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

SUPPLEMENTAL WRITTEN SUBMISSIONS OF RIOCAN AND KINGSETT

(Motion for Approval of Monitor's Reports and Activities)

Introduction

1. These written submissions are filed by RioCan and KingSett in respect of the motion by the Monitor seeking approval of various Monitor's Reports and the activities of the Monitor referred to therein. These submissions are supplemental to the submissions of these Responding Parties dated July 29, 2015 (the "**Submissions**"), a copy of which is appended at Schedule "A", and are filed pursuant to the request of Morawetz R.S.J. for further submissions, made at the hearing of the Monitor Approval Motion on July 30, 2015.

2. Terms defined in the original Submissions are employed in these supplemental submissions.

3. These supplemental submissions focus on issues of *res judicata* and issue estoppel in providing a context for these Responding Parties' position that:

(a) the Monitor's motion to obtain approval of its activities in the manner sought at this time is unnecessary, at the very least premature, and potentially very prejudicial to the interests of creditors in these liquidation proceedings; and

(b) alternatively, in the event that the Court determines that it is appropriate to grant the Monitor some form of activity approvals, any such order necessarily and specifically should be strictly limited to the actual intended purpose of such an order (liability protection for the Monitor), in order to ensure that the interests of creditors are not unfairly prejudiced in a manner unintended by the Court.

A. The Relief the Monitor Seeks is Unnecessary and Potentially Prejudicial to Creditors

4. As set out in the original Submissions, the Monitor's motion to obtain approval of its activities in this manner and at this point in time – particularly in these liquidation proceedings – is unnecessary and at the very least premature. Providing such approval at this time, when the proceeding is just beginning to enter a phase during which discovery of facts and analysis of past steps and actions becomes the focus, and in the absence thus far of full and complete disclosure of all of the underlying facts, would be decidedly unfair to creditors. This is particularly the case if any such approval could potentially be asserted and relied upon in the future by the Applicants or any other party seeking to limit or substantively prejudice the rights, interests or actions of creditors. Moreover, the non-particularized manner by which, and the extent to which, the Monitor is seeking such approvals can be expected to lead to confusion about the legal impact of activity approvals -- indeed, the Monitor's counsel's oral submission was that the legal impact of

such an Order would be determined in the future when it became an issue. In fact, *that is precisely the outcome which must be avoided.* Such an approach risks both substantive prejudice and wasted costs and resources.

5. The fact that this type of approval has been granted previously in certain CCAA proceedings, and that this issue has not been the subject of many reported cases, does not mean that it is not a real and significant issue for creditors. Due to cost and other considerations, including the passage of time before the negative consequences manifest themselves, it is often a difficult and expensive process to challenge approval of a Monitor's reports and/or activities. In addition, as has been acknowledged by the Court and the Monitor (see the Claims Procedure Order, for example), these proceedings are not "typical" given, among other others, the issues relating to Target U.S. and its very significant intercompany claims against the Applicants.

(a) Chantiers Davie - Quebec Superior Court rejects mid-proceeding Monitor Activity Approvals

6. In *Re Chantiers Davie Inc.*,[1] the Quebec Superior Court found in an ongoing CCAA proceeding that a requested order approving the Monitor's activities was unnecessary and, in fact, a potential source of confusion with respect to its import and scope. Instead, the Court simply "took note" of the Monitor's activities observing that such an approach prevents uncertainty or confusion with regard to the impact of any approval of the activities of the Monitor.[2] The Court held:

Approval of the Monitor's Activities

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[1] *Chantiers Davie Inc. (Arrangement relative à)*, 2010 QCCS 2643 at paras. 47-48 [*Chantiers Davie*]. A certified English translation is included with the original French version.
[2] *Chantiers* at paras. 47-48.

> 44 The Debtor asks the Court to approve the activities of the Monitor described in its fourth report.
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> 45 Investissement Québec emphasizes that this type of finding has no place within the framework of a request for an extension of the initial Order.
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> 46 When asked to clarify the purpose of this request, the Debtor's and Monitor's counsel indicated that this approval does not seek to free the Monitor from all liability resulting from the execution of its functions. Rather, it would take the form of a common practice whereby the Court would take note of the Monitor's actions as being in compliance with its mandate.
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> 47 With respect, the Court finds that this type of finding is unnecessary, and in fact, can become a source of confusion regarding its scope. The legislator has already set out the conditions under which a Monitor will not be liable in Sections 23(2) and 25 of the CCAA.
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> 48 Although none of the parties raised it at the hearing, the Court recalls a similar request that was formulated regarding the Monitor's second report, at the time of the first request for an extension. Despite a lack of opposition at that time, the Court did not comply with the request, and instead took note of the activities. The utility of this practice is perhaps debatable, but it prevents ambiguity regarding the approval of the Monitor's Activities.

(b) Issue Estoppel Considerations - *Preston Springs Gardens*

7. The concern identified in *Chantiers Davie* in respect of confusion or uncertainty over the impact of such approval is real, not merely theoretical. A real risk associated with a proposed order approving the activities of the Monitor is that such an order may give rise to arguments based on the doctrines of *res judicata* or issue estoppel, among other things, that might prevent creditors from (or add to the cost or difficulty of) challenging, or even from seeking additional information about, steps, activities or matters "described" in the Reports for which approval was previously obtained.

8. For example, a party (including the Applicants or the Monitor, which has been a particularly active litigant in these proceedings) attempting to assert *res judicata* or issue estoppel arguments in the future, or simply trying to rely upon a Report or activity approval

Order to resist disclosure or cross-examination, might seek to rely on this Court's decision in *Toronto Dominion Bank v. Preston Springs Gardens Inc.*[3] In that proceeding, the Court dismissed an attempt by creditors to bring proceedings against a receiver and manager on the basis that previous approval orders of the court (in that case, specific transaction approvals, which are obviously in a different category, supported by activity approvals) rendered the issue of whether the receiver's conduct was subject to challenge as being subject to *res judicata* or issue estoppel.[4]

9. A blanket approval of the Monitor's Reports and activities "described therein", as opposed to the specific transaction approval at issue in *Preston Springs Gardens*, should not prohibit or in any way limit a creditor from pursuing certain issues or seeking further disclosure later in these proceedings. The very real concern is as articulated by the Quebec Superior Court in *Chantiers Davie*: that such a blanket approval could give rise to confusion as to its intended purpose and legal effect, and lead to arguments that *res judicata* or issue estoppel might be applicable. The concern goes beyond whether such an attempt would ultimately be successful.

10. There is simply no good reason why creditors should be exposed to that risk – and to potential additional delay and costs – solely to provide the Monitor with unnecessary, additional comfort going beyond the Monitor's protections already provided for under the CCAA and the Initial Order. The problem can be entirely avoided by having the Court "take note" of the Monitor's activities as in *Chantiers Davie*.

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[3] *Toronto Dominion Bank v. Preston Springs Gardens Inc.*, [2006] O.J. No. 1834 (Sup. Ct. J. – Commercial List) [*Preston Springs Gardens*]; aff'd 2007 ONCA 145. See also *Bank of America Canada v. Willann Investments Ltd.*, [1993] O.J. No. 3039 (Ct. J. – Gen Div) [*Wilann*].

[4] *Ibid.* at para. 35.

(c) Creditors do not yet have Adequate Disclosure to Assess the Activities Described

11. The argument that the report and activity approval order sought at this time might prejudice rights or preclude creditors from taking certain steps in the future is particularly impactful because creditors (and the Court) simply do not have sufficient facts, much less the "full story", about the activities for which blanket approval is now sought. Indeed, the Monitor itself might not even have all such facts as there are significant portions of the Monitor's Reports where the Monitor is simply reporting second-hand information from the Applicants and others.

12. The Court should not approve the Monitor's Reports and activities in this proceeding where there has not been an opportunity for potentially affected parties to fully canvass evidence relevant to the issues and to present their arguments to the Court.[5] The onus should be on the Monitor in this case to establish why any such approval is necessary at this time. The Monitor has not even articulated why such approval is necessary or appropriate. It should not fall to the creditors to bear the risk and the expense that a party will argue that such approval could in future be relied upon in support of an argument of *res judicata* or issue estoppel, or seek to deny access to information. The fact that the Monitor's counsel asserted on July 30 that the Monitor is *entitled* to this relief is no substitute for providing compelling grounds for the alleged necessity, which have not been provided.

13. These Responding Parties' serious concerns regarding potential reliance on *res judicata* or issue estoppel were only heightened during the July 30 hearing when (as noted above) the Monitor's counsel effectively stated that the legal consequences of the approval sought was a

[5] *Bayhold Financial Corp. Ltd. v. Clarkson Company Ltd., [1985] NSJ No. 296 (N.S.C.A.) [Bayhold].* The Nova Scotia Court of Appeal in *Bayhold* noted at paragraph 4: "We cannot say that this issue has as yet been determined by the parties. A court should always be reluctant to deprive a litigant of his right to a trial, particularly where the allegation is one of res judicata which can only be properly canvassed after evidence has been taken."

question for a future day. The Monitor is asking this Court to approve its activities today without articulating precisely what is being approved, why such approval is necessary, or what legal effects such approval could have on future rights or issues that may be raised by creditors. Significantly, the Monitor resisted the inclusion of wording in the Order that would have made it clear that no one, including the Monitor, could use this approval for any purpose other than the protection of the Monitor from liability. The Court ought not make an order unless its legal effects are clearly understood and delineated, as any residual confusion may well be highly prejudicial to creditors' interests.

B. In the Alternative, the Scope of Approval Must Be Narrow and Particularized

14. In the event that the Monitor were to satisfy the Court that certain report and activity approval language is appropriate at this time, any such order must be carefully circumscribed and contain necessary limiting language to ensure that the rights and interests of creditors are not unfairly prejudiced in a manner unintended by the Court. In short, the language of the order must clearly and carefully communicate its scope and intended legal effects.

15. As such, if any such approval is deemed necessary, it must be narrowly and specifically defined so that the Court only approves particularized elements of the Reports and particularized activities (as opposed to "the Reports and the activities of the Monitor described therein"). The Monitor is already more than amply protected statutorily and in the Orders granted in these proceedings, including with respect to the content of its Reports and any potential liability that might flow from them.[6]

[6] As to reports, see CCAA subs. 23(2).

16. These proceedings provide a number of examples highlighting the need for such specificity in terms of the relief sought, certain examples of which are set out in the original Submissions. As an additional example, paragraphs 4.21 and 4.26 of the Monitor's Eighteenth Report state as follows:

> 4.21 Certain creditors have requested that the Monitor provide more information with respect to the role of Target Corporation in the context of the execution of the Real Property Portfolio Sales Process and the Inventory Liquidation Process. The Monitor has provided information to such parties and thought it would be of interest to provide additional commentary to the broader constituencies of the estate.

> 4.26 Certain creditors have also requested more detailed information concerning disclaimers of leases that were guaranteed by Target Corporation and those that were not guaranteed. Of the 73 Store leases that were disclaimed at May 10, 2015, 44 leases (approximately 60%) are guaranteed by Target Corporation (excluding Zellers) and 31 of the 64 leases that were included in a transaction agreement (approximately (48%) are subject to a Target Corporation guarantee. From the Monitor's perspective, whether a lease was supported by a Target Corporation guarantee or not was irrelevant to the conduct of the Real Property Portfolio Sale Process, except in two key respects: (a) to the extent that Target Corporation could be facilitative by providing funding incentives (to a third party buyer or to a landlord) where guarantees existed to make a transaction happen where the economics of the situation might have dictated otherwise; and (b) where a guarantee did exist, it was very much in the interest of the creditors of the estate that a release be sought from the landlord not just from their claim against the estate but also with respect to the guarantee due to the subrogation rights that Target Corporation would otherwise have.

17. In both cases, these Responding Parties were among those requesting information. Paragraph 4.21 of the 18th Report states that the Monitor "provided information" to such parties. It does not state whether all of the information requested was provided (it was not), and does not attempt, where less than all information sought was provided, to explain the reasoning behind such shortcoming. In fact, the information requests of these Responding Parties gave rise to long letters from both the Monitor and counsel to the Applicants, in which certain information was provided and other requests were refused. Is the providing of "information" (as the activity is *described* in the Report) an approval activity if the requested Order is made without the

additional limiting language in Schedule "B" to these submissions? If so, is the Court therefore approving the decision of the Monitor to provide only certain of the requested information and thereby making a finding that no further information need be provided? Perhaps more to the point, would the Applicants or the Monitor now resist further inquiries on the basis of this approval?

18. With respect to paragraph 4.26 of the 18th Report, the situation is somewhat different, but equally capable of confusion and creating problems for the creditors. In this case, the Report describes one aspect of a detailed question, which is not the way in which the question was phrased when asked by these Responding Parties. Rather, it contains the Monitor's choice of one aspect of the question and addresses only that aspect. It also does not attempt to suggest that the creditors' questions were answered, fully or otherwise (they were not), but does suggest that the issue of whether a lease was guaranteed did not, at least from the Monitor's perspective, matter to the way in which it was treated in the RPPSP.

19. If the approval order is made without the additional limiting language set out in Schedule "B" to these submissions, does that mean that further inquiries by creditors on these questions can be resisted on the basis of that approval order, and does it mean that the extent to which creditor questions were answered or unanswered has been found to be appropriate (when in fact this Court has virtually no information as to what was asked, answered and left unanswered)?

20. In reference to these passages from the 18th Monitor's Report, any approval order cannot constitute a definitive judicial blessing of the unspecified process followed, of the decisions made thus far with regard to the provision of information, or of the decision not to particularize in the Report the concerns that were raised. Any approval cannot block efforts of creditors to

inquire further and demand information relative to their concerns and claims. If approval is sought for the purpose of further protecting the Monitor from liability, any approval order must not extend beyond that.

21. Accordingly, any approval order (if thought appropriate) should be strictly limited to the benefit of the Monitor in its personal capacity, and even then, only in terms relevant to protection in respect of its personal liability. No other party (including the Applicants) should be in a position to argue in future that it can take any benefit from the approval of the Monitor's Reports or activities.

22. Even the Monitor should be limited to relying on the order to assist in resisting challenges that could result in personal liability concerning the particularized activities.[7] After all, the road to information in a CCAA proceeding is often through the Monitor, such that even the Monitor should not be allowed to raise any such approval of activities or Reports as a reason to resist providing or facilitating the obtaining of information.

23. In view of all of the above, if some form of approval order is thought appropriate, these Responding Parties have proposed necessary limiting or caveat language for such an order at Schedule "B" to these submissions. This language represents a significant change from that suggested on July 30 and sets out clearly the limitations to the use of the approvals granted, if any. That caveat language clarifies that no one other than the Monitor can take any benefit from the approval order, and that even the Monitor can only use such order for its own personal

[7] The case law is clear that the effect of any such approval order, if granted, is to impose the higher standard articulated in *Preston Springs Gardens* of requiring a stakeholder to establish a strong *prima facie* case before being granted leave to pursue acclaim in respect of any approved conduct of the Monitor. See (i) *Wilaan, (ii) Gallo v. Beber*, [1998] OJ No. 5357 (ON C.A.), and (iii) *1117387 Ontario Inc. v. National Trust Co.*, [2010] OJ No 1908 (ON C.A.) for additional examples. As these Responding Parties have made clear, they have no interest in pursuing any claim against the Monitor.

benefit/protection from liability (and not to raise roadblocks to creditors seeking more information or to challenge the actions of parties).

24. Such an order should be limited to specifically delineated parts of the Reports and to particularized activities identified for such approval, in each case on a motion, properly brought, giving the creditors ample opportunity to assess and respond to the relief sought.

C. Allegations of Improper Purpose

25. One final matter needs to be addressed. In the oral submissions made on July 30 by counsel to the Monitor, there was a suggestion that the opposition by these Responding Parties was somehow motivated by an attempt to exercise "leverage" against the Monitor in order to influence its decision-making going forward.

26. That is not only completely unfounded, but is also directly contradicted by the facts and the positions articulated by these Responding Parties prior to and on July 30. These Responding Parties have made it clear throughout, both in oral and written submissions, that their concern has nothing to do with the Monitor's personal liability or pursuing the Monitor. No special advantage was intended or can reasonably be expected as a result of the positions taken by these Responding Parties herein. The Monitor is an officer of the Court and will act in accordance with its obligations and duties as such. If anything, the relief being requested by these Responding Parties will simply serve to bring more transparency to that process and to ensure that creditor rights are not adversely affected, and the positions of the Applicants and others are not unnecessarily and improperly enhanced because of the relief requested by the Monitor.

27. The position of these Responding Parties is also not about creditors "lying in the weeds", as was rather remarkably suggested by the Monitor's counsel in oral argument. For the most part, the flow and progress of any CCAA proceeding – and certainly this one – are dictated by the debtor(s) and the Monitor, particularly in terms of priorities and timing. In many cases, creditors have no choice but to operate in a completely responsive mode due to the timing and priorities assigned by the debtor(s) and/or the Monitor. In these proceedings, the creditors were forced to deal with two sales processes, many related motions and various other issues, and have been provided only certain information at various times. These Responding Parties in particular asked for additional information, a significant portion of which was not provided.

28. In fact, those creditors that sought information, including with respect to the involvement of Target U.S., the nature of its claims, and other information of concern to them, were effectively told by the Monitor to wait until after the completion of the RPPSP and a Report on inter-company claims to be completed by the Monitor and delivered by August 31, before seeking additional information. It is therefore simply not appropriate for the Monitor to argue that anyone who has not taken specific objection to a particular portion of one of its 18 Reports has been "lying in the weeds". A neutral court officer should not take such an adversarial position against creditors who are simply seeking to prevent prejudice to their rights to seek further information or to take issue with certain activities. Creditors should not be disadvantaged by having been told by the Monitor to wait for further information.

Conclusion

29. The Monitor is not "entitled" as of right to an order approving its activities in these proceedings; the Court should approach this matter with appropriate caution to protect the rights

of creditors operating at a very real information disadvantage. An order "taking note" of the Monitor's Reports and activities, as in *Chantiers Davie*, is sufficient to fulfill current purposes. Alternatively, the Court should adopt the limiting language proposed at Schedule "B" to these submissions.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, THIS 18TH DAY OF AUGUST, 2015

BENNETT JONES LLP

Lawyers for RioCan and KingSett

SCHEDULE "A"

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

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WRITTEN SUBMISSIONS OF RIOCAN AND KINGSETT
(Motion Returnable July 30, 2015)

Introduction

1. These submissions are filed by RioCan Management Inc. and certain of its affiliates ("**RioCan**") and KingSett Capital Inc., certain funds under its management and certain of its and their affiliates (collectively, "**KingSett**", and together with RioCan, these "**Responding Parties**"), in respect of the request by the Monitor, originally in the Applicants' motion returnable May 11, 2015, seeking approval of various Monitor's Reports and the activities of the Monitor referred to therein (the "**Monitor Approval Motion**").

2. Paragraph 2 of the draft Order circulated by the Monitor with respect to its motion seeks the approval of, *inter alia*, 16 Monitor's Reports (the Third through the Eighteenth Reports) and, significantly, "the activities of the Monitor described in each of those reports". Those Reports

principally refer to activities during a period of time when the Real Property Portfolio Sales Process (the "**RPPSP**") and the liquidation sales were undertaken and ongoing.

3. The attempt to obtain approval of such activities at this point in time – particularly in these liquidation proceedings – is both premature and unnecessary. Providing such approval at this point, in the absence of full and complete disclosure of all of the underlying facts, would be unfair to the creditors, especially if doing so might in future be asserted and relied upon by the Applicants or any other party seeking to limit or prejudice the rights of creditors or any steps they might wish to take. For example, such approval might in future be relied upon by the Applicants or Monitor or others if one or more creditors seek appropriate information about steps or matters referred to in the Reports. This is particularly impactful because creditors simply do not have all the facts or the "full story" about the activities for which blanket approval is sought.

4. It is for these reasons that these Responding Parties ask the Court that the requested Order not be granted at this time. It is unnecessary. The Monitor has the full protections provided to it in the Initial Order and subsequent Orders, and under the CCAA.

5. In seeking such a result, these Responding Parties are not suggesting that the Monitor's Reports and the "activities" of the Monitor could not be approved at a subsequent point in time, or that the Responding Parties would be likely to object to the granting of such an Order at a later time. They are also not suggesting in any way any wrongdoing on the part of the Monitor in terms of its activities thus far. These Responding Parties are rather saying that the approval is premature and unnecessary at this point in time, and that such approval could result in serious prejudice to them and other creditors in the future.

The Relief Sought in the Monitor Approval Motion is Unnecessary at this Time

6. Pursuant to the Amended and Restated Initial Order and the CCAA, the Monitor has (i) a great deal of influence in these proceedings, but relatively little in the way of positive obligations or exposure to liability, including in the RPPSP and inventory liquidation process, and (ii) many levels of protection and insulation from liability. Indeed, there are few parties or court officers in any proceedings that have less exposure to any real potential liability than a monitor in CCAA proceedings.

7. For example:

(a) Paragraph 51 of the Amended and Restated Initial Order provides that "... in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of the Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, including for greater certainty in the Monitor's capacity as Administrator of the Employee Trust, save and except for any gross negligence or wilful misconduct on its part."; and

(b) Subsection 23(2) of the CCAA provides that "If the monitor acts in good faith and takes reasonable care in preparing the report referred to in any of paragraphs (1)(*b*) to (*d.1*), the monitor is not liable for loss or damage to any person resulting from that person's reliance on the report."

8. Although it is not uncommon in CCAA proceedings for monitors or the applicant's counsel to request Court approval of monitor's reports and various activities of the monitor at

various times during the proceedings, as with many other such prophylactic strategies, this began with someone deciding to try for such approval, it not having been objected to, and then others following suit. Indeed, the CCAA does not require, or even contemplate, such approvals on an ongoing basis. It does contemplate that the Monitor will ultimately have its accounts reviewed and scrutinized, and its activities impliedly reviewed at that time.

9. In other words, there is no statutory basis for approving activities mid-stream, and the fact that such approval has been sought, not objected to and granted in certain other cases does not mean that it is appropriate in these circumstances and at this point in time. It certainly does not mean that the Monitor has a right to such approval. A lack of objection to the concept in other proceedings does not create binding precedent, especially if making such an order in these proceedings could prejudice the rights of creditors. It is important to note that this Notice of Motion discloses no grounds whatsoever for the granting of the requested relief.

Monitor's Reports and "Activities described therein"

10. Furthermore, the practice that has generally evolved under CCAA in this Court, whereby the ability to cross-examine a monitor on its reports is not often, if ever, granted, makes it very difficult, if not impossible, for creditors and others to challenge or take issue with these reports in any event. In other words, a monitor's report may contain certain facts, selected facts, inadvertently inaccurate facts, conclusions (whether fully supported or not) and other statements that might serve to the detriment of various creditors attempting to enforce their rights or to protect their claims, all with only very limited ability of those creditors to challenge those statements in any effective manner. Therefore, of what consequence can and should an approval of the "activities" described solely in such a report be?

11. In this case, where a process such as the RPPSP has been run by the debtors, with only supervision by the Monitor, as a virtual "black box" for months with only limited details having been released and in which the various Reports of the Monitor do not detail in any way concerns that have been raised with the pursuit of the process by the Applicants and their advisors, the specific approval by the Court of those Reports and "the activities referred to therein" based on the limited disclosure and without at least an opportunity to test the disclosure when appropriate, could easily serve to prejudice the rights of creditors unfairly, prematurely and unnecessarily in ways that those creditors may not even be in a position to comprehend at this point in time.

12. If all of that happens in this case now, it will have been done ostensibly for no necessary purpose, other than the desire of the Monitor to have its actions "blessed" in a blanket fashion by the Court at this particular time. However, the Monitor is an officer of the Court, one without any statutory basis for seeking such ongoing blessing and one which is fully protected by a stay and various other exculpatory (and indemnification) provisions from ongoing lawsuits in any event.

13. If all of the activities and reports of the Monitor are approved on an ongoing basis throughout the proceedings, especially when the creditors do not have all the information they may need at the time to determine whether or not they wish to oppose such approval of individual activities, surely such approval has the potential to render it more difficult to object effectively to any activities of the Monitor or of those who interacted with the Monitor in the approved activities or to the costs it incurred at a later time when the facts become known. Even if ultimately the Court were to rule in favour of the position taken by the creditors in that regard, undoubtedly the creditors involved would have had to incur significant additional cost due to the

undoubted estoppels arguments likely to be raised by virtue of the approval of the earlier Monitor's Reports and activities.

14. It should be noted that, if this liquidation were being conducted as a bankruptcy pursuant to the BIA, the trustee, which would actually be running the process and not simply supervising it, would not be seeking this type of Court blessing of its activities part-way through the process and would certainly not be entitled to spend estate funds for that purpose.

15. Further, if the Monitor were concerned that any or all of its actions might be exposing it to liability, or that it might not be proceeding appropriately with respect to any of its duties, it always has the option (including pursuant to Section 73 of the Amended and Restated Initial Order and Section 4 of the Order approving the RPPSP) to seek advice and directions from the Court in that regard. Doing so would limit the relief sought and would require the Monitor to provide the Court (and the creditors) with the necessary detail upon which to make an informed decision. Instead, the Monitor in this case wishes to have its activities approved after the fact, but still in the middle of the proceedings, based on far less disclosure than would be required for a motion for advice and directions, and at a point in the process in which very little information is available to the creditors and the main fact-finding litigation has yet to get underway. Neither the creditors nor, significantly, the Court itself can make a truly informed decision on the "blessing" that is sought, a blessing which is neither contemplated by statute nor at all necessary.

16. A feature of many CCAA proceedings that has developed over the past few years has been the use of monitor's reports (rather than applicant affidavits) to provide an increasingly greater portion of the information to stakeholders and the Court – but still limited information – without exposing either the information or the provider to cross-examination.

17. In the past, Monitors' reports were primarily commentary and provided the monitor's perspective. They were not intended to be the primary purveyors of information and they were certainly not intended to be a protective screen against those seeking additional disclosure or for preventing the exposure of that information to extra scrutiny, such as cross-examination. Their reports were not meant to be records of proceeding or findings of fact.

18. The increasing reliance on monitor's reports, whether appropriate or not, and the clear limitations to the level and specificity of detail and to the breadth of coverage that one can expect a monitor's report to provide under our current system, make the potential consequences of activity "approvals" based on those reports more significant.

19. Further, whatever the merits of the information-delivery system and the structures that have developed are when it comes to an actual restructuring, the Target Canada proceedings are clearly liquidation proceedings and have been acknowledged as such. There are no ongoing operational interests to be protected by proceeding in other than the most transparent manner when it comes to the rights of the creditors, particularly because of the very large intercompany claims that are expected (and the lack of disclosure thereof as a probability in the initial *ex parte* proceedings). There are no sensitive restructuring negotiations underway or contemplated anytime soon. Simply put, there is no reason why the only or primary source of information for the creditors and the Court in these proceedings should be the Monitor's Reports rather than applicants' affidavits.

20. Creditors with concerns and wishing to seek further information should not have to be satisfied with that information being provided to a limited and summary extent by way of monitor's reports. That is especially the case in this situation where these Responding Parties

and others sought to have the RPPSP run by the Monitor, which was resisted, such that the Applicants remained in charge throughout. Again, in this case in particular there were many meetings, interactions and discussions during the RPPSP to which the Monitor was not party (and it is not suggested that the Monitor should have been party to those), of which the Monitor therefore has no first-hand knowledge. In other words, certain of the information that could be provided by the Monitor in terms of specifics in any report with respect to the RPPSP would necessarily be second-hand to it.

21. Therefore, in this matter, it would be unfair if the creditors were limited to and by information provided by Monitor's Reports, as opposed to information directly from the Applicants, which sought and were given permission to run the process. It would also be unfair if their ability to take issue with matters or to pursue further information were limited or adversely affected by such approvals.

This is Not about Suing the Monitor

22. The opposition of these Responding Parties to this motion has nothing to do with suing the Monitor, either now or later. They neither have currently, nor expect to have in the future, any intention of doing so and they have not threatened to do so. Rather, this opposition is about safeguarding the rights of creditors in a proceeding that is a pure liquidation, into which they have been given very little visibility and in which, unlike a bankruptcy, they have not been afforded the opportunity to appoint inspectors who would direct the proceedings and the court officer. Not insignificantly, these are also proceedings in which a huge potential, and obviously foreseeable (to the Applicants and others at least) claim for the ultimate benefit of the U.S. parent company was not disclosed sufficiently on the initial application, although the relevant materials

went to great lengths to justify this debtor-in-possession liquidation by emphasizing the magnanimity of that same U.S. parent in subordinating what then appeared to be its main claims and in seeing to the payment of employees.

23. From the perspective of these Responding Parties, these proceedings are very much about the role played by Target U.S., including in the months leading up to the filing, the choice and dealings with certain of the advisors, the pursuit of the RPPSP and the interaction with the interests of Target U.S. (including, but not limited to, its lease indemnities and guarantees). One of the biggest issues going forward will be intercompany claims and the expected litigation in that regard which will likely involve attempts to discover facts from the last 12 months or more.

24. Proceedings such as these are rarely, if ever, level informational playing fields for the creditors for various reasons, none of which ought to apply to pure liquidations. Creditors almost never have as much information available to them as do the debtor parties, often not even sufficient information on which to make complete assessments. Time constraints (real or otherwise) imposed throughout such proceedings are inevitably to the disadvantage of the creditors. They and the Court are often told certain things must be agreed to immediately or else some dire consequence will be visited upon the creditors or the assets, even though the proceedings and transactions in question may have been in the planning stages for months. In this case in particular, attempts to adjourn certain of the motions in order to give sufficient time to review the facts and to prepare were opposed vigorously by the Applicants and sometimes equally vigorously by the Monitor.

25. During the RPPSP, there was a significant and extensive veil of secrecy with respect to day-to-day matters, and even the manner of the drafting of the relevant confidentiality

agreements was arguably calculated to limit access to information for the creditors (including the landlords) and to make it very difficult later on to question or even seek full information as to the way in which the process was carried out. Indeed, even though the RPPSP is now complete, one of the key reasons given to these Responding Parties for the denial of full requested information as to what happened is the protection of the bidders, even though the names of the bidders were not sought as part of that search for information and the bidders were aware that they were participating in a public, Court-supervised process.

26. There is no urgency to the relief sought by the Monitor in this motion. Indeed, there is no justification at all for estate and creditor funds to have been expended for purposes of bringing, defending or opposing this aspect of the motion seeking approval of the Monitor's activities. This is a liquidation and there are no continuing interests to protect. Any attempt to call it a restructuring is pure 'bootstrapping' in reaction to the complaints by creditors that this should have been administered as a BIA proceeding.

27. Indeed, one of the key elements of this "black box" – the huge intercompany claims – will only be disclosed to the creditors after this motion is heard, an interesting point of timing to be noted.

Concerns as to the Effect of the Approval Sought

28. As referred to previously, the concern here is not at all with preserving the ability to sue the Monitor. The concern is with the ways in which this approval might be used by the Applicants, the Monitor or others to assert estoppels or related arguments that creditor rights, including, but not limited to, rights to information and cross-examination, might somehow have been affected by the approval.

29. A practical and illuminating example of the concern in this regard may be found in recent correspondence from counsel to the Applicants. By way of letter dated July 15, 2015, counsel for the Applicants wrote to counsel for these Responding Parties in partial response to a letter dated June 5, 2015 seeking further information about the RPPSP and related issues. Because the majority of the content of the July 15 response is confidential to these Responding Parties, only the relevant part of that response is referred to.

30. The essence of the final section of the July 15 response is to reply to issues raised about the RPPSP. In addition to substantive responses on some of those issues, counsel for the Applicants responded as follows, all under the heading "The Court Found that the RPPSP was "Fair and Reasonable":

> "The Target Canada Entities took more than 20 transactions, involving 69 properties, to Court for approval. In every case, we served the motion materials on the service list. In several cases, Bennett Jones attended the motions and advised the Court that it did not oppose the relief sought.
>
> **The Court repeatedly found that the RPPSP was conducted fairly and reasonably.** For example, in the Court's May 19, 2015 Endorsement – on which you are identified as attending as counsel for RioCan – Regional Senior Justice Morawetz stated that "The background facts, as set out in the Applicants' factum, were not challenged", and found [underlining emphasis in original]:
>
> > I am satisfied that the sale process was fair and reasonable. In arriving at this conclusion I have taken into account the submissions of counsel to the Applicants commencing at paragraph 49 [of the factum].
>
> Similarly, in the Court's May 20, 2015 Endorsement – on which you are again identified as attending as counsel for RioCan – Regional Senior Justice Morawetz found:
>
> > The Real Property Sales Process was Court approved. I am satisfied that the sale process was fair and reasonable. The submissions of counsel to the Applicants were not challenged nor was the recommendation of the Monitor. [...] The legal test, as set out in s. 36 of the *CCAA* has, in my view, been satisfied."

31. This is an excellent example of the concern that these Responding Parties have with the relief being sought in this motion. Notwithstanding that the hearings on May 19 and May 20, referred to by counsel to the Applicants in her letter quoted above, were hearings with regard to particular transactions to which no one was objecting and notwithstanding that there was no

discussion before the Court at that time as to issues relating to the RPPSP overall, counsel to the Applicants has attempted to take a standard finding contained in the Court's Endorsement as to the reasonability and fairness of the sale process – one that could only have related to the properties in question before the Court – and to attempt to use it as a shield against both requests for information and the ability to question the way in which the process was conducted, including the extent to which Target U.S. was able to participate and/or exercise influence therein.

32. It does not take much imagination to see how, by the same type of reasoning, now that the RPPSP is complete and as focus also is brought to bear upon the intercompany claims and the role of Target U.S. and other entities in all of this, attempts by creditors to seek further information or to make arguments in these proceedings might be met with counter-arguments from the Applicants, the Monitor and others that the Court has dealt with these issues in its approval of the Monitor's activities (including because the Monitor would have been intimately involved in many of these issues), such that further inquiries or discovery should not be allowed or arguments should be dismissed as a result of them being *res judicata*.

33. Simply put, there can be no fair or reasonable basis for further unlevelling of the playing field for the creditors – including in terms of providing more arguments to the Applicants and others that would need to be addressed in litigation – simply because a fully protected and insulated court officer wishes to seek early and unnecessary additional Court approval of its activities as disclosed in its own reports, notwithstanding that the full extent of the relevant events and the full implications of seeking that approval are neither apparent nor available to all. There may never need to be more such disclosure. At this point, the answer to that is not clear.

However, it might be necessary or desirable and the creditors should not be prejudiced, even to the extent of creating additional arguments that the creditors would need to overcome.

34. As a further example of the concern of these Responding Parties with respect to the issue of approval of the Monitor's activities, it is instructive to look at Section 6.0 of the Monitor's Fifteenth Report. That section refers to a great many activities, but contains almost no detail as to the specifics of those activities. The question then becomes whether the Monitor is simply seeking some sort of acknowledgement from the Court that these generally were proper areas in which to expend efforts or whether it is seeking the Court's blessing as to the way in which it did so, the degree to which it did so, and the amount of time and effort it expended in doing so. In the submission of these Responding Parties, only the first of those is reported in any detail in the Monitor's Reports.

35. Looking to the Fifteenth Report specifically, it is important to understand exactly what is meant by approval of the Reports and the activities of the Monitor:

(a) In Section 6.3, is the Monitor seeking approval of the extent to which it expended time and effort and as to the extent of the responses?

(b) Is the Monitor seeking approval of the extent to which it consulted and/or interacted with Target U.S.? Indeed, there is little information provided in that Report (or others) with respect to this issue despite it having been raised repeatedly by these Responding Parties. Sections 6.4(c), (d), (e), and (f) all refer to contacts with Target Canada Entities, but contain no detail as to similar contacts with Target U.S..

(c) In Section 6.4(d), is the Monitor seeking approval of all that happened in the RPPSP, or at least of anything that happened in which it was involved? If something happened and the Monitor was there, but a creditor subsequently wishes to challenge that or to seek information with respect thereto, will it be met with an argument by anyone that this approval forecloses or limits that ability?

36. Similarly, looking to the Third Report, in Section 5.4, is the Monitor seeking approval of everything that led up to the consent it gave for the entering into the mutual termination agreement that gave rise to the huge intercompany claim?

37. These Responding Parties have no quarrel if the Monitor seeks to know from the Court and the parties if the general areas it is pursuing or not pursuing (provided that details of the latter are given) are acceptable, but such a request is very different from seeking approval of activities based on generalized reports with relatively little detail provided and with virtually no mention of the issues and concerns that have been raised by these Responding Parties and others with regard to such issues as the role of Target U.S. in the RPPSP, for example.

There is not Enough Information Available as yet for the Approval Sought to be Understood and Evaluated Properly

38. Previous attempts of creditors to get access to information and to cross-examine on certain affidavits have been rebuffed and postponed thus far as being premature. The creditors and the Court were effectively told that such endeavours should await the end of the RPPSP and the intercompany claims report (which is not expected until August 31, 2015). The RPPSP has just recently been completed and even the Eighteenth Report of the Monitor, which provides certain information with respect thereto, does not contain enough information in order to enable

these Responding Parties and others to make a reasoned evaluation of the way in which the RPPSP was conducted in terms of the influence of Target U.S., for example.

39. In the Outline of Submissions of these Responding Parties filed February 11, 2015, these Responding Parties (and others orally at the time) expressed serious concerns as to the potential for "unfairness or an unlevelling of the playing field". Certain specific concerns were highlighted therein and orally at the time to the Monitor and, to some extent, to the Court.

40. Since that time, a number of matters of concern in terms of the way in which the RPPSP has been carried out have arisen and have been raised with the Monitor by various landlords, including these Responding Parties. For the most part, those relate to the extent to which Target U.S. has been able to participate in the decision-making process pursuant to the RPPSP and to influence certain steps and decisions that have been taken thereunder for its own benefit, although there are other concerns as well. It is too early to know whether any of this will require further discovery, litigation or other measures. However, it is clear that nothing should be done at this point, especially approvals solely for the benefit of the Monitor, to in any way affect the rights and remedies of creditors in that regard.

41. As has been referred to herein, it is the submission of these Responding Parties that the approval sought by the Monitor should not be granted at this time. However, if the Court were disposed to grant some part of that approval, it is submitted that it should be strictly limited in such a way that it does not allow any person other than the Monitor to gain any advantage therefrom (and only, in the case of the Monitor, in terms of its personal liability), and that it not preclude full investigation, information disclosure and the taking of further action with respect to

any relevant issues (including, without limitation, the intercompany claims and steps and actions taken by anyone relating or giving rise thereto).

42. As the Court would expect, these Responding Parties have attempted to reach a resolution of these issues in advance of this motion, including by providing alternative language for the Order.

43. After receiving the original proposed order, these Responding Parties provided language to address their concerns. The Monitor has circulated somewhat revised wording to its proposed draft Order, but there is no agreement.

44. In the event that the Court is disposed to include certain activity approval language, the Responding Parties propose that the additional language attached at Schedule A form part of any approval Order.

45. Although the Monitor's proposed revised wording represents an improvement over its originally proposed draft Order, it falls far short of covering all of the issues and risks referred to in these submissions and of making clear that no advantage whatsoever (including, for example, using the approval to resist discovery or to argue that certain matters can no longer be raised) can be gained by anyone (other than the Monitor with respect to its own personal liability, subject to the limitations of the approval in terms of coverage of content) as a result of the making of the Order. The Monitor's draft also fails to exempt out all possible matters relating to the intercompany claims, including with respect to the Monitor. After all, there has been virtually no disclosure with regard to those claims and the circumstances in which they arose as yet.

46. It is submitted that, if the Court decides to grant limited approval to the activities of the Monitor, both the endorsement of the Court and the terms of the Order should be stated in the clearest manner not to allow that approval to be misused to the disadvantage of creditors. While economy of words is often a laudable goal, in this case – especially when this entire Motion and the relief sought is unnecessary and premature and could result in significant prejudice to the creditors – it is crucial that, if an order is made, it and the endorsement rule out such potential misuse and prejudice.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, THIS 29TH DAY OF JULY, 2015

BENNETT JONES LLP

Lawyers for RioCan and KingSett

SCHEDULE "A"

"; provided, however, that (a) such approval shall not apply to anything in any way related to the Mutual Termination Agreement or claims advanced against any Target Canada Entity by a related or affiliated entity, (b) such approval shall be entirely without prejudice to any fee approval motion by the Monitor or any contestation thereof or objection thereto by any person, (c) such approval shall not render any matters referred to in those Reports of the Monitor *res judicata* or issue estoppel (even with respect to the Monitor, other than to the extent of the actual disclosure made therein), and (d) no person (including, without limitation, (i) the Target Canada Entities, (ii) Target Corporation and its affiliates and (iii) each creditor of a Target Canada Entity) other than the Monitor personally shall, directly or indirectly, derive any benefit or have any of its rights or remedies affected in any way whatsoever, as a result of or otherwise in connection with such approval. Without limiting the foregoing *proviso*, notwithstanding that certain of such Reports of the Monitor may make reference to, and/or describe certain activities of, involving or relating to, other persons, no approval or findings are being hereby provided or made with respect to such persons (or the role they played therein) or activities, no other persons' rights and remedies with respect to such persons or activities are hereby affected, and no one shall be entitled to raise as a defence or reason to deny or oppose any relief the fact of this limited approval, other than the Monitor, and then only, subject to (c) above, with respect to issues of its personal liability"

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT* AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TARGET CANADA CO. *ET AL*

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

OUTLINE OF SUBMISSIONS OF RIOCAN AND KINGSETT

BENNETT JONES LLP
Suite 3400, One First Canadian Place
P.O. Box 130
Toronto, Ontario M5X 1A4

S. R. Orzy (LSUC #23181I)
Tel: (416) 777-5737
R. Swan (LSUC #32076A)
Tel: (416) 777-7479
S. Zweig (LSUC#57307I)
Tel: (416) 777-6254

Fax: (416) 863-1716

Lawyers for RioCan and KingSett

SCHEDULE "B"

"provided however, that only the Monitor, in its personal capacity and only with respect to its own personal liability, shall be entitled to rely upon or utilize in any way such approval."

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT* AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TARGET CANADA CO. *ET AL*

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OUTLINE OF SUBMISSIONS OF RIOCAN AND KINGSETT

BENNETT JONES LLP
Suite 3400, One First Canadian Place
P.O. Box 130
Toronto, Ontario M5X 1A4

S. R. Orzy (LSUC #23181I)
Tel: (416) 777-5737
R. Swan (LSUC #32076A)
Tel: (416) 777-7479
S. Zweig (LSUC#57307I)
Tel: (416) 777-6254

Fax: (416) 863-1716

Lawyers for RioCan and KingSett