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 M&K RESPONDING LANDLORDS
Morguard Investments Limited, Crombie REIT, Triovest Realty Advisors Inc. and SmartREIT (formerly Calloway Real Estate Investment Trust)

(Motion to Accept Filing of a Plan and Authorize Creditors' Meeting to Vote on the Plan)
(Returnable December 21 and 22, 2015)

MCLEAN & KERR LLP
Barristers and Solicitors
130 Adelaide Street West, Suite 2800
Toronto, ON M5H 3P5

Linda Galessiere
Law Society No. 34678A
Tel: 416-369-6609
Email: lgalessiere@mcleankerr.com

Gus Camelino
Law Society No. 45607S
Tel: 416-369-6621
Email: gcamelino@mcleankerr.com
Lawyers for Morguard Investments Limited, Crombie REIT, Triovest Realty Advisors Inc. and SmartREIT (formerly Calloway Real Estate Investment Trust)

TO: **SERVICE LIST**

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 AND 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 M&K RESPONDING LANDLORDS
Morguard Investments Limited, Crombie REIT, Triovest Realty Advisors Inc. and SmartREIT (formerly Calloway Real Estate Investment Trust)

PART I – OVERVIEW

1. The Applicants have filed a motion to request an order permitting and authorizing them to file a plan of compromise and arrangement and to hold a meeting of creditors to vote on the plan. If the motion is granted, it will call into question the validity and reliability of all court orders and certainly court orders granted in *CCAA* proceedings.

Background

2. On January 15, 2015, Target Canada Co. and various other related entities (hereinafter collectively referred to as "**Target Canada**" and/or the "**Applicant**"), applied for

protection from the Ontario Superior Court of Justice (Commercial List) (the "**Court**") under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "***CCAA***"). The Court granted Target Canada's application and an Order (the "**Initial Order**") was issued on January 15, 2015.

3. Alvarez & Marsal Canada Inc. was appointed by the Court as the Monitor pursuant to the *CCAA* (the "**Monitor**").

4. The Respondents Morguard Investments Limited, Crombie REIT, Triovest Realty Advisors Inc. and SmartREIT (formerly Calloway Real Estate Investment Trust) (the "**M&K Responding Landlords**") are all former landlords or agents and managers of former landlords of leased premises in which Target Canada (directly or through related entities) previously operated retail stores (the "**Target Stores**"). Target Canada assumed each of the Target Store leases from Zellers Inc. ("**Zellers**") and in some cases, Target Corporation ("**Target Corp.**")., Target Canada's U.S. parent, executed a guarantee in favour of several of the M&K Responding Landlords (the "**Parent Guarantees**").

5. On February 11, 2015 the Initial Order was amended to address concerns raised by landlords and an Amended and Restated Initial Order (the "**Amended and Restated Initial Order**") was granted by the Court. The Amended and Restated Initial Order contained a new paragraph 19(A) confirming that the Parent Guarantees were not to be affected or compromised by the *CCAA* proceeding or any plan filed by Target Canada.

6. On June 11, 2015, the Court granted an order governing the process for the submission and adjudication of claims against the Applicants (the "**Claims Procedure**

Order"). The Claims Procedure Order provided for a procedure regarding the determination and resolution of all claims as against the Target Canada entities.

7. The Applicants have now filed a motion to request an order of the Court permitting and authorizing them to file a plan of compromise and arrangement (the "**Plan**") and to hold a meeting of creditors to vote on the Plan.

8. The M&K Responding Landlords oppose the motion for the following reasons:

(1) The Plan, which proposes to compromise the Parent Guarantees, is in direct violation of section 19(A) of the Amended and Restated Initial Order;

(2) The Plan, which proposes a set formula for the determination of all landlord claims and eliminates any rights for the adjudication of such claims, is in direct contradiction and violation of the Claims Procedure Order and in breach of section 20(1)(iii) of the *CCAA*;

(3) The Plan, which classifies all unsecured creditors in the same class despite disparate rights and remedies between class members, will improperly appropriate rights and remedies of certain landlords;

(4) The Plan, which proposed a broad release in favour of certain third parties (namely Target Corp. and Zellers/Hudson's Bay Company – the "**Third Party Releasees**"), is unjustified and improper in that:

(i) certain landlords who are excluded from the Plan and prohibited from voting on the Plan will be adversely affected by the release of the third parties;

(ii) the release of Zellers/Hudson's Bay Company will compromise the contractual rights of landlords, some of which have been in existence for more than 40 years, without any corresponding benefit to such landlords or the Plan;

and

(5) The Monitor and Target Corp. have refused to provide crucial information to the landlords, which information will assist all parties in evaluating the suitability of the Plan.

9. Given the serious issues regarding the appropriateness of the Plan, the Applicants should be prohibited from filing the proposed Plan and holding a meeting of creditors to vote on the Plan. Rather, the Applicants should be required to address and correct the deficiencies with the Plan and file an amended Plan.

PART II – BRIEF STATEMENT OF FACTS

The Parties

10. As indicated above, Target Canada operated retail department stores throughout Canada. On January 15, 2015, Target Canada applied for protection from the Court under the *CCAA*. The Court granted Target Canada's application and an Initial Order was issued on January 15, 2015. Alvarez & Marsal Canada Inc. was appointed by the Court as the Monitor pursuant to the *CCAA*.

11. Target Corp., one of the largest retailers in the United States, headquartered in Minneapolis, Minnesota, indirectly wholly-owns Target Canada.

12. The M&K Responding Landlords were all former landlords and/or agents and managers for former landlords of leased premises in which Target Canada (directly or through related entities) operated the Target Stores.[1]

13. The M&K Responding Landlords had the following Target Store leases:

(1) Morguard Investments Limited ("**Morguard**") had fifteen leases for Target Stores. Each of the Target Stores was previously a Zellers store and the leases

---

[1] **Affidavit of G. Camelino, para 1, Responding Motion Record of the M&K Landlords, Tab 3, page 90**

were assigned to Target Canada. When the leases were assigned, Zellers was *not* released, but continued to be bound by the terms of the leases as original covenantor. In addition, for thirteen of the locations, Target Corp. executed a Parent Guarantee in favour of the landlord. Of the fifteen leases, six were assigned to others in the *CCAA* proceeding, one was purchased by Morguard and eight were disclaimed by Target Canada. A Parent Guarantee was executed for each of the eight disclaimed leases. McLean & Kerr LLP, on behalf of Morguard, sent Notices of Default to Target Corp. for each of the disclaimed leases advising it that it was in default of its Parent Guarantees. No payment has been made by Target Corp. pursuant to its Parent Guarantees.[2]

(2) Triovest Realty Advisors Inc. ("**Triovest**") had two leases for Target Stores. Each of the Target Stores was previously a Zellers store and the leases were assigned to Target Canada. When the leases were assigned, Zellers was *not* released, but continued to be bound by the terms of the lease as original covenantor. No Parent Guarantees were provided to Triovest. Both leases were disclaimed by Target Canada. McLean & Kerr LLP, on behalf of Triovest, sent Notices of Default to the Hudson's Bay Company[3] for each of the disclaimed leases advising it that it was in default of its obligations. No payment has been made by the Hudson's Bay Company pursuant to its obligations under the leases.[4]

(3) SmartREIT (formerly Calloway Real Estate Investment Trust) ("**SmartREIT**") had two leases for Target Stores. Each of the Target Stores was previously a Zellers store and the leases were assigned to Target Canada. Both leases were disclaimed by Target Canada. For each lease, Target Corp. executed a Parent Guarantee. SmartREIT sent Notices of Default to Target Corp. for each of the

---

[2] **Affidavit of S. MacDonald, paras 2, 4, 12-14: Responding Motion Record of the M&K Landlords, Tab 1, pages 1,2 and 4.**
Affidavit of G. Camelino, para 3: Responding Motion Record of the M&K Landlords, Tab 3, page 91.

[3] In February 2014 Zellers amalgamated with Hudson's Bay Company.

[4] **Affidavit of G. Camelino, para 3: Responding Motion Record of the M&K Landlords, Tab 3, page 91.**

disclaimed leases advising it that it was in default of its Parent Guarantees. No payment has been made by Target Corp. pursuant to its Parent Guarantees.[5]

(4) Crombie REIT ("**Crombie**") had three leases for Target Stores. Each of the Target Stores was previously a Zellers store and the leases were assigned to Target Canada. For one of the locations, Target Corp. executed a Parent Guarantee. All three leases were disclaimed by Target Canada. McLean & Kerr LLP, on behalf of Crombie sent a Notice of Default to Target Corp. for the disclaimed lease for which a Parent Guarantee was executed advising it that it was in default of its Parent Guarantee. No payment has been made by Target Corp. pursuant to its Crombie Parent Guarantee.[6]

Target Canada's *CCAA* Proceeding

14. The Initial Order contained a stay of proceeding prohibiting parties from commencing claims against Target Corp. Paragraph 19 of the Initial Order provided, in part, as follows:

> THIS COURT ORDERS that during the Stay Period, no Proceeding shall be commenced or continued against or in respect of Target Corporation and its direct and indirect subsidiaries (other than the Target Canada Entities) (collectively, "**Target US**") arising out of or in connection with any right, remedy or claim of any Person (as defined herein) against Target US in connection with any indebtedness, indemnity, liability or obligation of any kind whatsoever of Target US under contract, statute ..... indemnity, ***guarantee***, ... with respect to any matter, action, cause or chose in action, ... which indebtedness, indemnity, liability or obligation is derivative of the primary liability of the Target Canada Entities except with the written consent of the Target Canada Entities and Target US and the Monitor, or with leave of this Court .... (emphasis added).[7]

---

[5] Affidavit of G. Camelino, para 3: Responding Motion Record of the M&K Landlords, Tab 3, page 92.
[6] Affidavit of F. Santini, para 2: Responding Motion Record of the M&K Landlords, Tab 2, page 36. Affidavit of G. Camelino, para 3: Responding Motion Record of the M&K Landlords, Tab 3, page 92.
[7] Initial Order: Motion Record of the Applicants, Tab 2(C).

15. When the M&K Responding Landlords learned that Target Canada had filed for protection under the *CCAA*, one of their immediate concerns was the impact that the *CCAA* proceeding might have on each of their Parent Guarantees. This concern was heightened by the fact that the Initial Order included a stay of proceedings prohibiting landlords from taking steps to enforce the Parent Guarantees.[8]

16. Given the importance of the issues, McLean & Kerr LLP, on behalf of its clients, considered all options available to ensure that the Parent Guarantees would not be compromised by the *CCAA* proceeding, including the possibility of requesting that the *CCAA* proceeding be terminated and Target Canada be required to make an assignment in bankruptcy.[9]

Negotiations and Amendments to Orders

17. Following the granting of the Initial Order, an informal group of counsel acting for various landlords (hereinafter referred to as "**Landlord Counsel**") met, had discussions and exchanged correspondence with Target Canada, the Monitor and counsel for Target Corp. to raise and address concerns regarding the appropriateness of the *CCAA* process, the provisions of the Initial Order, the process for the liquidation of Target Canada's inventory and the process for the sale of the real property. [10]

---

[8] Affidavit of S. MacDonald, para 6: Responding Motion Record of the M&K Landlords, Tab 1, page 2.
Affidavit of F. Santini, para 5: Responding Motion Record of the M&K Landlords, Tab 3, page 37.
Affidavit of G. Camelino, para 4: Responding Motion Record of the M&K Landlords, Tab 3, page 92.
[9] Affidavit of S. MacDonald, para 7: Responding Motion Record of the M&K Landlords, Tab 1, page 3.
Affidavit of F. Santini, para 6: Responding Motion Record of the M&K Landlords, Tab 3, page 37.
Affidavit of G. Camelino, para 5: Responding Motion Record of the M&K Landlords, Tab 3, page 93.

[10] Affidavit of S. MacDonald, para 9: Responding Motion Record of the M&K Landlords, Tab 1, page 3.
Affidavit of F. Santini, para 8: Responding Motion Record of the M&K Landlords, Tab 3, page 38.

18. During discussions with Target Canada, Target Corp. and the Monitor, McLean & Kerr LLP (and specifically Linda Galessiere) advised counsel for Target Canada, counsel for Target Corp., counsel for the Monitor and the Monitor that the M&K Responding Landlords were very concerned with the stay that had been included in the Initial Order affecting the Parent Guarantees and were very concerned and wished to ensure that the Parent Guarantees would not be compromised in the *CCAA* proceeding. In this regard, McLean & Kerr advised the parties that the M&K Responding Landlords were considering whether a *CCAA* proceeding was appropriate as opposed to a bankruptcy.[11]

19. In an effort to address the M&K Responding Landlords' concerns, on January 26, 2015 counsel for Target Canada and representatives of Target Canada attended at McLean & Kerr LLP's office to discuss the *CCAA* proceeding. During the meeting Target Canada provided McLean & Kerr LLP with a letter regarding the Parent Guarantees. The letter, which stated that guarantees given by Target Corporation were valid and binding, did not, however address the M&K Responding Landlords' concerns that the Parent Guarantees not be compromised in the *CCAA* proceeding.[12]

20. Late in January 2015, Target Canada advised that it would be re-attending at Court on February 4, 2015 to obtain:

(i) an order extending the Stay period;

Affidavit of G. Camelino, para 6: Responding Motion Record of the M&K Landlords, Tab 3, page 93.
[11] Affidavit of S. MacDonald, para 10: Responding Motion Record of the M&K Landlords, Tab 1, page 3.
Affidavit of F. Santini, para 9: Responding Motion Record of the M&K Landlords, Tab 3, page 38.
Affidavit of G. Camelino, para 7: Responding Motion Record of the M&K Landlords, Tab 3, page 93.
[12] Affidavit of G. Camelino, para 8: Responding Motion Record of the M&K Landlords, Tab 3, page 94.
Letter from Target: Responding Motion Record of the M&K Landlords, Tab 3(A), page 99.

(ii) an order approving an agency agreement for the liquidation of Target Canada's inventory, furniture, fixtures and equipment (the "**Approval Order - Agency Agreement**"); and

(iii) and an order approving a real property portfolio sales process (the "**RPPSP Order**").

21. Despite discussions and negotiations between the parties, including discussions regarding proposed amendments to the Initial Order, no agreement had been reached on the forms of order proposed by Target Canada or the terms of amendments to the Initial Order and as such, numerous counsel acting for various landlords attended at Court on February 4, 2015 to obtain an adjournment of the motion and/or oppose Target Canada's motion.

22. RioCan Real Estate Investment Trust ("**RioCan**") filed submissions with the Court on February 4, 2015 which outlined some of the concerns landlord counsel, including McLean & Kerr LLP, had regarding the *CCAA* proceeding and the terms of Target Canada's proposed RPPSP Order.[13]

23. While in Court an agreement was reached regarding the terms of the Approval Order – Agency Agreement and such order was granted by the Court. After hearing brief submissions from counsel, including submissions from landlord counsel regarding the appropriateness of the *CCAA* proceeding, Target Canada's motion for an extension of the Stay and the approval of the RPPSP Order was adjourned to February 11, 2015.

24. Thereafter Landlord Counsel and Target Canada, the Monitor and Target Corp. entered into extensive discussions and negotiations regarding amendments to the Initial Order and the process to be followed for the sale of real property.

---

[13] **Affidavit of G. Camelino, para 10: Responding Motion Record of the M&K Landlords, Tab 3, page 94. Submissions of RioCan: Responding Motion Record of the M&K Landlords, Tab 3(B), page 100.**

Amendments to Initial Order and the RPPSP Order

25. Changes to the Initial Order and the changes to the draft RPPSP Order were negotiated simultaneously.[14]

26. In light of Landlord Counsel's concerns relating to the Parent Guarantees, Landlord Counsel requested amendments to the Initial Order and in particular the inclusion of a provisions confirming that the Parent Guarantees would not be compromised in the *CCAA* proceeding. This provision was of utmost importance to the M&K Responding Landlords.[15]

27. Landlord Counsel were also very concerned with the terms of the draft RPPSP Order as such order would necessarily impact each and every landlords' leased premises and potentially result in the assignment of their leases.[16]

28. After very extensive negotiations, changes to the Initial Order and the changes to the RPPSP Order were agreed to on the understanding that both Orders would be amended as agreed. In this regard, it was agreed that Target Canada would request that the Court grant amendments to the Initial Order , which amendments included a new paragraph 19(A) that specifically ordered and confirmed that the Parent Guarantees were not to be compromised in the *CCAA* proceeding.[17]

---

[14] Affidavit of G. Camelino, para 11: Responding Motion Record of the M&K Landlords, Tab 3, page 94.
[15] Affidavit of S. MacDonald, para 11: Responding Motion Record of the M&K Landlords, Tab 1, page 3.
Affidavit of F. Santini, para 10: Responding Motion Record of the M&K Landlords, Tab 3, page 38.
Affidavit of G. Camelino, para 9: Responding Motion Record of the M&K Landlords, Tab 3, page 94.
[16] Affidavit of S. MacDonald, para 8: Responding Motion Record of the M&K Landlords, Tab 1, page 3.
Affidavit of F. Santini, para 8: Responding Motion Record of the M&K Landlords, Tab 3, page 38.
Affidavit of G. Camelino, para 6: Responding Motion Record of the M&K Landlords, Tab 3, page 93.
[17] Affidavit of S. MacDonald, para 11: Responding Motion Record of the M&K Landlords, Tab 1, page 4.
Affidavit of F. Santini, para 10: Responding Motion Record of the M&K Landlords, Tab 3, page 38.
Affidavit of G. Camelino, para 11: Responding Motion Record of the M&K Landlords, Tab 3, page 95.

29. The new paragraph 19A states in part as follows:

> THIS COURT ORDERS that, without in any way altering, increasing, creating or eliminating any obligation or duty to mitigate losses or damages, the rights, remedies and claims (collectively, the "**Landlord Guarantee Claims**") of any landlord against Target US pursuant to any indemnity, guarantee, or surety relating to a lease of real property ... shall not be determined, directly or indirectly, in the within *CCAA* proceedings; ... shall be unaffected by any determination (including any findings of fact, mixed fact and law or conclusions of law) of any rights, remedies and claims of such landlords as against the Target Canada Entities, whether made in the within proceedings under the *CCAA* or in any subsequent proposal or bankruptcy proceedings under the BIA, ... and ... shall be treated as unaffected and shall not be released or affected in any way in any Plan filed by the Target Canada Entities, or any of them, under the *CCAA*, or any proposal filed by the Target Canada Entities, or any of them, under the BIA.[18]

30. Target Corp. was a party to the discussions and negotiations regarding the changes to the Initial Order and RPPSP Order and counsel for Target Corp. specifically negotiated and approved the inclusion of paragraph 19(A) in the Amended and Restated Initial Order. [19]

31. As a term of the agreement regarding the changes to the Initial Order and the RPPSP Order, the M&K Responding Landlords agreed not to challenge the appropriateness of the *CCAA* proceeding. Although RioCan did file additional submissions at the hearing on February 11, 2015, as agreed McLean & Kerr LLP advised the Court that it did not oppose the Monitor's /Applicants' motion to amend the Initial Order and to obtain the RPPSP Order.[20]

---

[18] **Initial Order: Motion Record of the Applicants, Tab 2(C).**
[19] **Affidavit of G. Camelino, para 12: Responding Motion Record of the M&K Landlords, Tab 3, page 95.**
[20] **Affidavit of G. Camelino, para 11: Responding Motion Record of the M&K Landlords, Tab 3, page 95.**

32. In his affidavit sworn February 9, 2015 and filed in support of Target Canada's motion to obtain the RPPSP Order and amendments to the Initial Order, Mr. Wong, stated the following:

(1) Since February 4, 2015, the Target Canada, the Monitor and the Landlord Counsel held discussions on a daily basis and that Target Canada worked with its Financial Advisor to ensure the process would still enable maximization of recovery for the estate;

(2) A component of obtaining the consent of the landlord counsel to the RPPSP Order was the agreement of Target Canada to seek approval of changes to the Initial Order;

(3) That the Monitor and Target Corp. support the changes to the Initial Order;

(4) As part of the overall resolution of landlord issues, Target Canada was proposing an amendment to the Initial Order to lift the stay affecting the Parent Guarantees; and

(5) A new paragraph 19(A) was to be added to confirm that Parent Guarantees were not to be determined or affected by or within the CCAA process.[21]

33. In its second report filed in support of Target Canada's motion to obtain the RPPSP Order and amendment to the Initial Order, the Monitor stated the following:

(1) the terms of the RPPSP Order and the amendments to the Initial Order were the result of extensive negotiations between the parties;

(2) the Monitor reviewed the changes proposed by Landlord Counsel to the Initial Order with Target Corp.;

(3) that Landlord Counsel confirmed that terms agreed to for the RPPSP Order were conditional on obtaining the changes proposed to the Initial Order;

(4) the Monitor recommended the approval of the changes to the Amended and Restated Initial Order as it reflected negotiations between Landlord Counsel, Target Canada and Target Corp. (in conjunction with revisions to the RPPSP

---

[21] **Affidavit of M. Wong Sworn Feb. 9, 2015 (without exhibits) paras 11, 22, 23, 26-28: M&K Responding Landlords' Document Brief, Tab 1**

Order) with the assistance of the Monitor and that the agreed upon terms was a fair and reasonable balancing of interests; and

(5) that as a result of the agreed upon changes, the Landlord Group would not be opposing Target Canada's motion.[22]

34. The Amended and Restated Initial Order and in particular paragraph 19(A) thereof provided the M&K Responding Landlords with total assurance that the Parent Guarantees would not be compromised in the *CCAA* proceeding. [23]

Order for Advice and Direction

35. In May 2015 the Monitor advised that it intended to obtain an order governing the process for the calling and assessing of all claims as against the Applicants and on May 12, 2015 the Monitor obtained an order for advice and directions (the "**Order – Advice and Directions**") which order directed that the Monitor bring a motion seeking approval of a claims process, which process was to include, among other things, the following provisions:

(1) procedures regarding the calling of all claims as against the Target Canada Entities, including intercompany claims, and as against the Target Canada Entities' current and former directors and officers;

(2) *procedures regarding the determination and resolution of all claims as against the Target Canada Entities* and their directors and officers, other than intercompany claims or any inter-creditor disputes, including the appointment of claims officers; and

(3) preparation and service by the Monitor of a report on all intercompany claims submitted in accordance with the claims procedures.[24]

---

[22] **Second Report of the Monitor dated February 9, 2015 (without appendices) paras 3.2-3.5. 4.3, 4.4: M&K Responding Landlords' Document Brief, Tab 2.**

[23] **Affidavit of G. Camelino, para 13: Responding Motion Record of the M&K Landlords, Tab 3, page 95.**

[24] **Order – Advice and Direction dated May 12, 2015: M&K Responding Landlords' Document Brief, Tab 3.**

Claims Procedure Order

36. In compliance with the Order – Advice and Direction, the Monitor did bring a motion seeking the approval of a claims process, which process included, among other things, a procedure for the calling of all claims as against Target Canada and a procedure regarding the determination and resolution of all claims as against Target Canada.

37. Prior to attending at Court, Landlord Counsel and the Monitor underwent negotiations and discussions regarding the terms of the proposed order (the "**Claims Procedure Order**"). The parties agreed on a form of order, which order included a provision (para. 55) confirming that the Parent Guarantees were not to be prejudiced by the claims procedure and that the provisions of the Claims Procedure Order were subject to paragraph 19(A) of the Amended and Restated Initial Order.[25]

38. In its Fifteenth Report filed with the Court in support of its motion to obtain the Claims Procedure Order the Monitor advised:

(1) that it had consulted with various stakeholders including Target Canada, Target Corp.; and

(2) that the Claims Procedure Order was fair and reasonable and would facilitate the determination of claims against Target Canada in a fair, consultative and expeditious manner.[26]

39. The Claims Procedure Order was granted by the Court on June 11, 2015. The Claims Procedure Order stipulated that any creditor that disputed the Monitor's assessment of its claim was entitled to file a Notice of Dispute of Revision or Disallowance and if the

---

[25] **Claims Procedure Order, para 55: M&K Responding Landlords' Document Brief, Tab 4.**
[26] **Fifteenth Report of the Monitor dated June 5, 2015 (without appendices) paras 4.6, 4.9: M&K Responding Landlords' Document Brief, Tab 5.**

Monitor and the creditor were unable to resolve the dispute, the matter was to be referred to a Claims Officer or the Court for adjudication.[27]

Monitor's Notice of Revision or Disallowance

40. In accordance with the Claims Procedure Order, each of the M&K Responding Landlords filed proofs of claim for their disclaimed leases and for leases that were assigned by Target Canada to other tenants.[28]

41. The proofs of claim for the stores that were disclaimed particularized the rent lost for the term of the leases and the estimated costs to re-demise and re-let the Target Stores. The proofs of claim for the stores that were assigned claimed rent in the event the assignee should default and vacate the premises.[29]

42. The Monitor issued Notices of Revision or Disallowance for each and every proof of claim filed and only allowed an amount equal to the amount Target Canada proposes in its Plan for the stores that were disclaimed. No amount whatsoever was allowed for stores that were assigned. The M&K Responding Landlords will be filing Notices of Dispute for all of the disclaimed and assigned locations in response to the Monitor's Notice of Revision or Disallowances.[30]

---

[27] Claims Procedure Order, para 32: Appended behind Tab 4 of this Factum.
[28] Affidavit of S. MacDonald, para 25: Responding Motion Record of the M&K Landlords, Tab 1, page 7.
Morguard Proof of Claim: Responding Motion Record of the M&K Landlords, Tab 1(B), page 11.
Affidavit of F. Santini, para 16: Responding Motion Record of the M&K Landlords, Tab 3, page 40.
Crombie Proof of Claim: Responding Motion Record of the M&K Landlords, Tab 2(B), page 49.
[29] Affidavit of S. MacDonald, para 25: Responding Motion Record of the M&K Landlords, Tab 1, page 7.
Morguard Proof of Claim: Responding Motion Record of the M&K Landlords, Tab 1(B), page 11.
Affidavit of F. Santini, para 16: Responding Motion Record of the M&K Landlords, Tab 3, page 40.
Crombie Proof of Claim: Responding Motion Record of the M&K Landlords, Tab 3(B), page 49.
[30] Affidavit of S. MacDonald, para 25: Responding Motion Record of the M&K Landlords, Tab 1, page 7.

43. The Monitor has given no consideration to landlord's actual losses as required by the Claims Procedure Order and the *CCAA* prior to issuing its Notices of Revision or Disallowance and the amounts allowed by the Monitor are far below the damages that M&K Responding Landlords will actually suffer. [31]

Landlord Damages

44. Target Canada served as an "anchor" tenant in each of the shopping centres. Anchor tenants play a critical role in the financial viability of a shopping centre for both the landlord and other tenants as anchor tenants provide the single largest or one of the largest draws of customers to the shopping centres. Lease rates for other tenants are heavily dependent upon the identity and operation of anchor tenant(s). Furthermore, the retention of other tenants is also significantly impacted by the absence of anchor tenants. Target Canada was aware of its role as an anchor tenant and its impact on the shopping centres and the other tenants in the shopping centres.[32]

45. Each of the landlords comprising the M&K Responding Landlords offered to sign affidavits in response to Target Canada's motion. However to avoid duplication of submissions, two affidavits from two different landlords were filed and are contained in the Responding Motion Record filed by the M&K Responding Landlords, which affidavits

---

Monitor's Notices of Revision or Disallowance: Responding Motion Record of the M&K Landlords, Tab 1(B) page 31.
Affidavit of F. Santini, para 16: Responding Motion Record of the M&K Landlords, Tab 3, page 40.
Monitor's Notices of Revision or Disallowance: Responding Motion Record of the M&K Landlords, Tab 2(B), page 45.

[31] **Affidavit of S. MacDonald, para 26: Responding Motion Record of the M&K Landlords, Tab 1, page 7.**
Affidavit of F. Santini, para 17: Responding Motion Record of the M&K Landlords, Tab 3, page 40.

[32] **Affidavit of S. MacDonald, para 5: Responding Motion Record of the M&K Landlords, Tab 1, page 2.**
Affidavit of F. Santini, para 4: Responding Motion Record of the M&K Landlords, Tab 3, page 37.

represent the difficulties that the M&K Responding Landlords have encountered in re-letting their former Target Stores and the corresponding damages they are likely to suffer.[33]

46. Morguard, which originally held 15 Target Stores in its portfolio, filed one such affidavit. In its affidavit Morguard states that immediately upon learning that Target Canada had filed for insolvency protection, it mobilized its remerchandising teams (which team includes leasing personnel, asset managers, contractors, consultants, architects, engineers and development personnel) to consider and assess all options for re-leasing the locations. These efforts to re-lease continue to this date, however save for the six leases assigned by Target Canada, none of Morguard's vacant Target Stores have been re-let.[34]

47. All efforts to find tenants willing to lease the entire premises (which premises range in size from approximately 75,000 – 140,000 square feet) have been exhausted both by Target Canada and Morguard, Morguard has determined that it must now either demolish and rebuild and/or re-demise each of the vacant Target Stores, which premises are located in enclosed shopping centres.[35]

48. By way of example, for two locations in Western Canada, it appears that the best alternate leasing arrangement will be to demolish the existing Target Stores and rebuild new smaller structures to accommodate grocery stores. The new buildings will be approximately 40%-48% smaller than the existing Target Store and the lost rentable area will only be recaptured with the construction of new structures. The costs associated with the new

---

[33] **Affidavit of G. Camelino, para 14: Responding Motion Record of the M&K Landlords, Tab 3, page 95.**
[34] **Affidavit of S. MacDonald, para 15: Responding Motion Record of the M&K Landlords, Tab 1, page 4.**
[35] **Affidavit of S. MacDonald, para 17: Responding Motion Record of the M&K Landlords, Tab 1, page 5.**

redevelopment exceed $20,000,000.00 at each shopping centre.[36]

49. Although the new tenants will likely pay more in rent per square foot than that paid by Target Canada, at best, rent from the first new tenants will not commence until early 2017 (as no agreements have been reached with any tenants and construction/tenant fixturing will take 12 or more months to complete). In addition, the higher rents that may be paid by new tenants will need to be off-set against the rent reductions that have already been requested by tenants located near the closed Target Store who are suffering from a reduction in sales due to the closure and loss of this anchor tenant.[37]

50. At Bramalea City Centre ("**BCC**") (a Morguard disclaimed location in Brampton, Ontario), the Target Store was situated on two floors and extensive construction will be necessary to re-demise the area to accommodate 4-6 new smaller stores and reconfigure the space to fit within the existing shopping centre on both levels. In this regard, it will be necessary to reconfigure the space to provide for a new loading dock, new escalators, a freight elevator, a customer elevator, new exterior and interior access doors, new interior and exterior facade, new back access stairs, new internal mall stairs, new washrooms, new demising walls, etc.[38]

51. In addition, in order to accommodate several new smaller stores in the BCC Target Store, new common areas must be created resulting in a loss of gross rentable area of approximately 15%-25%.[39]

---

[36] **Affidavit of S. MacDonald, para 18: Responding Motion Record of the M&K Landlords, Tab 1, page 5.**
[37] **Affidavit of S. MacDonald, para 19: Responding Motion Record of the M&K Landlords, Tab 1, page 5.**
[38] **Affidavit of S. MacDonald, para 20: Responding Motion Record of the M&K Landlords, Tab 1, page 6.**
[39] **Affidavit of S. MacDonald, para 21: Responding Motion Record of the M&K Landlords, Tab 1, page 6.**

52. The costs to re-demise and re-let the BCC Target Store, including tenant allowance costs, are projected to exceed $30,000,000.00 depending on the final plans implemented[40]. The costs associated with re-demising a store located in an enclosed shopping centre are far greater than those needed to re-demise a stand-alone store or one located in a strip centre. In addition, although all tenants negotiate an "allowance" to be paid by the landlord, such allowances vary greatly depending on the tenant and can be upwards of $80 per square foot of the premises to be leased, adding a significant amount to the total re-leasing costs.[41]

53. As noted above, no new lease agreements have been entered into for any of the former Target Stores. It is expected that at best, if a new tenant is found now for BCC, rent will not commence until the fall of 2017 and the entire space will not be fully re-let before 2020.[42]

54. As most of Morguard's shopping centres are currently financed, the costs to re-demise the Target Stores will need to be paid for with new equity funding as new financing would not be available or would complicate existing financing arrangements.[43]

55. When Eaton's closed various stores in 1999 landlords were forced to re-demise the space and find new tenants. One such store was the Eaton's store located in Morguard's Coquitlam Centre, in Coquitlam B.C. The store (approximately 130,000 square feet) was re-demised into eight stores and was not fully re-let until October 2006 – a full 7 years after the

---

[40] Morguard has retained architects who have drafted numerous varying re-demising plans, which plans have been submitted to PCL, general contractors, to provide projected construction costs.

[41] **Affidavit of S. MacDonald, para 22: Responding Motion Record of the M&K Landlords, Tab 1, page 6. Morguard Proof of Claim: Responding Motion Record of the M&K Landlords, Tab 1(B), page 11.**

[42] **Affidavit of S. MacDonald, para 23: Responding Motion Record of the M&K Landlords, Tab 1, page 6.**

[43] **Affidavit of S. MacDonald, para 23: Responding Motion Record of the M&K Landlords, Tab 1, page 7.**

store was returned to Morguard. It appears that the assumption that the Target Stores will be re-let in 2-4 years has resulted in Morguard's claims being unjustifiably reduced.[44]

56. Crombie also filed an affidavit in response to Target Canada's motion. All three of Crombie's Target Stores were disclaimed in the *CCAA* proceeding.[45]

57. Immediately upon learning that Target Canada had filed for insolvency protection Crombie also mobilized its remerchandising team to consider and assess all options for re-leasing the locations. Crombie's efforts to re-lease continue to this date, however none of the 3 vacant Target Stores have been re-let. If and when new tenants are found, Crombie's losses arising from the disclaimer will be significant.[46]

58. By way of example, one of Crombie's former Target Store (which store has a Parent Guarantee) is a store located in North Bay. Despite efforts to re-lease this premises it remains vacant. There has been only one tenant which has expressed some interest in this location, however the prospective tenant is only willing to pay rent at a rate lower than that which was paid by Target, will pay such rent on only 84% of the gross leasable area (the "**gla**") of the store, requires that its common area costs be capped at a rate less than its proportionate share (and will continue to be capped on a go forward basis) and requires that the landlord invest approximately $7 million in leasehold improvements and tenant allowances. Even if a lease is executed with this new tenant, rent would not be paid until late 2017 at the earliest.[47]

---

[44] **Affidavit of S. MacDonald, para 27: Responding Motion Record of the M&K Landlords, Tab 1, page 8.**
[45] **Affidavit of F. Santini, para 4: Responding Motion Record of the M&K Landlords, Tab 3, page 37.**
[46] **Affidavit of F. Santini, paras 12-13: Responding Motion Record of the M&K Landlords, Tab 3, page 39.**
[47] **Affidavit of F. Santini, para 14: Responding Motion Record of the M&K Landlords, Tab 3, page 39.**

59. Crombie is also considering the possibility of re-demising the North Bay store into six smaller stores. If this is done, approximately 41,000 sq. ft. of the gla will be lost as the back half of the former Target Store would need to be severed off since tenants will only lease the front portion of the store. In addition, the landlord will need to expend more than $7,000,000 to reconfigure the space. If new tenants are located, the first tenant would likely not start paying rent until 2018 and it would likely take several more years before all six spaces are re-let.[48]

60. Landlord damages are significantly higher than the "formula amount" stipulated by Target Canada in its Plan (which amount was mirrored by the Monitor in its Notices of Revision or Disallowance) and as such the M&K Responding Landlords require and are entitled to an opportunity to have their damages assessed by a Claims Officer or the Court as provided for in the Claims Procedure Order.

Liability of Zellers and Target Corp.

61. When leases were assigned by Zellers to Target Canada, Morguard and Triovest were unwilling to release Zellers of its obligations under the leases and as such Zellers remains liable under the leases as original covenantor.[49]

62. Triovest, which has two disclaimed leases, does not have any Parent Guarantees, however as Zellers was not released when the leases were assigned to Target

---

[48] Affidavit of F. Santini, para 15: Responding Motion Record of the M&K Landlords, Tab 3, page 40. Crombie Proof of Claim: Responding Motion Record of the M&K Landlords, Tab 3(B), page 49.
[49] Affidavit of S. MacDonald, para 4: Responding Motion Record of the M&K Landlords, Tab 1, page 2. Affidavit of G. Camelino, para 3(2): Responding Motion Record of the M&K Landlords, Tab 3, page 90.

Canada, Triovest is entitled to make a claim against Zellers for any damages it will suffer as a result of the leases being disclaimed.[50]

63. Morguard, which has Parent Guarantees for thirteen of its fifteen leases, also did not release Zellers when the leases were assigned to Target Canada and as such Zellers remains liable under the leases as original covenantor. Although the original lease date for each of Morguard's fifteen locations varies, some leases were entered into with Zellers more than forty years ago.[51]

64. Zellers was similarly not released for five of the six Morguard leases that were further assigned by Target Canada to other tenants in the *CCAA* proceeding. Hence, if any of the new tenants should breach the leases that were assigned to them by Target Canada, Morguard will be entitled to make a claim against Zellers as original convenantor.[52]

65. In addition, neither Target Canada nor Target Corp. were released for three of the six leases which were assigned by Target Canada to other tenants in the *CCAA* proceeding. Hence if any of the three tenants should default on their leases, Morguard may be entitled to make a claim against Target Corp. under its Parent Guarantee.[53]

66. Although Morguard filed a proof of claim for each of the assigned leases claiming damages that may arise if the new tenant should default, the Monitor has disallowed each of the claims valuing such claims at zero.[54] As such Morguard has no entitlement to vote

---

[50] **Affidavit of G. Camelino, para 3(2): Responding Motion Record of the M&K Landlords, Tab 3, page 90.**
[51] **Affidavit of S. MacDonald, paras 3-4: Responding Motion Record of the M&K Landlords, Tab 1, page 2.**
[52] **Affidavit of S. MacDonald, para 13: Responding Motion Record of the M&K Landlords, Tab 1, page 4.**
[53] **Affidavit of S. MacDonald, paras 4, 13: Responding Motion Record of the M&K Landlords, Tab 1, pages 2 and 4.**
[54] **Affidavit of S. MacDonald, para 25: Responding Motion Record of the M&K Landlords, Tab 1, page 7.**

on the Plan or receive a distribution thereunder for any assigned leases, yet the Plan, which includes third party releases, will eliminate Morguard's contractual rights.

Settlement with RioCan

67. The M&K Responding Landlords learned that RioCan and Target Corp. had reached an agreement to settle RioCan's damages' claims arising from the disclaimer and/or assignment of its leases when the settlement was announced by RioCan and reported by the local media outlets.[55]

68. The RioCan press release stated that RioCan received *net* $132 million from Target Corp. for 18 disclaimed leases. No information of the "gross" amount paid by Target Corp. has been made public. In addition, based on the information available in RioCan's press releases, it appears that RioCan may have received between 2-6 additional years of rent than the amount being offered to landlords in Target Canada's Plan.[56]

69. RioCan's press release also states that "*the relevant RioCan entities have also directed that any distributions from Target Canada to be made to such entities, insofar as they relate to the Subject Leases, will be paid to Target Corp.*".[57]

70. As the information regarding the terms of settlement would assist the M&K Responding Landlords to assess the appropriateness of Target Canada's proposed Plan and

---

[55] Affidavit of G. Camelino, para 15: Responding Motion Record of the M&K Landlords, Tab 3, page 96.
RioCan Press Release dated November 23, 2015: Responding Motion Record of the M&K Landlords, Tab 3(C), page 136.
Affidavit of F. Santini, para 18: Responding Motion Record of the M&K Landlords, Tab 3, page 41.
[56] RioCan Press Releases dated January 15, 2015 and November 23, 2015: Responding Motion Record of the M&K Landlords, Tab 3(C), page 130.
[57] RioCan Press Release dated November 23, 2015: Responding Motion Record of the M&K Landlords, Tab 3(C), page 136.

Target Canada's motion to file its Plan, Linda Galessiere wrote to both counsel for the Monitor and counsel for Target Corp. requesting information regarding the settlement and if and how RioCan's claim would be voted in the Plan. Both the Monitor and Target Corp. have refused to provide any of the requested information. [58]

71. The M&K Responding Landlords require particulars of RioCan's settlement to properly assess the Plan. Presumably Target Corp. paid a fair price in settlement of RioCan's claims. If yes, then the significantly lower amount allocated to landlords under the Plan cannot be a fair and reasonable assessment of what landlords will suffer as a result of the disclaimer of their leases or the settlement of the Parent Guarantees.

72. If Target Corp. paid an inflated price in settlement of RioCan's claims, then it appears that it did so in an effort to influence the outcome of the Plan – less than honourable conduct from an entity now seeking that the Court exercise its discretion and permit the filing of a Plan that releases it from its contractual obligations.

Target Canada's Motion to Approve the Filing of a Proposed Plan

73. In direct contravention of the Amended and Restated Initial Order and the Claims Procedure Order, the Plan proposed by Target Canada compromises the Parent Guarantees, arbitrarily reduces and/or fixes landlord claims by applying a formula and eliminates the right of landlords to have their claims adjudicated.

---

[58] Affidavit of G. Camelino, para 16: Responding Motion Record of the M&K Landlords, Tab 3, page 96. Affidavit of F. Santini, para 18: Responding Motion Record of the M&K Landlords, Tab 3, page 41. Email correspondence between L. Galessiere and counsel for the Monitor and counsel for Target Corp. dated November 30 – December 2, 2015: Responding Motion Record of the M&K Landlords, Tab 3(D), page 147.

74. In addition, the Plan proposes that all creditors be in the same class despite the fact that landlords with Parent Guarantees and/or claims against Zellers clearly have significantly different rights being compromised by the Plan than those of other creditors.

75. Finally, the Plan proposes a broad release in favour of certain third parties (namely Target Corp. and Zellers/Hudson's Bay Company), which release will affect certain landlords who are not only excluded from the Plan, but prohibited from even voting on the Plan. In addition, the proposed release of Zellers/Hudson's Bay Company will compromise the contractual rights of landlords, some of which have been in existence for more than 40 years, without any corresponding benefit to such landlords or the Plan.

76. Based on the foregoing, Target Canada's motion to file its plan should be dismissed.

PART III – LAW AND ARGUMENT

Issues:

(i) Should the Applicants' motion be dismissed as its proposed Plan is in breach of the section 19(A) of the Amended and Restated Initial Order, which Order provides that Parent Guarantees were not to be compromised in the Plan?

(ii) Should the Applicants' motion be dismissed as its proposed Plan is in breach of the Claims Procedure Order and in breach of section 20(1)(iii) of the *CCAA* which Order and statutory provision provide that claimants are entitled to have their claims assessed and adjudicated upon?

(iii) Should the Applicants' motion be dismissed as its proposed Plan, which classifies all unsecured creditors in the same class despite disparate rights and remedies between class members, will improperly appropriate rights and remedies of certain landlords?

(iv) Should the Applicants' motion be dismissed as its proposed Plan, which proposed a broad release in favour of certain third parties (namely Target Corp. and Zellers/Hudson's Bay Company), is unjustified and improper in that:

(a) certain landlords who are excluded from the Plan and prohibited from voting on the Plan will be adversely affected by the release of the third parties;

(b) the release of Zellers/Hudson's Bay Company will compromise the contractual rights of landlords, some of which have been in existence for more than 40 years, without any corresponding benefit to such landlords or the Plan?

(v) Should the Applicants' motion be dismissed as the Monitor and Target Corp. have refused to provide crucial information to the landlords, which information will assist all parties in evaluating the suitability of the Plan?

Breach of the Amended and Restated Initial Order

VARYING COURT ORDERS

77. The *Rules of Civil Procedure* include two rules that deal specifically with the circumstances in which court orders can be varied: Rule 37.14 and 59.06. The facts of this case however, do not fall within the circumstances enumerated by those Rules and therefore they cannot be the basis upon which the Applicants can obtain an order varying the Amended and Restated Initial Order.

78. In order to move pursuant to rule 37.14(1) the moving party must satisfy the court that *at least* one of the following situations is true: (1) the order to be varied was obtained without notice to it; (2) the moving party failed to attend at the motion through accident, mistake or insufficient notice; or (3) the order to be varied is an order of a registrar. Target Canada cannot establish any of those prerequisites and therefore cannot move to vary the Initial Order pursuant to rule 37.14(1).

79. Rule 59.06 also deals with the amendment of orders and provides as follows:

Amending

> 59.06(1) An order that contains an error arising from an accidental slip or omission or requires amendment in any particular on which the court did not adjudicate may be amended on a motion in the proceeding.
>
> *Setting Aside or Varying*
>
> 59.06(2) A party who seeks to,
>
> (a) have an order set aside or varied on the ground of fraud or of facts arising or discovered after it was made;
> (b) suspend the operation of an order;
> (c) carry an order into operation; or
> (d) obtain other relief than that originally awarded,
>
> may make a motion in the proceeding for the relief claimed.

80. To move pursuant to rule 59.06(1), the moving party must satisfy the court that either (1) the order to be amended contains an error which arose from an accidental slip or omission; or (2) the order to be amended requires revision on a particular on which the court did not adjudicate. Again, neither of the conditions enumerated by the Rule is applicable to this case and as such this Rule does not permit a variation of the Amended and Restated Initial Order.

81. Amendments for matters not adjudicated refer to matters not referred to at all in the order – e.g. the undecided issue of costs;[59] or the omitted issue of post-judgment interest.[60] It is clear that the Court in this case heard the submissions of counsel and deemed it appropriate to amend the Initial Order to include 19(A) of the Amended and Restated Initial Order.

---

[59] See for example, *Kerr v. Danier Leather Inc.* (2005), 76 O.R. (3d) 354 (S.C.J); *Robertson v. Robertson* (1975), 8 O.R. (2d) 253 (H.C.): Book of Authorities of the M&K Responding Landlords, Tabs 1 and 2

[60] See for example, *Imperial Roadways Ltd. v. C.P. Ltd.* (1982), 28 C.P.C. (5th) 222 (Ont. H.C.); *Moyer v. Moyer* (1980), 30 O.R. (2d) 698 (Surr. Ct.): Book of Authorities of the M&K Responding Landlords, Tabs 3 and 4

82. To vary an order pursuant to rule 59.06(2), the moving party must establish that (1) the order was obtained on the basis of fraud; or (2) new facts arose or were discovered that warrant a varying of the original order.

83. In *Monarch Construction Ltd. v. Buildevco Ltd.*[61] the Ontario Court of Appeal made the following useful statement of law at paragraph 3:

> [3] A consent judgment is final and binding and can only be amended when it does not express the real intention of the parties or where there is fraud. In other words, a consent judgment can only be rectified on the same grounds on which a contract can be rectified. Here, there was no allegation of fraud and, in our opinion, there was no basis on the material before the local judge on which she was entitled to grant rectification.

84. In the case at bar, there is no evidence before the court that paragraph 19(A) of the Amended and Restated Initial Order was procured through fraud. Likewise there is no evidence before the court that the Amended and Restated Initial Order does not reflect the real intentions of the parties. As such, it is respectfully submitted that there is no basis upon which the Court is entitled to amend the Amended and Restated Initial Order.

85. Rule 59.02(2) also provides for a party to request the variation of an order based on newly arising facts. This provision does not assist the Applicants.

86. The test for varying an order on the basis of "new facts" is set out as follows:[62]

(1) that the evidence "might" probably have altered the judgment, and

(2) that the evidence "could not with reasonable diligence have been discovered sooner".

---

[61] *Monarch Construction Ltd. v. Buildevco Ltd.* (1988), 26 C.P.C. (2d) 164 (Ont. C.A.): Book of Authorities of the M&K Responding Landlords, Tab 5

[62] *Hall v. Durham Catholic District School Board* (2005), 80 O.R. 3d) 462 at paragraph 12 (S.C.J.) ["*Hall*"]: Book of Authorities of the M&K Responding Landlords, Tab 6

87. The court has established that rule 59.06(2) does not come into play where a party has simply changed its position since the original order was obtained.[63] In *Hall v. Durham Catholic School Board*, the plaintiff had obtained an interim injunction in 2012 that he not be prevented or impeded from attending his high school prom with his boyfriend. He went to the prom and then 3 years later he brought a motion to discontinue his action on a without costs basis citing his desire to focus on his university studies.

88. The defendant Board opposed the relief being sought because it wished the issues raised by the action to be tried. The Board argued that the injunction was issued on the basis that there would be a later trial and that it had been issued on the basis of a lower standard afforded to interlocutory injunctions – which they fear is now a precedent of sorts.

89. The Board moved to set aside the interim injunction order on the basis, *inter alia,* of Rule 59.06(2) on the grounds of "facts arising or discovered after it was made". The Board argued that the plaintiff's change of position with respect to his intention to proceed to trial was a "fact arising or discovered" after the interim injunction was made.

90. The court disagreed. Regional Senior Justice Shaughnessy wrote as follows at paragraph 13 of the *Hall* decision:

> [13] I find that rule 59.06(2) is not applicable as it applies to newly discovered evidence. In my opinion, this rule does not come into play where, as in the present case, the plaintiff has a change in position, or a change in circumstances.

91. It is respectfully submitted that the same reasoning should apply in the case at bar. Target Canada and Target Corp. negotiated the terms of the Amended and Restated Initial Order to include the provision prohibiting the compromising of the Parent Guarantees. The

---

[63] *Hall* at paragraphs 2 and 3.

parties relied on the negotiated provision. There are no newly discovered facts that would warrant a variation of the Initial Order. At best, Target Canada has simply changed its position with respect to this issue. Following *Hall* it is submitted that rule 59.06(2) has no application in this case.

Comeback Clause

92. The Amended and Restated Initial Order does include what is commonly referred to as a "comeback clause", entitling parties to re-attend[64] to vary the order on 7 days' notice. This provision however is not intended to re-open court orders and alter the right of interested parties who have made decision and acted upon such orders.

93. In *Muscle Tech Research & Development Inc.*[65], Justice Farley wrote:

> As this order today is being requested with notice to persons who may be affected, I would stress that these persons are completely at liberty and encouraged to use the comeback clause found in paragraph 59 of the Initial Order. In that respect, notwithstanding any order having previously been given, the onus rests with the applicants (and the applicants alone) to justify *ab initio* the relief requested and previously granted. Comeback relief, however, cannot prejudicially affect the position of parties who have relied *bona fide* on the previous order in question. This endorsement is to be provided to creditors and other receiving notice.

94. Two principles emerge from this the *Muscle Tech Research & Development Inc.* case: first, when an order is made without giving notice to a person who is affected, that person can use the comeback clause and the Debtor bears the burden of proving the correctness of the provisions in the original order.

---

[64] The "comeback" clause in the Initial Order stipulated February 11, 2015 as the comeback date.

[65] *Muscletech Research and Development Inc., Re*, 2006, ONSC (Canlii 1020) [Commercial List]: Book of Authorities of the M&K Responding Landlords, Tab 7.

95. The second principle inferred from *Muscle Tech Research & Development Inc.* is that possible modifications of an order cannot be detrimental to parties who have relied in good faith on the original order.

96. In *York (Regional Municipality)* v. *Thornhill Green Co-Operative Homes Inc.*,[66] the Honourable Justice Morawetz confirmed the limited use of comeback clauses and subject to errors, fraud or new evidence, orders will not be amended. In this regard Justice Morawetz wrote:

> 22. I agree with the submission of the Region that this is language of appeal – not a comeback motion. Further, a motion to vary is not a substitute for an appeal. See *Textron Financial Canada Ltd. v. Beta Ltee/Beta Brands Ltd.*, [2007] O.JH. NO. 2998 (Ont. S.C.J.) and *Canadian Commercial Bank v. Pilum Investments Ltd.* [1987] O.J. No. 29. **I also agree with the submission of counsel to the Receiver to the effect that the jurisdiction to vary an order must be exercised sparingly and comeback provisions are intended to apply in situations where parties impacted by an order are not provided with notice of the hearing giving rise to the order.**
>
> 23. This motion to vary the Appointment Order was not brought promptly. Thornhill Green and CHFC accepted the provisions of the Appointment Order. Further, neither the Co-op nor CHFC point to any error in the Appointment Order nor do they allege any fraud, nor do they allege the discovery of any new facts or evidence. **Under Rule 59, the court has discretion to vary or set aside an order based on error, fraud or new evidence. Thornhill Green and CHFC do not rely on any evidence of error, fraud or new facts discovered. The test under Rule 59 has not, in my view, been met.** (emphasis added)
>
> 25. Thornhill Green was involved prior to the granting of the Initial Order and, in my view, any utilization of the comeback clause should have been made immediately or shortly after the granting of the Appointment Order. In my view, the motion by Thornhill Green and CHFC is nothing but a late attempt to appeal the decision of Pepall J.

---

[66] *York (Regional Municipality)* v. *Thornhill Green Co-Operative Homes Inc.*2009, CanLII 37907 (ONSC) (Commercial List): Book of Authorities of the M&K Responding Landlords, Tab 8.

97. The M&K Responding Landlord acted and relied on the provisions of the Amended and Restated Initial Order (specifically paragraph 19(A)). In this regard they agreed not to oppose the issuing of the RPPSP Order and agreed not to challenge the use of the *CCAA* for the winding up of Target Canada. The Applicants, having fully utilized the benefits of the bargain reached with Landlord Counsel, should not now be permitted to undo the agreement and further amend the Amended and Restated Initial Order.

Breach of the Claims Procedure Order and the *CCAA*

98. Both the provisions of the *CCAA* and the Claims Procedure Order issued by the court in this proceeding provide for a mechanism for the resolution of unresolved disputed creditor claims.[67]

99. Section 20(1)(iii) of the *CCAA* provides as follows:

> 20. (1) Determination of amount of claims - For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor is to be determined as follows:
>
> (a) the amount of an unsecured claim is the amount
>
> ....
>
> (iii) in the case of any other company, proof of which might be made under the Bankruptcy and Insolvency Act, but if the amount so provable is not admitted by the company, the amount is to be determined by the court on summary application by the company or by the creditor; and ...

100. Contrary to both the Claims Procedure Order and section 20.(1) of the *CCAA*, the Target Canada (and the Monitor) propose that all landlord claims be valued based on an arbitrary formula regardless of what damages each landlord may actually suffer. In addition,

---

[67]It should be noted that the Monitor was directed by the court in the Order - Advice and Direction to provide for a dispute resolution mechanism in the Claims Procedure Order.

no landlord is entitled to appeal the use of the formula or have its claim adjudicated upon by an independent claims officer or by the Court.

101. The provisions of the CCAA underwent numerous amendments in 2009, and Parliament, although aware of the formula provided for in the BIA, chose not to import this provision into the CCAA. Instead the statutory framework for valuing claims in CCAA proceedings requires that claims not admitted be "determined by the court on summary application by the company or by the creditor".

102. It is contrary to the *CCAA* to import and force a formula for the valuation of landlord claims in a Plan. It follows then that if a debtor wishes to use a formula, it must do so only on consent of all creditors affected by the formula.[68]

103. Given the provisions of the Claims Procedure Order which provisions were negotiated by the parties[69] and the provisions of the *CCAA*, Target Canada is obligated to permit landlords to avail themselves of the dispute resolution mechanize for the valuation of their claims.

104. The evidence of the M&K Responding Landlords is that their damages far exceed the formula amount stipulated in the Plan and they wish to avail themselves of the adjudication process provided for in the Claims Procedure Order and the *CCAA*.

105. Further, and in any event, the Plan as currently structured is nonsensical and requires revision. The Plan provides that landlords' claims will be reduced to the formula

---

[68] See the endorsement of the Honourable J. Hoy in Re: Extreme Retail dated September 23, 24, 2009: Book of Authorities of the M&K Responding Landlords, Tab 9.

[69] For the reasons and law previously cited, it is submitted there is no basis for an amendment of the Claims Procedure Order to eliminate the dispute resolution mechanism provided for therein.

amount for both distribution purposes and for voting purposes. When voting on the Plan to reduce the value of landlord claims, landlords' votes will be weighed at the already reduced voting value. In addition, all other creditors will be entitled to vote on whether the values of landlords' claims for distribution and voting purposes will be reduced.

106. Finally, it is a fundamental tenet of our judicial system for aggrieved parties to be afforded the opportunity to be heard. Subject to specific statutory provisions eliminating such right, the forced elimination of this right is a breach of natural justice. The Applicants have cited no case law to support the position that they can unilaterally, or by majority vote, eliminate another party's fundamental right to be heard.

Classification of Creditors – Appropriation of Landlord Rights and Remedies

107. As noted above, landlords have unique and disparate rights and remedies, particularly those having claims against Zellers and Parent Guarantees. Even if the Plan were otherwise appropriate and not in breach of several Court orders, the Plan's failure to address the unique rights and remedies applicable to landlords by separate classification highlights the systemic problems with the proposed Plan.

108. Section 22.2 (2) of the *CCAA* sets out certain factors that may be considered in approving a classification for voting purposes:

> (2) **Factors** – 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.

109. In considering these factors, the courts have applied the "non-fragmentation test" - that not all creditor interests need be identical, they need be only sufficiently similar to allow them to vote with a common interest so as to avoid fragmentation of creditors.[70]

110. The classification of creditors is viewed with respect to the legal rights they hold in relation to the debtor company in the context of the proposed plan, as opposed to their rights as creditors in relation to each other[71]

111. In *Woodward's Ltd., Re*[72] the court wrote:

> Before I apply the general principles outlined above to the circumstances of this case, I wish to add some comments regarding the classification of creditors. The case authorities focus on the differences in the legal rights of the creditors in determining whether their interests are sufficiently similar or dissimilar to warrant creditors being placed in the same class or separate class. I agree that it is the legal rights of the creditors that must be considered and that other external matters that could influence the interests of a creditor are not to be taken in account. However, it is my view that the legal rights should not be considered in isolation and that they must be considered within the context of the provisions of the reorganization plan. **It would be appropriate to segregate two sets of creditors with similar legal interests into separate classes if the plan treats them differently.** Conversely it may be appropriate to include two sets of creditors with different legal rights in the same class if the plan treats them in a fashion that gives them a commonality of interest despite their different legal rights. In addition, when the Court is assessing whether there is a sufficient commonality of interest to include two sets of creditors in the same class, it is necessary in my view to examine their

---

[70] *Woodward's Ltd.*, 1993 CanLII 870 (BC SC): Book of Authorities of the M&K Responding Landlords, Tab 10.
[71] *Woodward's Ltd.*: Book of Authorities of the M&K Responding Landlords, Tab 10.
[72] *Woodward's Ltd.*, at page 8: Book of Authorities of the M&K Responding Landlords, Tab 10.

> legal rights within the context of the potential failure of the reorganization plan. **The treatment of the two sets of creditors under the plan should be compared to the rights they would have in the event of the failure of the plan (i.e., bankruptcy or other liquidation).** (emphasis added)

112. There is no doubt that landlords with Parent Guarantees and claims against Zellers have significantly different legal rights than all other creditors and the treatment of these landlords vis à vis other creditors under the Plan are at odds. In fact, the entirety of the proposed distribution of funds to other creditors under the Plan is at the expense of these landlords' rights. It is submitted that the structure of the Plan demands separate classification.

113. Although separate classification for landlords with Parent Guarantees would not address the deficiencies with the Plan, it is further evidence of Target Canada's complete failure to consider the differing rights of creditors and the historical dealings of the parties over the past 11 months.

Unjustified Third Party Releases

114. The current jurisprudence confirms that the *CCAA* permits the inclusion of third party releases in plans of arrangement *where those releases are reasonably connected to the proposed restructuring*. This principle was succinctly set out by the Ontario Court of Appeal in the leading case of *Re Metcalfe & Mansfield Alternative Investment II Corp.*[73] and the cases that have consistently followed it.

115. It is equally well established that not all third party releases may be made the subject of a compromise or arrangement. To be acceptable, there must be a nexus between the

---

[73] *Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 92 O.R. (3d) 513 (C.A.) ["*Metcalfe*"]: Book of Authorities of the M&K Responding Landlords, Tab 11.

third parties being released and the restructuring of the debtor. In order to allow the inclusion of a third party release in a proposed plan of compromise, the court must be satisfied that: [74]

(1) the parties to be released are necessary and essential to the restructuring of the debtor;

(2) the claims to be released are rationally related to the purposes of the proposed plan and necessary for it;

(3) the proposed plan cannot succeed without the third party releases;

(4) the parties who are to have claims against them released are contributing in a tangible and realistic way to the proposed plan; and

(5) the plan will benefit not only the debtor but the creditors.

116. It is not enough, therefore, for the releases to be "necessary" to the affected third parties in the sense that the third party or the debtor would not proceed without them. Rather, the release of the third party must be justified as part of the compromise or arrangement between the debtor and the creditors.[75] According to the court in *Metcalfe:*

"...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."[76]

117. The *Metcalfe* case itself provides a good example of how the nexus principle stated above has been applied.

118. *Metcalfe* was concerned with a creditor-initiated restructuring plan put forward by a group of investors dealing in the $32 billion Canadian market in Asset Backed

---

[74] *Metcalfe* at para. 70: Book of Authorities of the M&K Responding Landlords, Tab 11.
[75] *Metcalfe* at para. 69: Book of Authorities of the M&K Responding Landlords, Tab 11.
[76] *Metcalfe* at para. 70: Book of Authorities of the M&K Responding Landlords, Tab 11.

Commercial Paper ("ACBP"). The proposed plan in *Metcalfe* included releases of "virtually all participants in the Canadian ABCP market including: Canadian banks, Dealers, Noteholders, Asset Providers, Issuer Trustees, Liquidity Providers and other market participants."[77]

119. The proceeding in *Metcalfe* was unique in that the "insolvency is of the ABCP market itself, the restructuring is that of the market for such paper".[78] In that context, the court found that the participation of the third parties to be released was "vital to the restructuring, and [they] have made comprehensive releases a condition for their participation."[79] Without their future participation the Canadian ABCP market would literally cease to exist. The court thus justifiably permitted a plan that included such third party releases.

120. Although there are a myriad of judicial decisions that follow the principle set out in *Metcalfe* there are two decisions that deal with the proposed release of contractual rights as against third parties that are instructive. Both decisions apply the *Metcalfe* principles consistently but come to different outcomes based on their facts. Both decisions were rendered by Mr. Justice Étienne Parent of the Quebec Superior Court and both decisions deal with the proposed release of sureties under labour and material payment bonds issued to the debtor in the context of construction projects.

---

[77] *Metcalfe* at para. 29: Book of Authorities of the M&K Responding Landlords, Tab 11.
[78] *Metcalfe* at para. 56: Book of Authorities of the M&K Responding Landlords, Tab 11.
[79] *Metcalfe* at para. 32: Book of Authorities of the M&K Responding Landlords, Tab 11.

121. The first of those cases *Re Charles-Auguste Fortier Inc.*[80] decided in 2008 in the context of a *CCAA* restructuring.

122. The debtor in *CAF* was a contractor involved primarily in public works projects including aqueduct, sewer and road construction. The debtor's insolvency was triggered by the failure of a major highway extension project in which it was involved. That project represented half of the debtor's business revenues. Its plan of arrangement contemplated that it would restructure and continue its operations as a going-concern.

123. A necessary requirement of the debtor's continued viability in *CAF* was the debtor's need to obtain both Performance Bonds and Labour and Material Bonds as a condition of its construction contracts for public works projects. In the context of the project that ultimately led to its *CCAA* proceedings, the debtor obtained both a Performance Bond and a Labour and Materials Bond from an insurer named AXA Assurances Inc.("**AXA**")

124. Very generally, certain creditors of the debtor were entitled to claim against the AXA bonds on the event of default by the debtor under its construction project.[81] In exchange for its participation in the proposed plan – ie providing the necessary performance bonds for future projects, AXA required that creditors who benefit from the Labour and Material Bonds

---

[80] *Re Charles-Auguste Fortier Inc.* 2008, QCCS 5398 [*CAF*]: Book of Authorities of the M&K Responding Landlords, Tab 12.

[81] Typically, the beneficiary of a Performance Bond is the owner of the development and although it is not a party to the Performance Bond it is referred to by name as the Obliger. It would be entitled to make a claim on its own behalf in the event that the contractor defaults under the construction contract. The beneficiaries under a Labour and Material Payment Bond are typically subcontractors and suppliers although they are not named in the bond itself. In Labour and Material Payment Bonds it is typical for the owner of the development to be named as the Obligor and it would make claims against the bond as trustee for the beneficiaries.

reduce their claims to 85% of their value. The proposed plan of arrangement in *CAF*, therefore, contemplated a partial release in favour of AXA in that respect.

125. The evidence before the court in *CAF* included:

(1) that AXA would not participate in the proposed plan without the partial releases being sought (i.e. it would not furnish any further bonds); and

(2) that the viability of the proposed plan required that the debtor be able to obtain performance and labour and material payment bonds.

126. Following the reasoning in *Metcalfe,* the court in *CAF* permitted the inclusion of the partial release of AXA on the basis that:[82]

(1) the party seeking the releases was playing a central role in the plan of arrangement proposed by the debtor;

(2) the plan of arrangement (i.e. the going-concern nature of the plan) would fail if the releases are not granted;

(3) the party benefitting from the releases, which were partial releases in the present case, will contribute significantly to the plan of arrangement;

(4) the plan of arrangement was beneficial not only to the debtor but to all creditors;

(5) the creditors who presented themselves as the time of the acceptance of the plan were fully informed of the release given to AXA; and

(6) the partial releases which were granted were fair and reasonable and did not go against public order.

127. Although there is good reason to doubt the correctness of the court's finding in *CAF* that the *CCAA* permits the compromise of guarantees, even if one assumes such to be the case, Target Canada has not met the criteria enumerated by the court in *CAF* for the compromise of guarantees and the inclusion of third party release.

---

[82] *CAF* at para. 41: Book of Authorities of the M&K Responding Landlords, Tab 12.

128. The very limited circumstances under which third party releases affecting guarantees may be granted was confirmed by Mr. Justice Parent in his 2010 decision in *CFG Construction Inc.*[83] In *CFG* Mr. Justice Parent again dealt with proposed releases of sureties under construction bonds. This time he came to the conclusion that the third party releases would not be warranted (he assumed that they were generally permitted in a BIA proposal).

129. A significant factual distinction between *CAF* and *CFG* is that the debtor in *CFG* did not intend to continue in the construction business where sureties would be necessary. Mr. Justice Parent wrote as follows at paragraphs 87 to 92 of his decision:[84]

> [87] The situation of CFG in respect of the guarantors AXA and Jevco have nothing in common with the situation analyzed by the undersigned in Charles-Auguste Fortier.
>
> [88] Remember that the reorganization in that business was in virtue of the CCAA. AXA in that case played a crucial role not only during the period of restructuring, but also with the continuation in business of the enterprise.
>
> [89] AXA guaranteed the obligations of this debtor to the lender in a temporary fashion and took additional important risks and accepted to provide sureties and bonds in the continuation of its future business.
>
> [90] The creditors envisioned by the release in favour of AXA voted almost unanimously in favour of this so that they could continue to do business with the debtor for other contracts.
>
> [91] In the present case, the bonded creditors cannot count on future contracts to reduce their losses. This explains why many opposed the approval of the proposal and retained the services of lawyers would will represent them at the hearing.

---

[83] *CFG Construction Inc.* 2010 QCCS 4643 [*CFG*]: Book of Authorities of the M&K Responding Landlords, Tab 13. The *CFG* case related to third party release in a *BIA* proposal. The reasons however, are of general application to the consideration that must be given when determining whether third party releases should or should not be permitted.

[84] Unofficial Translation

> [92] Thus notwithstanding the consequences of refusing to approve the proposal, the Court cannot find reasons justifying the release of the guarantors AXA and Jevco assuming this would be possible under the BIA.

130. The decisions that have permitted the inclusion of third party releases in CCAA plans have the following factors in common: first, the plan contemplates the continuation of the insolvent enterprise; second, the parties seeking releases contribute significantly to the plan (i.e. the ongoing operations); third, the parties seeking releases contributed to the ongoing operations of the insolvent enterprise gives rise to a certain amount of risk to them; and fourth, the parties seeking releases would not have contributed to the ongoing operations unless they are provided releases in the plan. Without their participation, the plan would have failed; in other words, the ongoing operations of the insolvent enterprise would not be possible. The court in *Metcalfe* described the releases of the third parties a "*quid pro quo*" for their continued participation in the going-concern.[85]

131. It is respectfully submitted that Target Canada cannot establish any of the factors that typically exist to support the third party releases being sought. First, the proposed Plan does not contemplate the continuation of Target Canada as a going concern. Therefore the *viability* of the Plan is not in jeopardy.[86] Second, the third party Zellers is not making any contribution to the proposed Plan whatsoever. Third, although Target Corp. has agreed to

---

[85] Metcalf at paragraph 30: Book of Authorities of the M&K Responding Landlords, Tab 11.

[86] A distinction should be drawn here between the situation where a proposed plan is not *viable* (i.e. because it could not be completed) and the situation where a proposed plan is viable but unacceptable to voting creditors. A third party release could be permitted where the *viability* of the proposed plan is at stake. If its viability is not at stake, a third party release should not be permitted.

subordinate a portion[87] of its claim to the benefit of all other creditors (even those unaffected by guarantees or the third party releases), landlords whose leases were assigned will receive no consideration or benefit from Target Corp. in exchange for the release of the third parties. Fourth, the Third Party Releasees would not be subject to any further risk in the proposed Plan (insofar as they are not investing in a going concern business).

132. For the forgoing reason, it is respectfully submitted that this Honourable Court should not permit the inclusion of any third party releases being sought in the proposed Plan.

Other Factors to Consider

133. Another important factor required for the inclusion of third party releases is whether the creditors were made aware of the proposed third party release in the plan and whether and to what extent they voted in favour of the plan with full knowledge.[88] Such an analysis implies that all parties affected by the proposed third party releases would have an opportunity to participate in the vote for the plan. Such is not the situation in the case at bar.

134. For example, some landlords whose leases were assigned by Target Canada retained their contractual rights to claim from Target Corp. under a Parent Guarantee or from Zellers as original convenantor for any losses that the landlords may suffer if the assignee should breach the leases. Given the potential exposure to them in the event of a default of the assignee, landlords have submitted proofs of claim to the Monitor. The Monitor rejected the landlords' claim on the basis that they had fully mitigated their losses. As such, these landlords are not entitled to vote in respect of the proposed Plan.

---

[87] The "value", if any, of this subordinated debt has not yet been established (the Notice of Objection Bar Date" for creditors to object to intercompany claims was extended to February 12, 2016).

[88] See *Metcalfe* at paras 33 to 35; *CAF* at pars 48 to 50: Book of Authorities of the M&K Responding Landlords, Tabs 11 and 12.

135. Notwithstanding their inability to participate in the vote, the proposed Plan proposes to release Zellers and Target Corp. thereby extinguishing these landlords' right to assert their contractual claim against them.

Failure to Provide Crucial Information

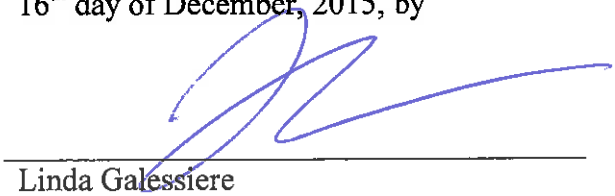
136. The Monitor and Target Corp. have refused to provide crucial information regarding the settlement with RioCan and the voting of RioCan's claim to Target Canada's creditors, which information will assist all parties in evaluating the suitability of the Plan.

137. It is submitted that Target Corp. is obligated to provide information that will affect the Plan and distributions to be made thereunder both in its capacity as Plan Sponsor and as a party requesting that the court exercise discretionary powers in its favour.

PART IV – ORDER REQUESTED

138. The M&K Responding Landlords respectfully request that Target Canada's motion be dismissed.

All of which is respectfully submitted this 16th day of December, 2015, by



Linda Galessiere
McLean & Kerr LLP
Lawyers for the M&K Responding Landlords

SCHEDULE A

Schedule "A"

1. *Rules of Civil Procedure*, R.R.O 1990, Reg. 194 as amended,

Rule 37.14 and 59.06.

2. The *Companies' Creditors Arrangement Act*, R.S.C. 1985, c.C-36, AS AMENDED

Section 20(1)(iii):

> 20. (1) Determination of amount of claims - For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor is to be determined as follows:
>
> (a) the amount of an unsecured claim is the amount
> ....
> (iii) in the case of any other company, proof of which might be made under the Bankruptcy and Insolvency Act, but if the amount so provable is not admitted by the company, the amount is to be determined by the court on summary application by the company or by the creditor; and ...

Section 22.2 (2):

> (2) **Factors** – 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.

(5) An order of the Court of Appeal shall be entered not only in the office described in subrule (3) but also in the office of the Registrar of the Court of Appeal.

(6) The certificate of the Registrar of the Supreme Court of Canada in respect of an order made on an appeal to that court shall be entered by the local registrar at Toronto and by the registrar in the office where the action or application was commenced, and all subsequent steps may be taken as if the order had been made in the court from which the appeal was taken.

O. Reg. 61/96, s. 4; 55/12, s. 5

Case Law

Brunelle v. Brunelle, [1964] 1 O.R. 113 (H.C.)

A party may compel the solicitor of an opposing party to enter any signed judgment in his possession, notwithstanding any solicitor's lien.

Pearson v. Park Plaza Corp., [1961] O.W.N. 22 (Master)

A *praecipe* order must be entered.

AMENDING, SETTING ASIDE OR VARYING ORDER

Amending

59.06 (1) An order that contains an error arising from an accidental slip or omission or requires amendment in any particular on which the court did not adjudicate may be amended on a motion in the proceeding.

Setting Aside or Varying

(2) A party who seeks to,

(a) have an order set aside or varied on the ground of fraud or of facts arising or discovered after it was made;

(b) suspend the operation of an order;

(c) carry an order into operation; or

(d) obtain other relief than that originally awarded,

may make a motion in the proceeding for the relief claimed.

Case Law

Change of Disposition Prior to Issuance of Order

Griffin v. Dell Canada Inc., 2009 CarswellOnt 2085, [2009] O.J. No. 1592, 76 C.P.C. (6th) 173, 64 B.L.R. (4th) 186 (S.C.J.); affirmed 2010 ONCA 29, 2010 CarswellOnt 177, [2010] O.J. No. 177, 98 O.R. (3d) 481, 315 D.L.R. (4th) 723, 259 O.A.C. 108, 64 B.L.R. (4th) 199, 80 C.P.C. (6th) 154 (C.A.); additional reasons 2010 ONCA 164, 2010 CarswellOnt 1192 (C.A.); leave to appeal refused 2010 CarswellOnt 3417, 2010 CarswellOnt 3418, [2010] S.C.C.A. No. 75, 409 N.R. 378 (note), 275 O.A.C. 398 (S.C.C.)

The court has broad discretion to reconsider a decision before judgment is formally entered. In this case, the court refused to alter its earlier decision based on a new appellate court decision.

Montague v. Bank of Nova Scotia (2004), 69 O.R. (3d) 87, 2004 CarswellOnt 11, 2004 C.L.L.C. 210-027, 30 C.C.E.L. (3d) 71, 180 O.A.C. 381 (C.A.); leave to appeal

Terms of Adjournment

Staiman Steel Ltd. v. Struxcon Ltd. (1989), 38 C.P.C. (2d) 136 (Ont. H.C.)

On the adjournment of a motion for summary judgment the court imposed a term that the defendant pay $100,000 into court.

Ordering Trial of an Issue — rule 37.13(2)(b) (See also cases under rule 38.10.)

Shepley v. Libby McNeil & Libby of Can. Ltd. (1979), 23 O.R. (2d) 354, 9 C.P.C. 201 (Div. Ct.)

The court has no jurisdiction to order the trial of an issue where a jury notice is outstanding.

Ball v. New York Central Railroad Co., [1954] O.W.N. 41, 71 C.R.T.C. 132 (H.C.)

The trial of an issue should be directed only to decide a matter collateral to and necessary for a decision on the motion in which the issue is directed.

McCaw v. Eames, [1948] O.W.N. 774 (H.C.)

Discussion of the jurisdiction of a local judge to direct a trial of an issue. [*But see now rules 38.02, 38.10(1) - Authors.*]

Shields v. The London and Western Trusts Co., [1924] S.C.R. 25, [1924] 1 D.L.R. 163

The ordering of the trial of an issue is in the discretion of the judge of first instance.

Conduct of Hearing of Motion

Re Ferguson and Imax Systems Corp. (1984), 47 O.R. (2d) 225, 44 C.P.C. 17, 52 C.B.R. (N.S.) 255, 11 D.L.R. (4th) 249, 4 O.A.C. 188 (Div. Ct.)

The court may impose a time limit for oral argument in a proper case.

Miscellaneous

Kulas (Litigation Guardian of) v. Markis (1999), 46 O.R. (3d) 360, 1 M.V.R. (4th) 81, 1999 CarswellOnt 4206 (S.C.J.)

A motion under s. 266(3) of the *Insurance Act* regarding whether the plaintiff meets the threshold to bring an action, may be converted to a motion for judgment under rule 37.13(2)(a) in which case the issue is decided on the balance of probabilities. rule 20, and its genuine issue for trial test, do not apply.

CMLQ Investors Co. v. CIBC Trust Corp. (1996), 39 C.P.C. (4th) 62 (Ont. C.A.)

The court converted a motion for directions for a trial to a motion for judgment where there was a full evidentiary base and the parties had a full opportunity to argue their positions.

SETTING ASIDE, VARYING OR AMENDING ORDERS

Motion to Set Aside or Vary

37.14 (1) A party or other person who,

(a) is affected by an order obtained on motion without notice;

(b) fails to appear on a motion through accident, mistake or insufficient notice; or

(c) is affected by an order of a registrar,

may move to set aside or vary the order, by a notice of motion that is served forthwith after the order comes to the person's attention and names the first

available hearing date that is at least three days after service of the notice of motion.

(2) On a motion under subrule (1), the court may set aside or vary the order on such terms as are just.

Order Made by Registrar

(3) A motion under subrule (1) or any other rule to set aside, vary or amend an order of a registrar may be made to a judge or master, at a place determined in accordance with rule 37.03 (place of hearing of motions).

Order Made by Judge

(4) A motion under subrule (1) or any other rule to set aside, vary or amend an order of a judge may be made,

(a) to the judge who made it, at any place; or

(b) to any other judge, at a place determined in accordance with rule 37.03 (place of hearing of motions).

Order Made by Master

(5) A motion under subrule (1) or any other rule to set aside, vary or amend an order of a master may be made,

(a) to the master who made it, at any place; or

(b) to any other master or to a judge, at a place determined in accordance with rule 37.03 (place of hearing of motions).

Order Made in Court of Appeal or Divisional Court

(6) A motion under subrule (1) or any other rule to set aside, vary or amend an order made by a judge or panel of the Court of Appeal or Divisional Court may be made,

(a) where the order was made by a judge, to the judge who made it or any other judge of the court; or

(b) where the order was made by a panel of the court, to the panel that made it or any other panel of the court.

O. Reg. 132/04, s. 9

Cross-Reference: See also cases under rule 38.11 and rule 39.01(6).

Case Law

Authors' Note on Organization of Cases:

Cases relevant to rule 37.14 have been organized as follows:

Setting Aside, Varying or Amending Orders — Generally — p. 926
Setting Aside, Varying or Amending Orders — Examples — p. 927
Setting Aside Registrar's Orders — Generally — p. 929
Setting Aside Registrar's Orders — Examples — p. 929

Setting Aside, Varying or Amending Orders — Generally

Strugarova v. Air France, 2009 CarswellOnt 4575, [2009] O.J. No. 3267, 82 C.P.C. (6th) 298 (S.C.J.); leave to appeal refused (October 20, 2009), Doc. Toronto 472/09, 484/09, 2009 CarswellOnt 6462 (Div. Ct.)

The court discussed the principles to be considered in exercising its discretion to re-open a motion after an order has been made.

SCHEDULE B

Schedule "B"

1. *Kerr* v. *Danier Leather Inc.* (2005), 76 O.R. (3d) 354 (S.C.J).

2. *Robertson* v. *Robertson* (1975), 8 O.R. (2d) 253 (H.C.).

3. *Imperial Roadways Ltd.* v. *C.P. Ltd.* (1982), 28 C.P.C. (5th) 222 (Ont. H.C.).

4. *Moyer* v. *Moyer* (1980), 30 O.R. (2d) 698 (Surr. Ct.).

5. *Monarch Construction Ltd.* v. *Buildevco Ltd.* (1988), 26 C.P.C. (2d) 164 (Ont. C.A.).

6. *Hall v. Durham Catholic District School Board* (2005), 80 O.R. 3d, 462.

7. *Muscletech Research and Development Inc., Re*, 2006, ONSC (Canlii 1020).

8. *York (Regional Municipality) v. Thornhill Green Co-Operative Homes Inc.*2009, ONSC (Commercial List).

9. Extreme Retail - Endorsement of Justice Hoy dated September 23-24, 2009.

10. *Woodward's Ltd.*, 1993 CanLII 870 (BC SC).

11. *Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 92 O.R. (3d) 513 (C.A.).

12. *Re Charles-Auguste Fortier Inc.* 2008, QCCS 5398.

13. *CFG Construction Inc.* 2010 QCCS 4643.

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c.C.36 as am.
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

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

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at TORONTO

FACTUM
OF THE M&K RESPONDING LANDLORDS
Morguard Investments Limited, Crombie REIT, Triovest Realty Advisors Inc. and SmartREIT (formerly Calloway Real Estate Investment Trust)

McLEAN & KERR LLP
Barristers & Solicitors
130 Adelaide Street West, Suite 2800
Toronto, ON M5H 3P5

Linda Galessiere / LSUC#: 34678A
Tel: 416-369-6609
Email: lgalessiere@mcleankerr.com

Gus Camelino/LSUC#: 45607S
Tel: 416-369-6621
Email: gcamelino@mcleankerr.com

Lawyers for Morguard Investments Limited, Crombie REIT, Triovest Realty Advisors Inc. and SmartREIT (formerly Calloway Real Estate Investment Trust)