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

RESPONDING FACTUM OF KINGSETT CAPITAL INC.

(Plan Filing Motion Returnable December 21, 2015)

December 16, 2015

LAX O'SULLIVAN LISUS GOTTLIEB LLP
Counsel
Suite 2750, 145 King Street West
Toronto, ON M5H 1J8

Matthew P. Gottlieb LSUC#: 32268B
mgottlieb@counsel-toronto.com
Tel: 416 644 5353

Andrew Winton LSUC#: 54473I
awinton@counsel-toronto.com
Tel: 416 644 5342

Laura M. Wagner LSUC#: 60319Q
lwagner@counsel-toronto.com
Tel: 416 645 5076

Fax: 416 598 3730

Lawyers for KingSett Capital Inc.

TO: SERVICE LIST

PART I - INTRODUCTION

1. In this motion the Applicants ("Target Canada") seek an Order allowing them to file a Plan that (i) violates this Court's orders; (ii) breaches agreements between Target Canada and its landlords; and (iii) values landlords' claims at amounts that are not related to their actual damages.

2. At the outset of this proceeding, Target Canada, its US parent ("Target US"), and Target Canada's landlords agreed that any landlord's claim against Target US in relation to a guarantee of Target Canada's leases ("Landlord Guarantee Claims") would not be affected by any plan of arrangement filed by Target Canada. In exchange, several landlords with Landlord Guarantee Claims, including KingSett Capital Inc. ("KingSett"), agreed to withdraw their opposition to Target Canada proceeding with a liquidation under the CCAA and the proposed real property sales process (the "RPPSP").

3. This binding agreement was reached after extensive negotiations between the parties, in consultation with the Monitor, and was then incorporated into paragraph 19A of the Amended and Restated Initial Order (the "Amended Order"). The Monitor supported the agreement and amendment to the Initial Order and told the Court it was "a fair and reasonable balancing of interests".

4. Now, ten months later, having received the benefit of the landlords not opposing the RPPSP and the continuation of the CCAA, Target Canada has taken the position that the agreement and Amended Order should not bind it or Target US. It seeks the Court's approval to unequivocally renege on the agreement and violate the Amended Order by filing a Plan that compromises Landlord Guarantee Claims at a fraction of their true value. This attempt is completely unprecedented and wholly inappropriate.

5. The proposed Plan also violates the Amended Order and the Claims Procedure Order (that was also arrived at through extensive negotiations and with the support of the Monitor) by purporting to value the landlords' claims, including all Landlord Guarantee Claims, using a formula. The Applicants do this notwithstanding that (i) the Claims Procedure Order provides that all disputed claims shall be adjudicated by a Claims Officer or the Court, and (ii) paragraph 19A of the Amended Order and paragraph 55 of the Claims Procedure Order provide, expressly, that Landlord Guarantee Claims will not be compromised and the claims "shall be determined by a Judge of the [Commercial List]".

6. The undisputed evidence on this motion is that KingSett has a claim against Target Canada as a result of its disclaimer of a long-term lease, guaranteed by Target US, of at least $26 million and that the Plan values KingSett's claim at $4.1 million, plus taxes. The Plan, contrary to the Court Orders and the parties' agreement, prohibits KingSett from pursuing the guarantee from Target U.S.

7. Target Canada has taken the extraordinary position that reneging on agreements and violating Court orders is a "procedural" matter with a "low threshold" for Court approval. That is obviously incorrect. It is a matter of utmost importance in this proceeding, CCAA proceedings generally and this Court's process that this Court enforce the terms of its previous orders and the terms of agreements to parties to a CCAA proceeding by rejecting the filing of the Plan and dismissing the Applicants' motion.

8. Further, and this point will be dealt with by other landlords' counsel, there is no basis or authority for Target US being granted a release in these circumstances.

9. This Court cannot and should not allow a plan to be filed that violates this Court's Orders and agreements made by the Applicants. If the motion is granted, the message will be conveyed that, in CCAA proceedings, there can be no assurance that the Court will:

(a) enforce third party guarantees;

(b) enforce agreements entered into by CCAA applicants after they apply for CCAA protection;

(c) enforce its own orders if it proves convenient not to do so; and,

(d) prevent CCAA applicants and the Monitor from "changing their minds" mid-proceeding, which means creditors cannot rely on agreements with applicants, or the position of the Monitor, at any time in the course of a proceeding.

10. If the motion is granted, the CCAA will no longer allow for a reliable process pursuant to which creditors can expect to negotiate with an applicant in good faith. The amendment of the Initial Order to buttress the agreement between the parties not to compromise Landlord Guarantee Claims in this proceeding was intended to strengthen, not weaken, the landlords' ability to enforce Target Canada's and Target US's contractual obligation not to file a plan that compromises Landlord Guarantee Claims. It would be a perverse outcome if this Court holds otherwise.

11. Target Canada's motion stretches the elasticity of the CCAA beyond its breaking point. The motion must be dismissed to preserve the commercial integrity of the CCAA and this Court's process.

PART II - SUMMARY OF FACTS

A. The Amended Order Reflects an Extensively Negotiated Agreement

12. On January 15, 2015, Target Canada obtained an *ex parte* Initial Order under the CCAA which, among other things, (i) granted a stay of proceedings in respect of Target Canada until February 13, 2015 (the "Stay Period"); (ii) granted a stay of proceedings in respect of Target US and its direct and indirect subsidiaries (other than Target Canada), also until February 13, 2015 (the "Parent Stay"); and (iii) scheduled a full comeback hearing for February 11, 2015.[1]

13. Regional Senior Justice Morawetz's endorsement dated January 16, 2015 acknowledged that there were "many aspect of the Initial Order that go beyond the usual first day provisions", and provided that "[t]he comeback hearing is to be a 'true' comeback hearing" in which the parties could move to set aside or vary any provisions of the order, including by challenging the "broad nature of the stay" extended to Target US.[2]

14. In its motion materials in support of the Initial Order, Target Canada set out in detail the financial position of the company, including the existence and value of outstanding intercompany debt and equity.[3]

15. After the Initial Order was granted but before the comeback hearing, Target Canada brought a motion for an order, among other things (a) approving an Agency Agreement, an Inventory Liquidation Process and the RPPSP[4]; and (b) extending the Stay Period from February 13, 2015 to May 15, 2015 (the "Motion for Process Approval and Stay Extension Orders").

---

[1] Initial Order of RSJ Morawetz dated January 15, 2015.
[2] Endorsement of Morawetz RSJ January 16, 2015, at ¶49-50, 81-82.
[3] Affidavit of Mark J. Wong dated January 14, 2015 (the "Wong January 14 Affidavit"), at ¶150, 154.
[4] Each as defined in the Affidavit of Mark J. Wong, sworn January 29, 2015.

16. The Motion for Process Approval and Stay Extension Orders was met with considerable opposition from the landlords. KingSett and certain other landlords filed opposition materials:

(a) expressing significant concerns about the appropriateness of the CCAA process in light of the fact that Target Canada was undergoing a liquidation, not a restructuring or reorganization;

(b) arguing that the proposed RPPSP prejudiced their rights as landlords and should not be controlled by Target Canada, which had no ongoing independent interests; and

(c) submitting that it was premature to grant a stay extension given that the comeback hearing was scheduled for February 11, 2015, at which time creditors may seek to have the CCAA liquidation process terminated in favour of a proceeding under the BIA.[5]

17. KingSett was particularly concerned that Target US intended to use the CCAA process to compromise Landlord Guarantee Claims. KingSett intended to vehemently oppose the CCAA proceeding at the comeback motion scheduled for February 11, 2015.[6] Other landlords were similarly concerned.[7] The landlords were also concerned about the manner in which Target

[5] Outline of Submissions of RioCan Management Inc. and Certain of Its Affiliates and KingSett Capital Inc. and Certain of Its Affiliates (Motion for Process Approval and Stay Extension Orders) dated February 4, 2015; Responding Factum of the Cadillac Fairview Corporation Limited and Its Affiliates (Motion for Process Approval and Stay Extension Orders) dated February 3, 2015. *See also* Outline of Submissions of RioCan and KingSett (Motion Returnable February 11, 2015) dated February 10, 2015.

[6] Affidavit of Theresa Warnaar, sworn December 10, 2015 ("Warnaar Affidavit"), at ¶8 [Responding Motion Record of KingSett Capital Inc. ("KRMR"), Tab 1].

[7] Affidavit of Scott MacDonald sworn December 8, 2015 ("MacDonald Affidavit"), at ¶6-7 [Responding Motion Record of the Respondents Morguard Investments Limited, Crombie REIT, Triovest Realty Advisors Inc. and SmartREIT (formerly Calloway Real Estate Investment Trust ("MRMR"), Tab 1]; Affidavit of Fred Santini sworn December 8, 2015 ("Santini Affidavit"), at ¶5-6 [MRMR, Tab 2].

Canada proposed to liquidate its inventory and to offer for sale and sell its real property leases as part of the proposed RPPSP.[8]

18. In late January and early February 2015, Target Canada and Target US, with input from the Monitor, entered into intense negotiations with KingSett and other landlords (the "Landlord Group"), to address and try to resolve the landlords' concerns.[9] During these negotiations, the parties exchanged proposed changes to the RPPSP and the Initial Order and ultimately agreed on a compromise to be presented to the Court for approval.[10]

19. As a condition of the Landlord Group withdrawing its opposition to the CCAA proceeding and the revised RPPSP, Target Canada agreed to seek approval of certain changes to the Initial Order in the form of an Amended and Restated Initial Order. The sworn evidence of Mark Wong, Target Canada's own affiant ("Wong"), is that "[t]hese proposed changes were the subject of significant negotiation between the Landlord Group and [Target Canada], with the assistance and input of the Monitor and [Target US]."[11] The proposed changes were agreed to by Target US (as its guarantees were a critical component of the deal) and supported by the Monitor.[12]

20. The proposed Amended Order included two key provisions to secure the agreement of the Landlord Group:

(a) A carve out at the end of paragraph 19, which clarifies that the Parent Stay does not apply to Landlord Guarantee Claims; and

---

[8] MacDonald Affidavit, at ¶8; Santini Affidavit, at ¶7.
[9] Warnaar Affidavit, at ¶8; Supplemental Affidavit of Mark J. Wong, sworn February 9, 2015 (the "Wong February 9 Affidavit"), at ¶8-10.
[10] Wong February 9 Affidavit, at ¶11-12, 22.
[11] Wong February 9 Affidavit, at ¶22.
[12] Wong February 9 Affidavit, at ¶23.

(b) The addition of paragraph 19A to specifically address treatment of Landlord Guarantee Claims. In particular, paragraph 19A provides:

> 19A. 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, including, without limitation, the validity, enforceability or quantum of such Landlord Guarantee Claims: (a) shall be determined by a judge of the Ontario Superior Court of Justice (Commercial List),** whether or not the within proceeding under the CCAA continue (without altering the applicable and operative governing law of such indemnity, guarantee or surety) and notwithstanding the provisions of any federal or provincial statutes with respect to procedural matters relating to the Landlord Guarantee Claims; provided that any landlord holding such guarantees, indemnities or sureties that has not consented to the foregoing may, within fifteen (15) days of the making of this Order, bring a motion to have the matter of the venue for the determination of its Landlord Guarantee Claim adjudicated by the Court; **(b) shall not be determined, directly or indirectly, in the within CCAA proceedings;** (c) 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 Target Canada Entities, whether made in the within proceedings under the CCAA or in any subsequent proposal or bankruptcy proceedings under the BIA, other than that any recoveries under such proceedings received by such landlords shall constitute a reduction and offset to any Landlord Guarantee Claims; and **(d) 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.[13] [Emphasis added.]

21. Critically, paragraph 19A provides that the Landlord Guarantee Claims will not **in any way** be determined or affected by the CCAA proceedings, and that these claims **shall not be affected or released in any Plan filed by Target Canada under the CCAA**. The Monitor noted

[13] Amended and Restated Initial Order of Morawetz RSJ dated February 11, 2015.

in its Second Report that the inclusion of these terms in the Amended Order was a condition to securing the Landlord Group's approval to the RPPSP process.[14]

22. The Monitor's Second Report to the Court recommended approval of the Amended Order:

> The Monitor recommends approval of the Amended and Restated Initial Order as it reflects: (a) **revisions negotiated as among [Target Canada], the Landlord Group and Target US (in conjunction with revisions to the Real Property Portfolio Sales Process),** with the assistance of the Monitor; and (b) **a fair and reasonable balancing of interests.**[15] [Emphasis added.]

23. The Amended Order, as agreed to by the parties, was granted by Regional Senior Justice Morawetz at the comeback motion.[16] The Court also approved a revised RPPSP, as agreed to by the parties, and extended the Stay Period until May 15, 2015.[17] No party sought leave to appeal the Amended Order.

B. Target Canada Disclaimed Most of its Leases During or After the RPPSP Process

24. Following the Court's approval of the RPPSP, approximately 360 prospective parties were contacted to solicit interest in the process and asked to submit letters of intent by March 5.[18] Parties who submitted LOIs were provided access to additional due diligence materials and then asked to "Qualified Bids" by April 23 (the "Qualified Bid Deadline").[19]

---

[14] Second Report of the Monitor dated February 9, 2015 ("Monitor's Second Report"), at ¶3.4.
[15] Monitor's Second Report, at ¶3.5.
[16] Amended and Restated Initial Order of Morawetz RSJ dated February 11, 2015.
[17] Order Approving Real Property Portfolio Sales Process and Extending the Stay Period, February 11, 2015. The Stay Period was further extended until August 14, November 15 and December 11, 2015, and most recently until February 12, 2016.
[18] Affidavit of Mark J. Wong, sworn May 4, 2015 (the "Wong May 4 Wong Affidavit"), at ¶44-45.
[19] Wong May 4 Affidavit, at ¶50-51, 54.

25. As a result of the RPPSP, Target Canada completed transactions in respect of 62 store leases. The store leases were assigned/transferred to various large retailers, including Canadian Tire, Lowe's, Wal-Mart and Rona Inc., or surrendered to their respective landlords.[20]

26. Target Canada disclaimed the leases for the remaining 75 stores.[21] All of the leases that were disclaimed shortly after the Qualified Bid Deadline were leases that did not receive Qualified Bids or any indication from Target Canada's advisors of other solutions for the premises.[22]

C. The Disclaimer of the Place Vertu Lease

27. KingSett or its affiliates was a landlord to Target Canada with respect to six Target stores. Five of those leases were assigned as part of the RPPSP.[23]

28. The unassigned lease is in respect of leased premises in "Place Vertu", a mall located in the Province of Québec (the "Place Vertu Lease" or the "Lease"). The Place Vertu Lease commenced on December 1, 2007 and expires on November 30, 2022. The leased premises were comprised of 121,103 square feet of leasable area. The Lease required Target Canada to operate a department store at Place Vertu until the end of October 2017 (the "Covenant to Open").[24]

29. The Place Vertu Lease is guaranteed by Target US. The guarantee is effective until May 27, 2021.[25]

30. The Place Vertu Lease was disclaimed by Target Canada on April 29, 2015, effective May 29, 2015.[26] By letter dated June 2, 2015, Place Vertu Holdings Inc. (the "Place Vertu Landlord")

[20] Affidavit of Mark J. Wong, sworn August 7, 2015 ("Wong August 7 Affidavit"), at ¶13-14.
[21] Wong August 7 Affidavit, at ¶14.
[22] Wong May 4 Affidavit, at ¶58.
[23] Warnaar Affidavit, at ¶3-4.
[24] Warnaar Affidavit, at ¶5.
[25] Warnaar Affidavit, at ¶6-7 and Exhibit "C".

demanded payment from Target US of all rent and other amounts payable under the Place Vertu Lease by Target Canada. Target US has not paid any such amounts.[27]

D. The Claims Procedure Order Reflects a Negotiated Agreement of the Parties

31. By Notice of Motion dated June 4, 2015, the Monitor brought a motion returnable June 11, 2015 for, among other things, an order establishing and approving a claims process (the "Claims Process"). The Court's endorsement granting the motion noted that the motion was supported by Target Canada and unopposed:

> The motion was unopposed. Target Canada supported the motion. **It is clear that the interested parties worked in a cooperative manner and developed a process which is acceptable to the Court.** The Court is appreciative of those efforts."[28] [Emphasis added.]

32. The order granted by this Court after consultation between the parties (the "Claims Procedure Order") sets out a detailed process for filing and adjudicating claims against Target Canada or its directors and/or officers. Among other things, the Claims Procedure Order provides at paragraph 32 that a claim that is subject to a dispute "shall" be referred to a Claims Officer or the Court for adjudication.

33. The Claims Procedure Order also re-affirmed the agreement between Target Canada, Target US and the Landlord Group with respect to Landlord Guarantee Claims. Paragraph 55 specifically provides that nothing in the Order shall prejudice, limit, bar, extinguish or otherwise affect any rights or claims, including under any guarantee or indemnity, against Target US or any predecessor tenant. The paragraph states explicitly that "[f]or greater certainty, this Order is subject to and shall not derogate from paragraph 19A of the Initial Order".

---

[26] Warnaar Affidavit, at ¶11 and Exhibit "D".
[27] Warnaar Affidavit, at ¶12-13 and Exhibit "E".
[28] Endorsement of Morawetz RSJ dated June 11, 2015.

E. Target Canada and Target US Renege on their Agreement with the Landlord Group

34. On November 27, 2015, Target Canada brought this motion for, among other things, approval to file the Plan and to conduct a creditors' meeting to vote on the Plan.

35. The Plan does not comply with the provisions of the *CCAA* and violates the Amended Order, the Claims Procedure Order and the agreement with the Landlord Group as set out above. In particular, the Plan:

(a) affects and compromises Landlord Guarantee Claims in contravention of paragraph 19A of the Amended Order and the agreement of the parties;

(b) denies landlords with Guaranteed Landlord Claims the right to have those claims determined by a Judge of the Commercial List as agreed and set out in paragraph 19A of the Amended Order and paragraph 55 of the Claim Procedure Order;

(c) denies landlords' their right pursuant to the Claims Procedure Order to have their disputed claims adjudicated on the merits by a Claims Officer or the Court, substituting instead claim valuation via a cookie-cutter "Landlord Formula Amount" that has no bearing on the actual damages suffered by a landlord as a result of Target Canada's disclaimers of its leases;

(d) affects the landlords' voting rights under the Plan by only valuing their claims for voting purposes via the Landlord Formula Amount, without separately tabulating their votes according the disputed value of their proofs of claim (or as determined by a Claims Officer or the Court); and,

(e) establishes a single class of "Affected Creditors" (the "Unsecured Creditors' Class"), notwithstanding that landlords with Landlord Guarantee Claims are being treated differently from creditors without guarantees under the Plan and do not have a commonality of interest with those creditors.

36. Target Canada and Target US planned for months that the proposed Plan would renege on their agreement with the landlords and violate paragraph 19A of the Amended Order and the Claims Procedure Order. Wong admits that at some point after June 2015, Target Canada and Target US discussed a plan in which Target US would agree to subordinate certain intercompany claims in exchange for a global settlement that would include "a settlement and release of all Landlord Guarantee Claims".[29] During August and September 2015, Target Canada negotiated a plan term sheet with Target US that contained proposed terms to compromise Landlord Guarantee Claims pursuant to a cookie-cutter formula.[30] This term sheet was presented to the Monitor on September 11, 2015.[31]

37. Remarkably, the Monitor recommends the Plan be accepted for filing,[32] notwithstanding that the Plan violates two Court orders that were each previously recommended to the Court by the Monitor as a fair and reasonable balancing of interests.

38. Target Canada claims that it has "sought to achieve a fair and equitable balance in the Plan between all of the Affected Creditors and other stakeholders".[33] Yet on November 23, 2015, just days before Target Canada filed its motion, RioCan Real Estate Investment Trust announced that it

[29] Affidavit of Mark J. Wong sworn November 27, 2015 (the "Wong November 27 Affidavit"), at ¶20.
[30] Wong November 27 Affidavit, at ¶21.
[31] Wong November 27 Affidavit, at ¶22-23.
[32] Twenty-Third Report of the Monitor dated November 27, 2015, at ¶9.1.
[33] Notice of Motion (Motion to Accept Filing of a Plan and Authorize Creditors' Meeting to Vote on the Plan), dated November 27, 2015, returnable December 8, 2015.

reached a binding settlement with Target US with respect to its Landlord Guarantee Claims for the 18 guaranteed RioCan leases that were disclaimed by Target Canada.[34] Repeated efforts by counsel for other landlords to obtain particulars of the RioCan settlement from Target US and the Monitor have been rebuffed.[35]

39. Target Canada submits that an essential component of the Plan is the involvement of Target US as "Plan Sponsor" and that if the Plan is approved and implemented, Target US will be making significant economic contributions to the Plan. Target Canada relies on these "significant economic contributions" to justify the full and final release of Landlord Guarantee Claims (in violation of paragraph 19A of the Amended Order and the agreement with the landlords) even though Target US contributes little value to Landlords with Landlord Guarantee Claims.[36]

40. This is simply an attempt by Target US to avoid its obligations to honour the guarantees it granted to landlords and agreed would not be compromised as part of this CCAA proceeding. It now seeks to use leverage as a "Plan Sponsor" against the creditors and this Court to obtain approval to renege on its obligations. It is an economic decision by Target US in its own financial interest.

41. Further, neither the existence nor the value of Target US's intercompany claims against Target Canada is new information. As explained above at paragraph 14, the intercompany claim was anticipated at the outset of this proceeding, before Target Canada and Target US, with the input of the Monitor, negotiated the terms of the Amended Order, and in particular, the agreement with the Landlords enshrined in paragraph 19A.

---

[34] Wong November 27 Affidavit, at ¶29 and Exhibit D.
[35] Santini Affidavit, at ¶18.
[36] In addition, it is important to note that Target US's intercompany claims are still subject to objections by other creditors pursuant to the Claims Procedure Order. The deadline for creditors to file objections to intercompany claims is February 12, 2016.

42. Moreover, the value of Target US's intercompany claims is still subject to determination by this Court. Pursuant to the Claims Procedure Order, as amended by subsequent orders of this Court, the deadline for creditors to object to the valuation of intercompany claims is February 12, 2016, after which the Monitor will bring a motion for directions for the Court to establish a process to resolve creditors' objections to intercompany claims.[37]

F. The Monitor Applied an Unsanctioned Plan Formula in the Claims Process

43. The Place Vertu Landlord has followed the claims process approved by this Court in the Claims Procedure Order. It delivered its proof of claim prior to the deadline established under the Claims Procedure Order (the "Place Vertu Proof of Claim").[38]

44. The following evidence of KingSett on this motion is undisputed and uncontradicted by the Applicants, Target US or the Monitor:

(a) the Place Vertu Lease was marketed to every major "big-box" tenant in Canada, including Wal-Mart, Canadian Tire, Lowes and Sears, as part of the RPPSP;

(b) none of these potential tenants were willing to take over the Lease;

(c) after the Lease was disclaimed by Target Canada, the Place Vertu Landlord directly approached the major big-box retailers, including Costco, Sears, Winners/HomeSense, Sail, Wal-Mart, Brault and Martineau, Urban Planet, Trevi and Vaillancourt, but none of these retailers were interested in taking over the entire space leased by Target Canada;

(d) there is no possibility that the leased premises can be leased to a new anchor tenant;

[37] Claims Procedure Order, ¶37-38.
[38] Warnaar Affidavit, at ¶15 and Exhibit "F".

(e) the leased premises will have to be redeveloped by transforming the approximately 120,000 square-foot store into smaller stores, otherwise the premises will lie vacant for the duration of the Lease's term;

(f) the Place Vertu Landlord is owed $11,422,010.24 on account of rent, common area expenses and realty taxes due to the end of the term of the Place Vertu Lease;

(g) it will cost approximately $16 million to redevelop the leased premises;

(h) in addition, the Place Vertu Landlord anticipates that other tenants will assert co-tenancy claims of approximately $1.9 million that are related to Target Canada's failure to comply with the Covenant to Open; and,

(i) if the leased premises are divided into three, four, or more smaller stores, approximately seven to twelve per cent of the leaseable area will be lost to less efficient store configurations, which will have a long-term negative effect on the value of the Place Vertu property.[39]

45. The Place Vertu Proof of Claim sets out in detail grounds for a total claim of $26,422,010.34, comprised of, among other things:

(a) $6,366,384.71 on account of rent due to the end of the term of the Place Vertu Lease;

(b) $1,128,053.83 on account of common area expenses due to the end of the term of the Place Vertu Lease;

[39] Warnaar Affiadvit, ¶16-19 and 24-26.

(c) $3,927,571.70 on account of realty tax due to the end of the term of the Place Vertu Lease; and,

(d) approximately $15,000,000.00 in respect of costs and expenses associated with re-leasing the leased premises, including, but not limited to, leasehold improvements, construction costs, leasing and brokerage commissions and advertising and legal fees.[40]

46. Again, these facts are not disputed on this motion.

47. On December 1, 2015, the Monitor delivered a "Notice of Revision or Disallowance" to the Place Vertu Landlord that reduced its claim to an amount equal to the "Landlord Formula Amount" proposed by Target Canada in its Plan. This revision resulted in a drastic reduction of the claim, from $26,422,010.34 to $4,108,899. This amount is equivalent to less than three years' rent, maintenance charges and realty taxes on a lease with seven and half years remaining on its term as of the date of disclaimer.[41]

48. The justification for the Monitor's revision of the Place Vertu Landlord's claim is set out in a single paragraph in the Notice of Revision or Disallowance:

> Your claim against Target Canada Co. has been partially disallowed. The Monitor, based on data and information gathered from various sources, is of the view that, on balance, the Landlord Formula Amount (as defined in the Target Canada Entities' Joint Plan of Compromise and Arrangement pursuant to the Companies' Creditors Arrangement Act dated November 27, 2015 (the "Plan") is within the range of reasonableness and has applied such formula

[40] Warnaar Affidavit, at ¶15.
[41] Warnaar Affidavit, at ¶15, 25 and Exhibit "G"; Santini Affidavit, at ¶16; MacDonald Affidavit, at ¶25.

> in calculating your allowed Landlord Restructuring Period Claim (as defined in the Plan).[42]

49. The Monitor's revision of the Place Vertu Landlord's claim drastically undervalues Place Vertu's claim for its actual losses. It is KingSett's uncontested evidence that the Place Vertu Landlord's damages as a result of Target Canada's disclaimer of the Place Vertu Lease include not only rent, common area expenses and realty taxes due to end of the term of the Lease, but also significant costs to redevelop the Leased Properties, potential co-tenancy claims from other tenants in the Place Vertu mall and decreased value of the redeveloped leased premises.[43] The Monitor's application of the Plan Landlord Formula Amount excludes all of these claims without justification for that exclusion.[44] Instead, the Monitor has presumed that the Plan will be accepted for filing and applied the Landlord Formula Amount without any apparent regard for the particulars of the Place Vertu Landlord's damages.

50. For example, it is KingSett's uncontested evidence that it will cost approximately $16,000,000 to redevelop the leased premises into smaller stores and lease them to new tenants.[45] The Landlord Formula Amount excludes these significant re-development costs that it is undisputed will be required for Place Vertu unless the leased premises are left vacant for the duration of the lease.

51. The Monitor's adoption of the Landlord Formula Amount from an unapproved Plan excludes without justification these real and significant costs that will be incurred by the Place Vertu Landlord. The Place Vertu Landlord intends to challenge the Monitor's revision by

[42] Warnaar Affidavit, at ¶26 and Exhibit "G".
[43] Warnaar Affidavit, at ¶19-21.
[44] Warnaar Affidavit, at ¶24, 27.
[45] Warnaar Affidavit, at ¶17-19.

delivering a Notice of Dispute of Revision or Disallowance in accordance with its rights under the Claims Procedure Order issued by this Court.[46]

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

52. KingSett respectfully submits the Court cannot, or in the alternative should not:

(a) accept for filing a Plan that seeks to compromise Landlord Guarantee Claims in violation of Orders of the Court;

(b) accept for filing a Plan that violates an express agreement entered into by the Applicants and other parties to not compromise Landlord Guarantee Claims;

(c) accept a Plan for filing that values landlords' claims for voting and distribution purposes using a formula that:

(i) does not, in fact, value the claims and damages suffered by the landlords;

(ii) does not comply with the CCAA;

(iii) violates the Claims Procedure Order; and

(iv) approves a single class of unsecured creditors that confiscates the rights of landlords with guarantee claims; and

(d) change its Orders and permit Target Canada and Target US to disclaim their agreement with the landlords in order to "cure" the defaults in the Plan.

53. As a result, the motion should be dismissed.

[46] Warnaar Affidavit, at ¶28.

A. The Court Cannot Accept a Plan or Call a Meeting for a Plan that Cannot Be Sanctioned

54. It is respectfully submitted that the law is clear: the Court should not allow a party to file a Plan that from the outset cannot be sanctioned because it violates Court Orders or is otherwise improper. Allowing such a Plan to be filed and voted on would be a waste of time and significant money. For this reason alone, this motion should be dismissed.[47]

55. For example, in *Crystallex*, a committee of noteholders delivered a plan of arrangement on short notice that contained provisions that were contrary to the terms of the debtor-in-possession facility. The noteholders argued that this issue could be dealt with by the Court at the sanction approval stage and should not prevent the Court from accepting the plan for filing. Justice Newbould rejected this argument:

> The Noteholders say that all of this can be dealt with at the stage of the court application for sanction approval. They point to *Sino-Forest Corp., Re*, 2012 ONCA 816 (Ont. C.A.) in which a number of issues, including the validity and quantum of any claim, had not been determined and yet an order was made requiring the holding of a meeting to vote on a plan. However, that was an unusual case and the order was made on the consent of all parties. That is not the situation here at all.
>
> In my view the motion by the Noteholders to now have a meeting to vote on its plan of arrangement is tactical and raised to get a perceived leg up in negotiations.[48]

56. In his reasons, Justice Newbould cited with approval *Doman Industries*. In that case, the applicants attempted to call a creditors' meeting to vote on a plan that affected the rights of unaffected creditors, including a group of senior secured noteholders, without allowing those creditors to vote on the plan. In his reasons for dismissing the applicants' motion, Justice Tysoe (as he then was) wrote:

---

[47] *Crystallex International Corp., Re*, 2013 ONSC 823 at ¶9 per. Newbould J.
[48] *Crystallex* at ¶12-13.

> [I]t is common ground that I should not authorize the holding of the creditor meetings if the Reorganization Plan cannot be sanctioned by the Court following the holding of the creditor meetings **or if the implementation of the Reorganization Plan is contingent on the Court granting an order which it has no jurisdiction to make or would not otherwise make.**[49] [Emphasis added.]

57. One of the issues in *Doman Industries* was whether the Court had the jurisdiction to grant a permanent injunction as a condition precedent of implementation of the proposed plan. Justice Tysoe held that this issue was a threshold issue that had to be determined before the creditors' meeting was authorized:

> Although the permanent injunction contemplated in this clause is mentioned in the Reorganization Plan, it is not, strictly speaking, part of the Plan. Rather, the granting of the injunction is a condition precedent in the implementation of the Plan. The result of this distinction is that the Plan itself does not purport to bind the Senior Secured Noteholders in this regard and they are not entitled to vote on the Plan. **Thus, the question becomes whether the Court has the jurisdiction to grant such an injunction because, if it does not have the jurisdiction, there would be no point in convening creditor meetings to consider a plan containing a condition precedent which cannot be fulfilled.**[50] [Emphasis added.]

58. As discussed below, Justice Tysoe concluded that he did not have the jurisdiction to grant the injunction contemplated by the applicants' proposed plan and therefore it was inappropriate for him to authorize the calling of creditor meetings to consider the plan because a condition precedent to plan implementation could not be satisfied,. The motion to file the proposed plan was dismissed, with liberty to re-apply in respect of a revised plan.[51]

59. Here, there is no issue that the Plan violates Court Orders.

---

[49] *Doman Industries Ltd., Re,* 2003 BCSC 376 at ¶8.
[50] *Doman Industries* at ¶11.
[51] *Doman Industries* at ¶30.

60. The law concerning Court Orders is clear: an Order of the Court must be obeyed until it is reversed or varied.[52] Refusal to obey court orders strikes at the heart of the rule of law, at the core of the organization of our society.[53]

61. In the present case, the Plan cannot be accepted for filing because it violates paragraph 19A of the Amended Order and paragraph 55 of the Claims Procedure Order.

62. The Plan, as a condition precedent to its implementation, requires Target Canada to bring a motion to vary the Amended Order to delete paragraph 19A and to renege on its agreement with the Landlord Group. As in *Doman Industries*, the Court has to determine at this stage of the proceeding whether it has the jurisdiction to accept the Plan as presently constituted for filing because if it does not, then there is no point in authorizing a creditors' meeting.

63. Paragraph 19A of the Amended Order is unequivocal. Landlord Guarantee Claims:

(a) shall not be determined, directly or indirectly, in the CCAA proceeding;

(b) shall be unaffected by any determination of claims of landlords against Target Canada; and,

(c) shall be treated as unaffected and shall not be released or affected in any way in any Plan **filed** by Target Canada under the CCAA.

64. Likewise, the Claims Procedure Order, as amended, clearly provides that:

(a) disputed creditors' claims shall be adjudicated by a Claims Officer or the Court;

---

[52] *Carey v. Laiken*, 2015 SCC 17 at ¶58.
[53] *Larkin v. Glase*, 2009 BCCA 321 at ¶7.

(b) creditors have until February 12, 2016 to object to intercreditor claims; and,

(c) the claims process shall not affect Landlord Guarantee Claims and shall not derogate from paragraph 19A of the Amended Order.

65. There is no dispute that the Plan that Target Canada now seeks to file violates these terms of the Amended Order and the Claims Procedure Order. The Plan:

(a) extinguishes the right of landlords with Landlord Guarantee Claims to have those claims determined by a Judge of the Commercial List;

(b) determines the value of Landlord Guarantee Claims;

(c) treats Landlord Guarantee Claims as affected claims to be compromised and released;

(d) deprives landlords of the right to adjudicate the true value of their claims; and,

(e) deprives creditors of the right to object to intercreditor claims.

66. The Plan Filing Motion does not seek to vary the Court Orders that the Plan violates as a condition precedent to the Court accepting the Plan for filing. On this basis alone, the Court cannot accept the Plan for filing.

B. The Court cannot Accept a Plan that Reneges on Post-Filing Agreements with Creditors

67. It is not a controversial statement of law that commercial contracts should be enforced, not varied, by the Court. Parties must be held to the bargains they make. As Chief Justice Dickson stated in *Hunter Engineering*, "Only where the contract is unconscionable, as might arise from

situations of unequal bargaining power between the parties, should the courts interfere with agreements the parties have freely concluded."[54]

68. This principle applies, and if the CCAA restructuring regime is to work, must continue to apply to post-filing agreements made by debtors under Court protection, who are also required to act in "good faith" under the CCAA.[55]

69. It is undisputed that the agreement to treat Landlord Guarantee Claims as unaffected claims was reached between sophisticated parties who were represented by counsel with the assistance of a Court officer. There is no basis upon which this Court can interfere with the agreement the parties freely concluded. Simply, Courts do not and cannot relieve a party from complying with its agreements just because it is convenient for a party to do so.

70. Nor does the Court have some special jurisdiction under the CCAA to allow a debtor company to breach a post-filing contract. The CCAA only permits a debtor company to disclaim or resiliate pre-filing contracts and a plan of compromise can only compromise pre-filing claims.[56] Post-filing contracts cannot be disclaimed or compromised.

71. In *Doman Industries*, Justice Tysoe was faced with a similar issue: the applicant sought, as a condition precedent of implementation of its proposed plan, to permanently excuse the applicants from the consequences of a change of control clause in a trust indenture that would only be triggered after the proposed plan was implemented. Justice Tysoe held that the CCAA did not

[54] *Hunter Engineering Co. v. Syncrude*, [1989] 1 SCR 426 at 462.
[55] CCAA, s. 11.02(3)(b).
[56] CCAA, ss. 19 and 32.

authorize the Court to unilaterally and prospectively vary the terms of a contract to which the applicant is a party.[57] Justice Tysoe wrote:

> It is my opinion, however, that s. 11(4) does not give the power to courts to grant permanent injunctions as a means to permit a debtor company to unilaterally and prospectively vary the terms of a contract to which it is a party.[58]

72. This conclusion accords with the remedial purpose and scheme of the CCAA. The flexibility of the CCAA is enhanced through the ability of a debtor and its stakeholders to agree, during the CCAA proceeding, on common terms pursuant to which the proceeding will unfold. Those agreements, which are entered into **after** the CCAA filing, are obligations that cannot, and should not, be compromised by the Court, or else chaos would ensue.

73. It is undisputed that in late January/early February 2015, Target Canada, Target US and the Landlord Group entered into intense negotiations, which resulted in an agreement among those parties that allowed this proceeding to continue unopposed.

74. The Landlord Group upheld their side of this bargain – they withdrew their opposition to the CCAA proceeding and the amended RPPSP. Now, having received the benefits it bargained for under this agreement, Target Canada and Target US, with the Monitor's support, seek the Court's permission to renege on their part of the deal.

75. The fact that the agreement was incorporated into a Court Order does not change the fact that the Court cannot relieve Target Canada and Target US from fulfilling its part of the agreement.

76. Even if the Court had the authority to permanently vary the terms of such a contract, which it does not, it should not do so. If the Court in this case establishes a precedent whereby a CCAA

[57] *Doman Industries* at ¶26.
[58] *Doman Industries* at ¶21-26 [emphasis added].

applicant and its parent company can renege on an agreement with a class of creditors entered into **after** the commencement of a CCAA proceeding, then there is no mechanism by which creditors will be able to enforce a CCAA applicant's post-filing obligations. As a practical matter, this will prevent debtors from being able to enter into agreements with stakeholders to facilitate a restructuring. The Court should avoid applying its powers under the CCAA in a fashion that undermines the CCAA's remedial purpose.

C. The Court Cannot Delete Paragraph 19A from the Amended Order

77. Target Canada does not seek to vary the Court Orders that the Plan violates prior to filing its Plan. But even if it did, its motion would fail because the Court lacks the authority to vary the Amended Order as contemplated under the Plan.

78. Orders of the Court are final unless appealed. Neither the Amended Order nor the Claims Procedure Order was appealed. If an Order is not appealed, it can only be set aside or varied pursuant to subrule 59.06(2), which provides:

> 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.[59]

79. The test for varying an order is very stringent. As this Court held in *Muscletech*,

[59] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, rule 59.06(2).

> The courts have been loathe to vary or set aside an order unless it is established that there was:
>
> (a) fraud in fraud in obtaining the order;
>
> (b) a fundamental change in circumstances since the granting of the order making the order no longer appropriate;
>
> (c) an overriding lack of fairness; or
>
> (d) the discovery of additional evidence between the original hearing and the time when a review is sought that was not known at the time of the original hearing and the time when a review is sought that was not known at the time of the original hearing and that could have led to a different result.[60]

80. In addition, it is well established that a consent order 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, like with a contract. These grounds go to the formation of the agreement that led to the order, not to its subsequent performance.[61] As Justice Quinn held in *Verge Insurance Brokers Ltd. v. Sherk*,

> A consent order represents an agreement reached by the parties. A court rarely, very rarely, should pick and choose what part or parts of that agreement may be reworded or otherwise excused from enforcement.[62]

81. The need for the Court to enforce consent orders absent fraud or mistake is a bedrock principle, dating back at least as far as the English case of *Holt v. Jesse*:

> I think if I were to accede to this application it would be a general license to parties to come to this Court and deliberately give their consent, and afterwards at their will and pleasure come and undo what they did inside the Court, because on a future day they find they do not like it.[63]

---

[60] *Muscletech Research & Development Inc., Re,* 2006 CarswellOnt 6230 at ¶10 (SCJ).
[61] *Verge Insurance Brokers Ltd. v. Sherk*, 2015 ONSC 4044 at ¶53-57, citing *Monarch Construction Ltd. v. Buildevco Ltd.* (1998), 26 CPC (2d) 164 (Ont. CA) and *McCowan v. McCowan* (1995), 24 OR (3d) 707 (CA). See also *Yan v. Chen*, 2014 ONSC 3111 at ¶84-86.
[62] *Verge Insurance* at ¶72.
[63] *Holt v. Jesse*, [1876] 3 Ch. D. 177 at 184.

82. In this case, Target Canada is the party that sought the Amended Order that it now seeks to vary. KingSett submits that the more stringent test for varying consent orders ought to apply to this situation as the Amended Order was submitted to the Court based on the agreement of the parties. Therefore, it can only be set aside on grounds that would justify setting aside an agreement (*i.e.*, fraud and unconscionability). No such grounds exist here.

83. Further, whether this Court applies the *Verge Insurance* test or the principles in *Muscletech*, the only conclusion available is that the circumstances of this case do not justify varying the Amended Order.

84. Contrary to the submissions of Target Canada, the subordination of Target US's intercompany claim is not a "change of circumstance" that makes the agreement set out in paragraph 19A no longer appropriate. Moreover, it is not a change in the circumstances between the parties to the agreement/order (*i.e.*, the landlords).

85. The amendments to the Initial Order were sought by the Applicants in February 2015 to incorporate the terms of the agreement concerning the treatment of Landlord Guarantee Claims into a Court Order to ensure those terms were **stronger** than a contract. Paragraph 55 of the Claims Procedure Order in June 2015 confirmed paragraph 19A of the Amended Order.

86. Paragraph 19A of the Amended Order benefits Target Canada creditors who have guarantees from Target US. These creditors gain **nothing** from a subordination of Target US's intercompany claim, which only benefits creditors who **did not** obtain guarantees from Target US. The subordination of an intercompany claim does not change the circumstances under which paragraph 19A was negotiated and agreed to by the parties and approved by the Court, with the Monitor's comment that paragraph 19A represented "a fair and reasonable balancing of interests".

87. The only "change of circumstances" since February 2015 is that Target US and Target Canada no longer wish to comply with this Court's order and with their agreement to treat Landlord Guarantee Claims as unaffected claims under a Plan and to adjudicate those claims before a Judge of the Commercial Court outside of the CCAA proceeding.

88. Target Canada's reliance on previous cases where third party releases were granted under a plan is misplaced. In those cases, there was no pre-existing Court Order, agreed to by the parties or otherwise, excluding those claims from the CCAA proceeding. Indeed, the precedent set by those cases is what led the Landlord Group to insist on the exclusion of Landlord Guarantee Claims from this proceeding as part of their bargain with Target Canada and Target US. The Landlord Group predicted that Target US would try to use the CCAA in a liquidation proceeding to compromise its guarantees and headed off that possibility by obtaining Target US's agreement not to do so, as reflected in paragraph 19A of the Amended Order.

D. The Court cannot Vary the Claims Procedure Order to Deny Claimants the Right to Adjudicate their Claims

89. The reasoning set out above applies with equal force to the Court's inability to vary the Claims Procedure Order to replace the claims adjudication process with a fixed formula for determining Landlord claims. This is especially the case where the undisputed facts demonstrate that the Landlord Formula Amount proposed by Target Canada and applied by the Monitor to Landlord claims drastically undervalues KingSett's claim.

90. The adjudication process that the parties agreed to in the Claims Procedure Order complies with subsection 20(1)(a)(iii) of the CCAA, which provides that disputed claims must determined

by summary application to the Court.[64] The Court cannot vary this process to deprive landlords of their statutory right to dispute the value of their provable claims.

91. The case law clearly holds that the proper measure of damages for a terminated lease is the unpaid rent to the date of the breach (arrears of rent), plus the present value of the unpaid future rent for the unexpired period of the lease less the actual rental value of the premises for that period plus reasonably foreseeable consequential losses.[65] Reasonable foreseeable consequential losses include expenditures to attract new tenants, such as rental abatements and costs for configuring premises to the requirements of new tenants.[66]

92. In *Re Alternative Fuel Systems*, the Alberta Court of Queen's Bench rejected the CAAA debtor's efforts to apply a fixed formula to a repudiated commercial lease. The Court held that the landlord was entitled to prove its claim for rent arrears plus damages based on the balance of the rent due for the lease period, less occupancy rent paid by the applicant, less prepaid rent held, and less the results of the landlord's mitigation.[67]

93. In that case, the applicant's appeal to the Alberta Court of Appeal was dismissed. In its reasons, the Court held that a debtor's choice to seek protection under the CCAA, with all of the benefits the act provides over a BIA proposal, requires it to follow the statutory claims process set out in the CCAA:

> [52] A company which invokes the CCAA process retains a great deal of control over it. Under the CCAA claims process, the company, not the monitor, initially accepts or rejects claims. Section 12(2)(a)(iii) [now 20(1)(a)(iii)] states, "if the amount so provable is

[64] CCAA, s. 20(1)(a)(iii).
[65] *Morguard Corp. v. 2063881 Ontario Inc.*, 2013 ONSC 7213 at ¶21-23 and 34.
[66] *Morguard* at ¶38.
[67] *Alternative Fuel Systems, Re*, 2003 ABQB 745 at ¶27, affirmed 2004 ABCA 31.

> not admitted by the company, the amount shall be determined by the court on summary application by the company or by the creditor".
>
> [53] Section [20(1)(a)(iii)] permits different treatment of different claims. **The company can admit a claim, or refer it to a court to determine by summary application or trial.** In recent cases, recognizing the need for expedited valuation of claims to facilitate the process, the courts have begun appointing a claims officer to make this determination.[68] [Emphasis added.]

94. In *Alternative Fuel Systems*, both the motion judge and the Alberta Court of Appeal emphasized the importance of following a claim procedure and complying with subsection 20(1)(a)(iii) to determine landlords' claims. A cookie-cutter formula does not comply with that principle.

95. The *Extreme Retail* case relied upon by Target Canada supports this position. In that case, the claims process and the proposed plan of arrangement were negotiated and agreed upon **simultaneously** by the applicant and its landlords. Thus, the use of a set formula to determine landlord claims **was consented to by the landlords** as part of the claim procedure order.[69]

96. In fact, in *Extreme Retail*, the proposed claims process was specifically revised to allow landlords who were not served with the applicant's motion materials and who opposed the use of a formula to determine their claims to bring a motion to dispute the use of such formula. Those landlords were specifically authorized by the Court to bring a motion to determine their actual damages sustained as a result of the resiliation of their lease.[70]

---

[68] *Alternative Fuel Systems, Re*, 2004 ABCA 31 at ¶51-53.
[69] *Extreme Retail (Canada) Inc., Re*, CV-09-8084-00CL, unreported endorsement of Justice Hoy dated September 23 and 24, 2009. Target Canada referred to the *Extreme Retail* case as an example where a formula was used to value landlord claims, but did not refer to Justice Hoy's endorsement.
[70] *Ibid*.

97. Barring landlord consent at the **claims process** stage of a CCAA proceeding, the Court cannot unilaterally impose a cookie-cutter formula to determine landlord claims at the plan stage of a CCAA proceeding.

98. KingSett and other Landlords vehemently dispute the value of their claims as revised by the Monitor. Neither Target Canada nor KingSett has yet applied to the Court to determine this dispute. Instead, Target Canada seeks to bypass the Court-ordered process, as prescribed by the CCAA and the Claims Procedure Order, for determining disputed claims by imposing a formula on claims without a right for landlords to dispute the use of that formula.

99. The Court lacks the jurisdiction under the CCAA to permit Target Canada to unilaterally determine the value of disputed claims. It also cannot allow creditors to "vote" on the value of claims of other creditors. This is contrary to the process required under the CCAA, which cannot be overridden by Court Order. In addition to all of the other flaws in the Plan, on this basis alone, the Plan cannot be accepted for filing.

E. The Plan Classification Scheme Improperly Confiscates Rights

100. By grouping landlords with Landlord Guarantee Claims with other unsecured creditors, the Plan does not comply with section 22 of the CCAA, which sets out specific requirements for the classification of creditors:

> 22. (1) A debtor company may divide its creditors into classes for the purpose of a meeting to be held under section 4 or 5 in respect of a compromise or arrangement relating to the company and, if it does so, it is to apply to the court for approval of the division before the meeting is held.
>
> (2) For the purpose of subsection (1), creditors may be included in the same class if their interests or rights are sufficiently similar to give them a commonality of interest, taking into account

> (a) the nature of the debts, liabilities or obligations giving rise to their claims;
>
> (b) the nature and rank of any security in respect of their claims;
>
> **(c) the remedies available to the creditors in the absence of the compromise or arrangement being sanctioned, and the extent to which the creditors would recover their claims by exercising those remedies;** and
>
> (d) any further criteria, consistent with those set out in paragraphs (a) to (c), that are prescribed.[71] [Emphasis added.]

101. Subsection 22(2) essentially codifies some of the principles of the "commonality of interest" test that developed in the CCAA case law. *Stelco Inc.* is the leading appellate case that sets out these principles:

> In summary, the cases establish the following principles applicable to assessing commonality of interest:
>
> 1. Commonality of interest should be viewed based on the non-fragmentation test, not on an identity of interest test;
>
> 2. The interests to be considered are the legal interests that a creditor holds qua creditor in relationship to the debtor company prior to and under the plan as well as on liquidation.
>
> 3. The commonality of interests are to be viewed purposively, bearing in mind the object of the C.C.C.A., namely to facilitate reorganizations if possible.
>
> 4. In placing a broad and purposive interpretation on the C.C.C.A., the court should be careful to resist classification approaches that would potentially jeopardize viable plans.
>
> 5. Absent bad faith, the motivations of creditors to approve or disapprove [of the Plan] are irrelevant.
>
> 6. The requirement of creditors being able to consult together means being able to assess their legal entitlement as creditors before or after the plan in a similar manner.
>
> […]

[71] CCAA, s. 22.

> In addition to commonality of interest concerns, a court dealing with a classification of creditors issues needs to be alert to concerns about the confiscation of legal rights and about avoiding what the parties have referred to as the "tyranny of the minority".[72]

102. KingSett submits that the current classification scheme does not comply with subsection 22(2) of the CCAA or with the principles set out in *Stelco*, in that the class as currently constituted does not have a sufficient commonality of interest.

103. The Plan will compromise and release Landlord Guarantee Claims in exchange for Target US's subordination of its intercompany claims to the unsecured creditors' claims. Target US is adamant it will unsubordinate all of its claims if the Plan does not compromise and release Landlord Guarantee Claims.[73]

104. Target US's position creates a clear conflict of interest between landlords with Landlord Guarantee Claims, who lose considerable rights under the Plan, and all other unsecured creditors, who benefit from the subordination of Target US's intercompany claims. Simply put, the Plan confiscates one set of creditors' rights to benefit a different set of creditors.

105. As the only creditors who stand to lose contractual rights of indemnity against third parties under the Plan, the landlords with Landlord Guarantee Claims ought to be placed in their own class to avoid creating an injustice whereby unsecured creditors who do not have guarantees can use their superior numbers to outvote creditors who stand to lose their guarantees under the Plan. This conflict of interest that cannot be resolved other than by creating two classes of creditors to separate creditors with guarantees from creditors without guarantees.

---

[72] *Stelco Inc., Re,* 2005 CarswellOnt 6818 at ¶23 and 28 (CA).
[73] Wong November 27 Affidavit, at ¶12, 33.

F. Information is Being Withheld from the Landlords

106. As explained above, Target US's last-minute deal with RioCan appears to compensate RioCan for its losses at a much higher value than the value ascribed to those claims under the Plan. The Monitor and Target US have proven unable or unwilling to confirm this information.

107. While the fairness of this higher recovery and the consequences for RioCan's status as a voting creditor are matters that are best addressed at a sanction hearing, the issue is relevant to the appropriateness of the adoption by the Court of the Landlord Formula Amount for voting purposes.

108. By restricting Landlords' claims to the Landlord Formula Amount, Target Canada not only undervalues those claims for distribution purposes, it also undervalues those claims for voting purposes.

109. To the extent that Target US is paying RioCan more than what it is offering to the other landlords under the Plan (which must be assumed given the refusal to say otherwise), this undermines Target Canada's, Target US's and the Monitor's suggestion that the Plan as currently structured ascribes a fair and reasonable value to the landlords' claims. Simply, this is information that should be available to parties who are being asked to vote on a plan.

PART IV - CONCLUSION AND ORDER REQUESTED

110. In the wake of *Muscletech* and the ABCP CCAA proceedings, the Landlord Group had the foresight to negotiate Target Canada's and Target US's agreement not to compromise Landlord Guarantee Claims in this proceeding. This agreement was re-enforced, not weakened, through the addition of paragraph 19A to the Amended Order and the inclusion of paragraph 55 in the Claims Procedure Order.

111. Target Canada's current effort to renege on its agreement with the Landlord Group and to violate this Court's Orders is improper and abusive. It does so not to obtain any benefit for itself – it has no interest in the outcome of this liquidation CCAA proceeding – but rather at the behest of its US parent, which stands to gain millions through the compromise of Landlord Guarantee Claims for pennies on the dollar.

112. The Court should not be party to this misuse of the CCAA. Should this motion be granted, the CCAA process will fall apart. Applicants' post-filing agreements, the Monitor's word and indeed this Court's orders will mean nothing in future proceedings. That outcome must be avoided at all costs.

113. KingSett requests that the Applicants' motion be dismissed, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 16th day of December, 2015.

Matthew P. Gottlieb

Andrew Winton

Laura M. Wagner

LAX O'SULLIVAN LISUS GOTTLIEB LLP
Counsel
Suite 2750, 145 King Street West
Toronto, ON M5H 1J8

Matthew P. Gottlieb LSUC#: 32268B
mgottlieb@counsel-toronto.com
Tel: 416 644 5353

Andrew Winton LSUC#: 54473I
awinton@counsel-toronto.com
Tel: 416 644 5342

Laura M. Wagner LSUC#: 60319Q
lwagner@counsel-toronto.com
Tel: 416 645 5076

Fax: 416 598 3730

Lawyers for KingSett Capital Inc.

SCHEDULE "A": LIST OF AUTHORITIES

1. *Crystallex International Corp., Re*, 2013 ONSC 823.

2. *Doman Industries Ltd., Re*, 2003 BCSC 376.

3. *Carey v. Laiken*, 2015 SCC 17.

4. *Larkin v. Glase*, 2009 BCCA 321.

5. *Hunter Engineering Co. v. Syncrude*, [1989] 1 SCR 426.

6. *Muscletech Research & Development Inc., Re*, 2006 CarswellOnt 6230.

7. *Verge Insurance Brokers Ltd. v. Sherk*, 2015 ONSC 4044.

8. *Monarch Construction Ltd. v. Buildevco Ltd.* (1998), 26 CPC (2d) 164 (Ont CA).

9. *McCowan v. McCowan* (1995), 24 OR (3d) 707 (CA).

10. *Yan v. Chen*, 2014 ONSC 3111.

11. *Holt v. Jesse*, [1876] 3 Ch. D. 177.

12. *Morguard Corp. v. 2063881 Ontario Inc.*, 2013 ONSC 7213.

13. *Alternative Fuel Systems, Re*, 2003 ABQB 745.

14. *Alternative Fuel Systems, Re*, 2004 ABCA 31.

15. *Extreme Retail (Canada) Inc., Re*, CV-09-8084-00CL, unreported endorsement of Justice Hoy dated September 23 and 24, 2009.

16. *Stelco Inc., Re*, 2005 CarswellOnt 6818 (CA).

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

1. *Companies' Creditors Arrangement Act*, R.S.O. 1985, c C-36 (as amended).

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

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(3) The court shall not make the order unless (a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

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

11.04 No order made under section 11.02 has affect on any action, suit or proceeding against a person, other than the company in respect of whom the order is made, who is obligated under a letter of credit or guarantee in relation to the company.

19. (1) Subject to subsection (2), the only claims that may be dealt with by a compromise or arrangement in respect of a debtor company are

(a) claims that relate to debts or liabilities, present or future, to which the company is subject on the earlier of

> (i) the day on which proceedings commenced under this Act, and
>
> (ii) if the company filed a notice of intention under section 50.4 of the *Bankruptcy and Insolvency Act* or commenced proceedings under this Act with the consent of inspectors referred to in section 116 of the *Bankruptcy and Insolvency Act*, the date of the initial bankruptcy event within the meaning of section 2 of that Act; and

(b) claims that relate to debts or liabilities, present or future, to which the company may become subject before the compromise or arrangement is sanctioned by reason

of any obligation incurred by the company before the earlier of the days referred to in subparagraphs (a)(i) and (ii).

20. (1) 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

> (i) in the case of a company in the course of being wound up under the Winding-up and Restructuring Act, proof of which has been made in accordance with that Act,
>
> (ii) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act, proof of which has been made in accordance with that Act, or
>
> (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; […].

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

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

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

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

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

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

32. (1) Subject to subsections (2) and (3), a debtor company may — on notice given in the prescribed form and manner to the other parties to the agreement and the monitor — disclaim or resiliate any agreement to which the company is a party on

the day on which proceedings commence under this Act. The company may not give notice unless the monitor approves the proposed disclaimer or resiliation.

2. *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194

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.

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

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT
TORONTO

FACTUM

LAX O'SULLIVAN LISUS GOTTLIEB LLP
Counsel
Suite 2750, 145 King Street West
Toronto ON M5H 1J8

Matthew P. Gottlieb LSUC#: 32268B
mgottlieb@counsel-toronto.com
Tel: 416 644 5353

Andrew Winton LSUC#: 54473I
awinton@counsel-toronto.com
Tel: 416 644 5342

Laura M. Wagner LSUC#: 60319Q
lwagner@counsel-toronto.com
Tel: 416 645 5076
Fax: 416 598 3730

Lawyers for KingSett Capital Inc.