord Guarantee Creditors

67. As submitted below, the CCAA Court has the jurisdiction to approve a Plan that compromises and releases claims against guarantors, at least in the circumstances of this case, in

which the guarantor acts as Plan Sponsor and otherwise satisfies the criteria for a third-party release. The Target Canada Entities submit that the treatment of the Landlord Guarantee Creditors under the Plan fairly and appropriately compensates them for their right to claim under the Guarantees. However, whether the Landlord Guarantee Creditors support this conclusion is properly assessed after the Affected Creditors vote on the Plan. It is not appropriate to take into account such considerations at this stage.

68. Recently, in *U.S. Steel*, the broad jurisdiction of the CCAA Court under section 11 of the CCAA to make any orders that are appropriate was held to give the CCAA Court the jurisdiction and the discretion to provide for the determination of certain inter-creditor claims within the CCAA. The Court held that it was entitled do so "if the court is of the opinion that, on balance, such action is likely to further the remedial purpose of the CCAA".[76]

69. Among other factors, the Court considered whether *on balance*, the determination of the particular claims would render a successful plan of arrangement more or less likely.[77] Additional considerations included: (a) whether resolution of inter-creditor claims would encourage support for a negotiated plan;[78] (b) whether inclusion of the claims would produce a more expeditious process, given the dynamic of the related CCAA process;[79] (c) judicial economy

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[76] *Re U.S. Steel Canada Inc.*, 2015 ONSC 5103 [*U.S. Steel*] at para. 93.

[77] *U.S. Steel*, para. 97.

[78] *U.S. Steel*, para. 98 and 100.

[79] *U.S. Steel*, para. 99.

and the avoidance of multiple proceedings with possible conflicting judgments;[80] and (d) whether inclusion would prejudice any creditor or conversely give one creditor a tactical advantage.[81]

70. These considerations are, it is submitted, equally relevant when determining whether to address particular inter-creditor claims in a debtor's plan. On the facts of *U.S. Steel*, the Court left open the possibility that the debtor could choose not only to resolve the inter-creditor claims within the CCAA proceeding, but also to address the third party claims in a plan. In such event, the plan, with the inclusion of those claims, would have to receive the requisite approvals by creditors.[82]

71. Based on the principles set out in *U.S. Steel* and the broad jurisdiction of the CCAA Court to make orders in furtherance of a successful plan, the CCAA Court has jurisdiction to authorize the resolution of the Landlord Guarantee Creditor Claims under the Plan. The global resolution of all matters arising out of the insolvency of the Target Canada Entities, including the Landlord Guarantee Claims, is part of the *quid pro quo* for the significant contributions to the Plan by Target Corporation, as Plan Sponsor. Target Corporation's material economic contributions to the success of the Plan – which will have the benefit of significantly improving recoveries for all Affected Creditors – would not have been forthcoming if the Plan did not address the Landlord Guarantee Claims. Moreover, Target Corporation has indicated that the subordination of Intercompany Claims would not be available in a bankruptcy.[83]

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80 *U.S. Steel*, para. 99 and 105.

81 *U.S. Steel*, para. 101.

82 *U.S. Steel*, para. 92.

83 Meeting Order Affidavit, para. 35.

72. The Landlord Guarantee Creditors, as a result of the Landlord Guarantee Creditor Top-Up Amounts, will be paid 100% recovery on their Landlord Restructuring Period Claims, calculated in accordance with the Landlord Formula Amount. In other words, they will not have their Landlord Restructuring Period Claims reduced by sharing on a *pro rata* basis with other Affected Creditors in the proceeds of the Target Canada Entities' estates and they will receive an immediate and certain distribution of their recoveries.[84]

73. Given that the Landlord Formula Amount represents a reasonable proxy for the actual damages of Landlord Guarantee Creditors resulting from the disclaimer of their Leases (taking into account the obligation of Landlords to mitigate), the Landlord Guarantee Creditors are appropriately compensated under the Plan. At the same time, the treatment of the Landlord Guarantee Creditors under the Plan avoids costly, potentially time-consuming litigation to resolve the Landlord Guarantee Claims and to address any resulting subrogated or similar Claims by Target Corporation. It promotes the efficient, timely resolution of all claims by Affected Creditors, in the interests of the stakeholders as a whole.

### ii. Availability of Third Party Releases

74. It is also well-established that a CCAA plan can, in appropriate circumstances, provide for a release of third parties. There is no reason why such a third party release should not benefit a guarantor, as long as the criteria for obtaining a third-party release have been satisfied.

75. The test for obtaining a third party release is:

(a) The Claims being released are rationally related to the purpose of the plan;

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[84] Meeting Order Affidavit, para. 34(b).

(b) The parties to be released are necessary and essential to the restructuring;

(c) The plan cannot succeed without the releases;

(d) The parties to be released will contribute in a tangible and realistic way;

(e) The plan will benefit the debtor and creditors generally;

(f) The voting creditors who have approved the plan did so with knowledge of the nature and effect of the releases; and

(g) The releases are fair and reasonable and not overly broad or offensive to public policy.[85]

76. In one Quebec Superior Court decision, the CCAA Court sanctioned a plan over the objections of two creditors who had independent claims against a bonding company. Although those creditors could have recovered their claims in full from the bonding company, their claims were instead addressed in the debtor's plan. Under the terms of the plan, they were reduced by 15 percent. The bonding company benefitted from a third-party release under the plan.[86]

77. Key factors influencing the Court's decision to uphold the release of the bonding company include: (i) the debtor could only continue operating thanks to the bonding company's continued participation as surety during the restructuring; (ii) the bonding company provided financial support, undertaking to ensure payment of 85 percent of the guaranteed creditors' claims; (iii) the vast majority of the creditors voted in favour of the plan; and (iv) the monitor

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[85] See *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 at paras. 71 and 113.

[86] *Re Charles-Auguste Fortier inc.*, 2008 QCCS 5388.

recommended acceptance of the plan, as creditors would receive significantly less in a bankruptcy.[87]

78. Courts have also commonly provided third party releases in situations where a third party plaintiff has tort claims against a third party defendant which, if successful, could result in the defendant making a claim for contribution and indemnity against the debtor.[88]

79. Although the test for approving a third-party release is properly and logically evaluated at the Sanction Hearing when the results of the creditor vote are known and the overall fairness of the Plan can be assessed, the Target Canada Entities submit that the third-party release under the Plan that benefits Target Corporation, including in relation to the Landlord Guarantee Claims, *prima facie* meets the required criteria. Target Corporation's release is rationally connected to the purpose of the Plan. Target Corporation's material and tangible economic contributions to the CCAA Plan are being made on the understanding that the third party release will be provided and will result in an effective, global resolution of all matters arising out of the insolvency of the Target Canada Entities.[89]

80. Target Corporation's economic and other contributions during the CCAA proceeding, as well as under the Plan, are essential to the Plan's success. For example, the funding of the Employee Trust materially reduced the employee claims being made under the Plan. Perhaps most importantly, Target Corporation would not have agreed in a bankruptcy to subordinate the significant Intercompany Claims that it has agreed to subordinate under the Plan. All of the

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87 *Re Charles-Auguste Fortier inc.*, 2008 QCCS 5388.

88 See, for example, *Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corp.*, 2013 ONSC 1078 at paras. 58 to 66.

89 Meeting Order Affidavit, paras. 12-13 and 35.

economic contributions by Target Corporation will materially improve recovery for Affected Creditors.[90]

### iii. Amendment to Paragraph 19A of the Initial Order

81. Paragraph 19A of the Initial Order provides that Landlord Guarantee Claims are to be dealt with outside of the CCAA proceedings and that Landlord Guarantee Claims are to be unaffected claims under a plan. In addition, paragraph 19A precludes the Applicants from releasing Target Corporation's guarantee liability under a plan.[91] Since the date of the Initial Order, and since this paragraph was included in the Initial Order, the landscape of this restructuring has shifted considerably, most notably in the form of the material economic contributions that are being offered by Target Corporation, as Plan Sponsor, in order to effect a global resolution of all of the matters arising from the estate of the Target Canada Entities.

82. As submitted above, the CCAA clearly authorizes the Landlord Guarantee Claims to be addressed under the Plan and authorizes a third-party release to be granted in favour of Target Corporation, subject to an affirmative vote at the Creditors' Meeting and approval of this Court at the Sanction Hearing. In view of the significant economic contributions that Target Corporation is prepared to make to the success of the Plan and to facilitate the timely, efficient distribution to creditors in respect of all Proven Claims, it has become apparent that it is in the best interests of the estate of the Target Canada Entities and of stakeholders generally to address the Landlord Guarantee Claims inside the CCAA proceeding and to resolve and release these claims under the Plan. This is the only basis on which Target Corporation has agreed to make its material economic

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90 Meeting Order Affidavit, paras. 12-13 and 35.

91 Initial Order, section 19A.

contributions to maximize recoveries for stakeholders generally. Those contributions would not be available on a bankruptcy.

83. The Target Canada Entities therefore propose that, on Plan implementation, paragraph 19A of the Initial Order will be deleted. The CCAA Court has the jurisdiction to amend an Initial Order as a function of the broad jurisdiction under section 11 of the CCAA to make any order that it considers appropriate in the circumstances.[92] The Court would be exercising its discretion to amend its own Order, on the basis that it is just and appropriate to do so in these particular circumstances. The requested amendment is essential to the success of the Plan and to maximizing and expediting the recoveries of all stakeholders.[93]

84. Since this Honourable Court has the jurisdiction to amend paragraph 19A of the Initial Order, and the Plan expressly provides for its deletion if the Plan is accepted by Affected Creditors and approved by this Court, the operation of paragraph 19A of the Initial Order does not constitute a legal impediment to granting the Meeting Order. Whether the treatment of the Landlord Guarantee Creditors under the Plan, the third-party releases of Target Corporation and the proposed amendment to section 19A are fair and reasonable are considerations that are simply not relevant at this stage. These considerations can be fully assessed at the Sanction Hearing, with the benefit of information regarding the Affected Creditors' support of the Plan obtained from the Creditors Meeting.

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92 CCAA, s. 11.

93 Meeting Order Affidavit, paras. 13 and 32-35.

## PART IV – NATURE OF THE ORDER SOUGHT

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

**ALL OF WHICH IS RESPECTFULLY SUBMITTED:**

Tracy Sandler

Jeremy Dacks

John MacDonald

## Schedule "A"

## LIST OF AUTHORITIES

**Case Law**

1. *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587
2. *Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corp.*, 2013 ONSC 1078
3. *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 41 O.A.C. 282 (C.A.)
4. *Re Alternative Fuel Systems Inc.*, 2004 ABCA 31
5. *Re Armbro Enterprises Inc.*, 1993 CarswellOnt 241 (Gen. Div.)
6. *Re Canadian Airlines Corp.* (2000), 19 C.B.R. (4th) 12 (Alta. Q.B.)
7. *Re Canwest Global Communications Corp.*, 2010 ONSC 4209
8. *Re Charles-Auguste Fortier inc.*, 2008 QCCS 5388
9. *Re Federal Gypsum Co.*, 2007 NSSC 384
10. *Re First Leaside Wealth Management Inc.*, 2012 ONSC 1299 (S.C.J.)
11. *Re Jaguar Mining Inc.*, 2014 ONSC 494
12. *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div)
13. *Re Nelson Financial Group Ltd.*, 2011 ONSC 2750
14. *Re Norcen Energy Resources Ltd.* (1988), 72 C.B.R. (N.S.) 20 (Alta. Q.B.)
15. *Re Nortel Networks Corp.*, 2014 ONSC 5274
16. *Re SAAN Stores Ltd.*, 2005 CarswellOnt 1482
17. *Re San Francisco Gifts*, 2004 ABQB 705
18. *Re ScoZinc*, 2009 NSSC 163
19. *Re SemCanada Crude Co.*, 2009 CarswellAlta 1269 (Q.B.)
20. *Re Stelco Inc.*, 2005 CarswellOnt 6483, aff'd 2005 CarswellOnt 6818 (C.A.)
21. *Re T. Eaton Co.*, 1999 CarswellOnt 4661 (S.C.J.)

**Case Law**

22. *Re Target Canada Corp.*, 2015 ONSC 303

23. *Re Ted Leroy Trucking (Century Services) Ltd.,* 2010 SCC 60

24. *Re U.S. Steel Canada Inc.*, 2015 ONSC 5103

25. *Re Woodward's Ltd.* (1993), 84 B.C.L.R. (2d) 206 (B.C.S.C.)

26. *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia* , 1991 CarswellOnt 220 (Gen. Div.)

27. *Sovereign Life Assurance Co. v. Dodd* (1891), [1892] 2 Q.B.573 (Eng. C.A.)

**Secondary Source**

28. L.W. Houlden, G.B. Morawetz and Janis Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed. (Toronto: Carswell, 2009)

**Schedule "B"**

***BANKRUPTCY AND INSOLVENCY ACT***

R.S.C. 1985, c. B-3, as amended

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**Insolvent person may disclaim or resiliate commercial lease**

**65.2** (1) At any time between the filing of a notice of intention and the filing of a proposal, or on the filing of a proposal, in respect of an insolvent person who is a commercial lessee under a lease of real property or an immovable, the insolvent person may disclaim or resiliate the lease on giving thirty days notice to the lessor in the prescribed manner, subject to subsection (2).

**Lessor may challenge**

(2) Within fifteen days after being given notice of the disclaimer or resiliation of a lease under subsection (1), the lessor may apply to the court for a declaration that subsection (1) does not apply in respect of that lease, and the court, on notice to any parties that it may direct, shall, subject to subsection (3), make that declaration.

**Circumstances for not making declaration**

(3) No declaration under subsection (2) shall be made if the court is satisfied that the insolvent person would not be able to make a viable proposal without the disclaimer or resiliation of the lease and all other leases that the lessee has disclaimed or resiliated under subsection (1).

**Effects of disclaimer or resiliation**

(4) If a lease is disclaimed or resiliated under subsection (1),

(*a*) the lessor has no claim for accelerated rent;

(*b*) the proposal must indicate whether the lessor may file a proof of claim for the actual losses resulting from the disclaimer or resiliation, or for an amount equal to the lesser of

(i) the aggregate of

(A) the rent provided for in the lease for the first year of the lease following the date on which the disclaimer or resiliation becomes effective, and

(B) fifteen per cent of the rent for the remainder of the term of the lease after that year, and

(ii) three years' rent; and

(*c*) the lessor may file a proof of claim as indicated in the proposal.

**Classification of claim**

(5) The lessor's claim shall be included in either

(*a*) a separate class of similar claims of lessors; or

(*b*) a class of unsecured claims that includes claims of creditors who are not lessors.

**Lessor's vote on proposal**

(6) The lessor is entitled to vote on the proposal in whichever class referred to in subsection (5) the lessor's claim is included, and for the amount of the claim as proven.

**Determination of classes**

(7) The court may, on application made at any time after the proposal is filed, determine the classes of claims of lessors and the class into which the claim of any of those particular lessors falls.

**Section 146 not affected**

(8) Nothing in subsections (1) to (7) affects the operation of section 146 in the event of bankruptcy.

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**Priority of claims**

**136.** (1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:

(*a*) in the case of a deceased bankrupt, the reasonable funeral and testamentary expenses incurred by the legal representative or, in the Province of Quebec, the successors or heirs of the deceased bankrupt;

(*b*) the costs of administration, in the following order,

(i) the expenses and fees of any person acting under a direction made under paragraph 14.03(1)(*a*),

(ii) the expenses and fees of the trustee, and

(iii) legal costs;

(*c*) the levy payable under section 147;

(*d*) the amount of any wages, salaries, commissions, compensation or disbursements referred to in sections 81.3 and 81.4 that was not paid;

(*d.01*) the amount equal to the difference a secured creditor would have received but for the operation of sections 81.3 and 81.4 and the amount actually received by the secured creditor;

(*d.02*) the amount equal to the difference a secured creditor would have received but for the operation of sections 81.5 and 81.6 and the amount actually received by the secured creditor;

(*d.1*) claims in respect of debts or liabilities referred to in paragraph 178(1)(*b*) or (*c*), if provable by virtue of subsection 121(4), for periodic amounts accrued in the year before the date of the bankruptcy that are payable, plus any lump sum amount that is payable;

(*e*) municipal taxes assessed or levied against the bankrupt, within the two years immediately preceding the bankruptcy, that do not constitute a secured claim against the real property or immovables of the bankrupt, but not exceeding the value of the interest or, in the Province of Quebec, the value of the right of the bankrupt in the property in respect of which the taxes were imposed as declared by the trustee;

(*f*) the lessor for arrears of rent for a period of three months immediately preceding the bankruptcy and accelerated rent for a period not exceeding three months following the bankruptcy if entitled to accelerated rent under the lease, but the total amount so payable shall not exceed the realization from the property on the premises under lease, and any payment made on account of accelerated rent shall be credited against the amount payable by the trustee for occupation rent;

(*g*) the fees and costs referred to in subsection 70(2) but only to the extent of the realization from the property exigible thereunder;

(*h*) in the case of a bankrupt who became bankrupt before the prescribed date, all indebtedness of the bankrupt under any Act respecting workers' compensation, under any Act respecting unemployment insurance or under any provision of the *Income Tax Act* creating an obligation to pay to Her Majesty amounts that have been deducted or withheld, rateably;

(*i*) claims resulting from injuries to employees of the bankrupt in respect of which the provisions of any Act respecting workers' compensation do not apply, but only to the extent of moneys received from persons guaranteeing the bankrupt against damages resulting from those injuries; and

(*j*) in the case of a bankrupt who became bankrupt before the prescribed date, claims of the Crown not mentioned in paragraphs (*a*) to (*i*), in right of Canada or any province, rateably notwithstanding any statutory preference to the contrary.

**Payment as funds available**

(2) Subject to the retention of such sums as may be necessary for the costs of administration or otherwise, payment in accordance with subsection (1) shall be made as soon as funds are available for the purpose.

**Balance of claim**

(3) A creditor whose rights are restricted by this section is entitled to rank as an unsecured creditor for any balance of claim due him.

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## *COMPANIES' CREDITORS ARRANGEMENT ACT*

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

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**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.

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**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.

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**Company may establish classes**

**22.** (1) A debtor company may divide its creditors into classes for the purpose of a meeting to be held under section 4 or 5 in respect of a compromise or arrangement relating to the company and, if it does so, it is to apply to the court for approval of the division before the meeting is held.

**Factors**

(2) For the purpose of subsection (1), creditors may be included in the same class if their interests or rights are sufficiently similar to give them a commonality of interest, taking into account

(*a*) the nature of the debts, liabilities or obligations giving rise to their claims;

(*b*) the nature and rank of any security in respect of their claims;

(*c*) the remedies available to the creditors in the absence of the compromise or arrangement being sanctioned, and the extent to which the creditors would recover their claims by exercising those remedies; and

(*d*) any further criteria, consistent with those set out in paragraphs (*a*) to (*c*), that are prescribed.

**Related creditors**

(3) A creditor who is related to the company may vote against, but not for, a compromise or arrangement relating to the company.

**Class — creditors having equity claims**

**22.1** Despite subsection 22(1), creditors having equity claims are to be in the same class of creditors in relation to those claims unless the court orders otherwise and may not, as members of that class, vote at any meeting unless the court orders otherwise.

**IN THE MATTER OF** THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED
**AND IN THE MATTER** OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TARGET CANADA CO., *et al.*

Applicants

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

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

PROCEEDING COMMENCED AT
TORONTO

# FACTUM OF THE APPLICANTS

**(Motion to Accept Filing of a Plan and Authorize Creditors' Meeting to Vote on the Plan)**

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