Court File No. M44123
M44124

COURT OF APPEAL FOR ONTARIO

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 THE CASH STORE FINANCIAL SERVICES INC., THE CASH STORE INC., TCS CASH STORE INC., INSTALOANS INC., 7252331 CANADA INC., 5515433 MANITOBA INC., 1693926 ALBERTA LTD DOING BUSINESS AS "THE TITLE STORE"

Applicants

COMPENDIUM OF THE DIP LENDERS AND THE AD HOC COMMITTEE

October 1, 2014

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Court File No. CV-14-10518-00CL

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 THE CASH STORE FINANCIAL SERVICES INC., THE CASH STORE INC., TCS CASH STORE INC., INSTALOANS INC., 7252331 CANADA INC., 5515433 MANITOBA INC., 1693926 ALBERTA LTD DOING BUSINESS AS "THE TITLE STORE"

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[1] Bodnar et al. v. The Cash Store Financial Services Inc. et al., Supreme Court of British Columbia, Vancouver Reg. No. S041348;
Stewart v. The Cash Store Financial Services Inc. et al, Supreme Court of British Columbia, Vancouver Reg. No. S126361;
Tschritter et al. v. The Cash Store Financial Services Inc. et al, Alberta Court of Queen's Bench, Calgary Reg. No. 0301-16243;
Efthimiou v. The Cash Store Financial Services Inc. et al, Alberta Court of Queen's Bench, Calgary Reg. No. 1201-11816;
Meeking v. The Cash Store Inc. et al, Manitoba Court of Queen's Bench, Winnipeg Reg. No. CI 10-01-66061;
Rehill v. The Cash Store Financial Services Inc. et al, Manitoba Court of Queen's Bench, Winnipeg Reg. No. CI 12-01-80578;
Ironbow v. The Cash Store Financial Services Inc. et al, Saskatchewan Court of Queen's Bench, Saskatoon Reg. No. 1452 of 2012;
Ironbow v. The Cash Store Financial Services Inc. et al, Saskatchewan Court of Queen's Bench, Saskatoon Reg. No. 1453 of 2012

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TAB 1

CITATION: Cash Store Financial Services (Re), 2014 ONSC 4326
COURT FILE NO.: CV-14-10518-00CL
DATE: 2014-08-05

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 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 THE CASH STORE FINANCIAL SERVICES, THE CASH STORE INC., TCS CASH STORE INC., INSTALOANS INC., 7252331 CANADA INC., 5515433 MANITOBA INC., 1693926 ALBERTA LTD. doing business as "THE TITLE STORE"

BEFORE: Regional Senior Justice Morawetz

COUNSEL: *Jeremy Dacks*, for the Chief Restructuring Officer of the Applicants

Heather Meredith, for the FTI Canada Consulting Canada Inc., Monitor

Robert W. Staley and *Raj S. Sahni* and *Jonathan Bell,* for 0678786 B.C. Ltd.

Alan Merskey and *Orestes Pasparakis*, for Coliseum Capital Partners LP, Coliseum Capital Partners II LP, Blackwell Partners LLC, Alta Fundamental Advisors Master LP and the Ad Hoc Committee of Cash Store Noteholders in their representative capacities as DIP Lenders, First Lien Noteholders and Holders of Senior Secured Notes

Brendan O'Neill, for the Ad Hoc Committee of Cash Store Noteholders

Andrew Hatnay, *James Harnum* and *Adrian Scotchmer*, for Tim Yeoman,

Brett Harrison, for Trimor Annuity Focus LP, No. 5

HEARD: June 11 and June 16, 2014

ENDORSEMENT

Introduction

[1] Cash Store (as defined below) is a payday lending company operating under CCAA protection.

[2] Cash Store is not a conventional lender. When operating in the "normal course", Cash Store acts as a broker charging a fee of 23% of funds advanced, paid by its customers with the fee being taken directly off the loan proceeds.

[3] On paper, Cash Store obtains funding from sources which include a number of third party lenders ("TPLs"). On paper, these TPLs provide Cash Store with funds which Cash Store, as broker, then lends to Cash Store customers. On paper, the loans are assigned to the TPLs. On paper, the TPLs "own" all payments received from the customers. These payments are comprised of principal and interest. Interest is charged at a rate of 59% per annum. On paper, Cash Store is required to keep TPL funds segregated. On paper, the operating model leads to a conclusion that the relationship between TPLs and Cash Store is not a debtor-creditor relationship, but is one where Cash Store functions as a broker.

[4] However, the manner in which Cash Store business operations were conducted differed substantially from that set out "on paper". Specifically, interest payments did not flow to the TPLs at the contract rate of 59% - or even at 59% less a bad debt expense, or after an allowance for impaired loans. Rather, Cash Store would make "voluntary payments" or "retention payments" at the rate of 17.5% (in some cases 20%) to the TPLs as "an inducement" to ensure the continued support of the TPLs.

[5] Payments received from Cash Store customers were used in the operations of Cash Store. Cash Store did not keep payments that it received from its customers in a segregated account for TPLs. The TPLs did not audit the accounts of Cash Store.

[6] Cash Store breached a number of contractual agreements. Cash Store defaulted on its obligations. The management team of Cash Store has departed and Cash Store has filed for protection under the CCAA. The parties that provided Cash Store with funds are now trying to recover those funds.

[7] At the core of this motion is a dispute over whether these TPLs loaned their funds *to Cash Store*, which in turn made its own loans to its customers; or whether the funds were loaned by the TPLs *to Cash Store's clients*, with Cash Store merely operating as a broker. If the conclusion is the former, the TPLs must stand in line as creditors of Cash Store. If the latter is true, the TPLs argue they, and not Cash Store, are the beneficial owners of certain funds in the possession of Cash Store and of certain outstanding loans.

[8] The circumstances, and the relief sought on this motion, are set out below. I begin with the relief sought by the various parties on the motion and cross motion. I then set out the relevant history of the CCAA proceedings, followed by the positions of the respective parties. Finally, I turn to an analysis of the issues.

I. Relief Sought

[9] 0678786 B.C. Ltd. (formerly the McCann Family Holding Corporation) ("McCann") is a TPL and brings this motion for a declaration that the following property (collectively, the "McCann Property"), including, without limitation, the McCann Loans as defined in the order of April 30, 2014 is owned by McCann free of any interests or claims of any creditor:

a. Any loans made in the name of any third party lender and brokered by the Cash Store Inc. and 1693926 Alberta Ltd. (collectively, "Cash Store") on

behalf of their customers ("Customers") using funds made available by McCann for that purpose (the "McCann Funds");

b. Any advances originated by Cash Store and subsequently purchased with the McCann Funds;

c. Any loans or advances originated by Cash Store and subsequently assigned to McCann as capital protection or otherwise (together with (a) and (b) above, the "McCann Loans");

d. Any amounts received by Cash Store from its customers in repayment of the McCann Loans (the "McCann Receipts");

e. Any accounts receivable in respect of the McCann Loans (the "McCann Accounts Receivable"); and

f. The McCann Funds.

[10] Trimor Annuity Focus Limited Partnership No. 5 ("Trimor") is also a TPL and brings a similar motion for a declaration that the following property (the "Trimor Property") is owned by Trimor free of any interests or claims of any creditor of the Applicants:

a. Any loans made in the name of Trimor and brokered by the Cash Store on behalf of their Customers using funds made available by Trimor for that purpose (the "Trimor Funds");

b. Any advances originated by Cash Store and subsequently purchased with the Trimor Funds;

c. Any loans and advances originated by Cash Store and subsequently assigned to Trimor as capital protection or otherwise (together with (a) and (b) above, the "Trimor Loans");

d. Any amounts received by Cash Store from its Customers in repayment of the Trimor Loans (the "Trimor Receipts");

e. Any accounts receivable in respect of the Trimor Loans (the "Trimor Accounts Receivable"); and

f. The Trimor Funds.

[11] The lenders under the Applicants' amended and restated Debtor and Possession Term Sheet, dated May 16, 2014, (collectively, the "DIP Lenders") bring a cross-motion for a declaration that:

i. the Applicants are the beneficial owners of funds described as "Trimor Funds", "McCann Funds", "Trimor Receipts" and "McCann Receipts" (collectively, the "Disputed Post-Filing Receipts") in the Fresh as Amended Notice of Motion of Trimor and the Fresh as Amended Notice of Motion of McCann (collectively, the "TPL Notices of Motion");

ii. the following transactions constitute preferences under applicable legislation:

1. the designation by the Applicants of any advances or loans, including brokered loans, as advances or loan in the names of Trimor or McCann; and

2. any assignment, whether as capital protection or otherwise, by the Applicants to Trimor or McCann, or in their names, of non-brokered loans made in the names of the Applicants (collectively, the "Reviewable Transactions").

iii. The Reviewable Transactions shall be reversed such that the Applicants are the beneficial owners of the assets described as "Trimor Loans", "Trimor Accounts Receivable", "McCann Loans" and "McCann Accounts Receivable" in the TPL Notices of Motion;

iv. Neither Trimor nor McCann shall take any steps to collect any advances or loans made to the Applicants' Customers, irrespective of whether such loans or advances have been designated in the name of Trimor or McCann or otherwise assigned to Trimor or McCann by the Applicants, and any recoveries or collections on such advances or loans by Trimor or McCann shall be deemed to be held in trust for the Applicants;

v. In the alternative to (ii) through (iv) above, declaring that no steps be taken by Trimor or McCann to assert an interest in, collect, or otherwise recover any of the advance or loans made to the Applicants' Customers, whether in the names of Trimor or McCann or otherwise, unless the Monitor determines not to challenge the Reviewable Transactions.

II. Background of CCAA Proceedings

[12] On April 14, 2014, an initial order (the "Initial Order") was granted pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA"), to the Cash Store Financial Services Inc. ("CSF"), Cash Store Inc., TCS Cash Store Inc., Instaloans Inc., 7252331 Canada Inc., 5515433 Manito Inc. and 1693926 Alberta Ltd. doing business as "The Title Store"

(collectively, the "Applicants" or "Cash Store"), providing protections to the Applicants under the CCAA, and appointing FTI Consulting Canada Inc. as monitor (the "Monitor").

[13] On April 15, 2014, an amended and restated Initial Order (the "Amended and Restated Initial Order") was granted, which, among other things, approved an interim CCAA credit facility (the "Initial DIP") by Coliseum Capital LP, Coliseum Capital Partners II LP, and Blackwell Partners LLC (collectively, "Coliseum"), and appointed Blue Tree Advisors Inc. as Chief Restructuring Officer of the Applicants (the "CRO").

[14] On April 20, 2014, an order was granted providing certain protections for third party lenders ("TPLs") (McCann and Trimor are TPLs) specifically relating to repayments of loans bearing the name of, attributable to, or assigned to, McCann and Trimor and requiring the Applicants to maintain the $3 million minimum cash balance (the "Additional TPL Protection Order").

[15] On May 13, 2014, the court granted an order (the "May 13 Order"), which extended the stay to May 16, 2014, approved a key employee retention plan and related charge, approved the cessation of the Applicants' brokered loan business (the "Broker Business") in all jurisdictions in which it was then carried out, and authorized the CRO, in consultation with the Monitor, to conduct an orderly cessation of such business.

[16] On May 17, 2014, an order was granted extending the stay and approving an amended and restated term sheet providing for a DIP Facility by the following lenders (together, the "DIP Lenders"): Coliseum, Alta Fundamental Advisors, LLC, and certain members of the Ad Hoc Committee (the "Ad Hoc Committee") of the Applicants' 11½% Senior Secured Notes (the "Notes").

[17] The TPL protections and provisions of the Additional TPL Protection Order provide as follows:

a. A charge in favour of the TPLs (the "TPL Charge") in the amount of Cash Store's cash on hand as of the effective time of the Initial Order, as security for any valid trust or other proprietary claim of a TPL to such cash on hand;

b. A declaration that the TPLs' entitlement to TPL brokered loans in existence at the effective time of the Initial Order (the "TPL Brokered Loans") is to be determined based on the legal rights as they existed immediately prior to the effective time, and that post-filing treatment of receipts is not relevant to determination of the TPLs alleged entitlement to or ownership of and will not prevent the TPLs from arguing that segregation would have been required by them, but for the Initial Order; and

c. Restrictions on the treatment of post-filing receipts and new TPL Brokered Loans and requirements to keep certain minimum cash balances.

III. Facts

a. Monitor's Reports

[18] As the Monitor noted in the pre-filing report, according to the Applicants the TPLs had provided approximately $42 million of funding (the "TPL Funds") over time in relation to various brokered loans. The original $42 million could be accounted for as follows:

a. Restricted cash (TPL Funds received by Cash Store that are not redeployed to other broker customers as referenced on Cash Store's financial statements), estimated to be approximately $14.7 million as at March 31, 2014; and

b. Amounts on loan to Customers pursuant to the Broker Agreements (defined therein) of which approximately $8.5 million were "historic bad loans" which the Monitor understood were outstanding since at least 2012, unlikely to be recovered and all brokered with Trimor.

[19] The Monitor is of the understanding that the relief sought by Trimor and McCann relates specifically to TPL Brokered Loans that existed immediately prior to the commencement of the CCAA proceedings and amounts collected by Cash Store in relation to the Brokered Loans after the commencement of the CCAA proceedings (the "TPL Post-Filing Receipts").

[20] The Monitor also noted that the question of ownership of the TPL Brokered Loans and the specific relief sought on this motion may have broader implications on the question of compliance with regulatory restrictions and on potential class action claims arising therefrom.

[21] The Monitor compiled and updated data relevant to these foregoing issues.

[22] As of April 13, 2014 (the day before the Initial Order), TPL Brokered Loans in the following value were recorded in the Applicants' books and records:

a. $5.7 million of McCann loans, which included:

i. 673 loans with a total face value of $449,000 that were written off prior to April 13, 2014 all of which had been Cash Store direct loans that had been assigned to McCann; and

ii. 7,855 line of credit loans in Ontario with a face value of $5.26 million, all of which had been written in Trimor's name and subsequently transferred to McCann

b. $16.8 million of Trimor loans, which included:

i. $4.4 million in loans that were written off prior to April 13, 2014, which included $2,155,464 of loans that had been Cash Store direct loans that had been assigned to Trimor;

ii. $12.4 million of brokered loans that had not been written off that had been written in Trimor's name;

c. $799,114 in loans in the name of other TPL Lenders of which $292,021 were written off prior to April 13, 2014.

[23] The brokered line of credit product was discontinued in Ontario as at February 12, 2014 and no TPL Brokered Loans were made in Ontario during the CCAA proceedings.

[24] New TPL Brokered Loans were made by the Applicants outside Ontario after the Initial Order (pursuant to the Amended and Restated Initial Order and additional TPL Protections Order) until May 12, 2014 when the Applicants ceased the broker business. The Monitor understands that, during this time, TPL Brokered Loans totalling $5,911,141 were made in the name of Trimor, with no new TPL Brokered Loans made in the name of McCann.

[25] As at May 31, 2014, TPL Brokered Loans in the following value were recorded in the Applicants' books and records.

a. McCann: $4,274,924 of which $242,614 have been written off;

b. Trimor: $13,288,913 of which $3,059,224 have been written off;

c. Other TPL: $649,060 of which $266,823 have been written off.

[26] Trimor post-additional TPL Protection Order loans (*i.e.* loans made after the date of the additional TPL Protection Order and before the business broker ceased in the name of Trimor for which a declaration had been made that Trimor is the owner) totalled $2,520,540.

TPL Post-Filing Receipts

[27] After the additional TPL Protection Order was issued, segregated accounts were opened to maintain the McCann Post-Filing Receipts and the Post-Filing Trimor Ontario Receipts. After the broker business ceased, the Post-Filing Trimor Non-Ontario Receipts were also deposited into the Trimor account for post-filing receipts.

[28] The Monitor reported the following amounts in the segregated accounts as of May 6, 2014:

a. McCann Post-Filing Receipts of $699,558

b. Post-Filing Trimor Ontario Receipts of $690,380.

[29] The balances in the segregated accounts as of May 27, 2014 were as follows:

a. McCann Post-Filing Receipts of $927,774

b. Post-Filing Trimor Ontario Receipts and Post-Filing Trimor Non-Ontario Receipts of $2,092,824.

[30] The balances in the segregated accounts as of June 4, 2014 were as follows:

a. McCann Post-Filing Receipts of $1,236,053

b. Post-Filing Trimor Ontario Receipts and Post-Filing Trimor Non-Ontario Receipts of $2,686,089

c. Other TPL Lender Receipts of $175,788.

The Monitor's Position on the Reviewable Transactions

[31] The cross motion by the DIP Lenders seeks a declaration that any designation of TPL Brokered Loans in the name of Trimor or McCann and any assignment of non-brokered loans to Trimor or McCann are preferences pursuant to the CCAA and/or provincial legislation.

[32] The Monitor has advised the DIP Lenders that it is of the view that it is the Monitor who has standing to proceed with such a challenge using the provisions of the CCAA (absent an order equivalent to a *Bankruptcy and Insolvency Act* s. 38 Order authorizing the DIP Lenders to do so) and that, at this time, the Monitor is not bringing a preference or transfer at under value application. The Monitor advised that it continues to investigate relevant facts and is evaluating the merits of such an application, together with its assessment of other transactions made prior to the Initial Order.

[33] The Monitor does not take a position on the DIP Lenders' motion pursuant to provincial reviewable transaction legislation.

[34] McCann has requested that its legal and other professional fees incurred in or in connection with the CCAA proceeding be paid by the Applicants and be included in the Administration Charge. The Monitor notes that Trimor (which has not made a similar request for relief) does not have its legal or professional fees listed in the Administration Charge although Trimor's legal counsel (McMillan LLP) is listed in the Amended and Restated Initial Order among counsel whose reasonable fees and disbursements the Applicants "shall also be entitled to pay". The Monitor is of the understanding that this was included on the understanding that the Applicants would not fund any Trimor fees for challenges made by Trimor against the Applicants.

[35] The Monitor notes that it is mindful of the limited resources available in the CCAA proceedings and that any party requesting coverage of fees pursuant to the Administration Charge must establish that such coverage would be necessary for their effective participation in proceedings under s. 11.52 of the CCAA.

b. Submissions of TPLs

[36] McCann and Trimor take the position that they entrusted millions of dollars to the Applicants for the sole purpose of brokering loans between the TPLs and Borrowers and at all times, the TPLs retained ownership of their funds and of all the loans ultimately brokered with those funds or otherwise purchased by or assigned to the TPLs. They also take the position that they own any accounts receivable in respect of their loans in any amounts actually received by the Applicants from their customers in repayment of the loan. The TPLs take the position that this arrangement was memorialized in written broker agreements.

[37] The fundamental problem with this position, as I discuss in the next section, is that the written agreements did not accord with reality.

[38] McCann requests a declaration that, among other things, McCann is the sole legal and beneficial owner of these funds, loans and receivables, as reflected in its broker agreement. Trimor takes the same position with respect to the funds it made available to the Applicants under its broker agreement.

[39] The TPLs take issue with the position being taken by the DIP Lenders to declare that the TPLs' property belongs to the Applicants. The TPLs submit that the DIP Lenders do not articulate any plausible legal theory in support of their request but rather, they simply insist that the TPLs are mere unsecured creditors.

[40] Further, the TPLs take issue with the DIP Lenders' preference arguments which they say are intended to attack ordinary course transactions between the Applicants and the TPLs. McCann submits that this issue is not properly before the Court as the right to impugn a transaction as a preference or transfer at undervalue belongs to the Monitor, and the Monitor has not challenged any of the transactions in question. The TPLs also take the position that the period for reviewing transactions as possible preferences has lapsed and, in any event, the evidence makes clear that the impugned transactions do not constitute preferences or transfers at undervalue. Rather, the TPLs take the position that TPL property is, and always has been, understood and intended to be, the property of the TPLs. They take the position that the transaction were not intended to prefer, defraud or otherwise hinder the Applicants' other creditors and the TPLs did not knowingly participate in any fraudulent scheme or preference.

The Broker Agreements

[41] The position of the TPLs is founded on various broker agreements.

[42] On June 18, 2012, McCann and Cash Store executed a broker agreement ("Broker Agreement"). McCann takes the position that, as financier, it made $13,350,000 in funds available (the "McCann Funds") to Cash Store, as broker, for the sole purpose of Cash Store brokering loans (the "McCann Loans") between McCann and Cash Store's customers (the "Customers").

[43] Before the McCann Funds could be loaned out, the Broker Agreement provided that Cash Store was required to ensure that extensive loan criteria were met or to obtain specific approval from McCann. Further, the McCann Funds were to be used for no other purpose. This requirement is set out in Article 2.10 of the Broker Agreement:

> 2.10 Usage of Loan Advances
>
> For greater certainty, funds, from time to time, advanced to broker from financier are solely intended to be utilized for the purposes of making advances to broker customers on financiers' behalf as contemplated hereunder. The broker agrees that any funds not otherwise being held by the broker as a "float" in anticipation of loan approvals shall not, without the consent of financier, be advanced or utilized for any other purpose.

Representations Allegedly Made to McCann

[44] McCann contends that in discussions leading up to the Broker Agreement's execution, and while Cash Store was administering the McCann Funds on McCann's behalf, it was expressed to be important to McCann that its funds be kept separate and apart from Cash Store Financial's general operating funds in accordance with the Broker Agreement. McCann takes the position that Cash Store Financial assured it that the McCann Funds were – and could continue to be – segregated at all times. McCann alleges that Cash Store represented to McCann, and it was a term of the Broker Agreement, that all of the McCann Funds would be placed in a "designated broker bank account", which would be separate and apart from Cash Store Financial's general operating account.

[45] McCann also takes the position that it understood McCann owned both the McCann Funds and the McCann Loans and that its accounts would be administered on a segregated basis from Cash Store's funds and be pooled safely with other "broker only" monies.

[46] In his affidavit, Mr. Murray McCann, former president of McCann, states that a number of account statements were received from Cash Store and that the "funding excess/deficiency" on the statements provided a summary of the McCann Loans. Mr. McCann goes on to state that when the McCann Funds exceeded the amount deployed as loans to customers, Cash Store described the undeployed monies as the "funding excess/deficiency". McCann states that at all times he understood this amount to be held separate and apart from Cash Store's other accounts in accordance with the Broker Agreement and McCann's instructions. Further, he states that Cash Store's public disclosure always showed the McCann Funds as McCann's property, not the property of Cash Store or Cash Store Financial.

[47] As recently as mid-March 2014, Mr. McCann states that Mr. Carlstrom, Vice President, Financial Reporting for Cash Store Financial, provided assurances to McCann that undeployed portions of the McCann Funds were secure and remained available to McCann and that Cash Store was administering McCann's property in accordance with the Broker Agreement.

Additional Submissions of McCann

[48] McCann takes the position that under the Broker Agreement, McCann owned loans made in the name of TPLs which were brokered by Cash Store on behalf of the customers using funds made available by McCann. In addition, McCann takes the position that it also owned advances originated by Cash Store which were subsequently purchased with the McCann Funds, and certain loans and advances originated by Cash Store which were subsequently assigned to McCann as capital protection or otherwise. McCann takes the position that it was entitled to receive a stated rate of 59% interest under these loans from the customers.

[49] McCann acknowledges that the McCann Loans were, by their nature, risky and accordingly, Cash Store historically made inducement payments to TPLs – referred to by Cash Store as "retention payments" – to induce TPLs to continue to make their funds available to Cash Store, which, in turn, enabled Cash Store to earn Broker Fees. In other words, these payments were intended to ensure that the TPLs were receiving a return commensurate with the considerable risk they were assuming. These "inducement payments" or "retention payments" were made by Cash Store on a monthly basis.

[50] Until March 2014, McCann states that it received monthly statements indicating the cash that McCann had made available to Cash Store and the amount that was deployed in loans to customers.

[51] In the Carlstrom affidavit, Mr. Carlstrom acknowledged that the so-called "restricted cash" in Cash Store's bank accounts totalled $12,961,000 as at February 28, 2014. However, by close of business on April 11, 2014, this amount had dwindled to approximately $2.9 million.

[52] McCann takes issue with Cash Store's disclosure of events when they moved for the Initial Order. Specifically, McCann contends that Mr. Carlstrom did not disclose in his affidavit that, in breach of the Broker Agreement and without the knowledge or consent of McCann, and contrary to the multiple representations made to McCann, Cash Store had misappropriated the TPLs monies and spent them on the Applicants' operating and professional costs leading up to the CCAA filing.

[53] McCann takes the position that the Special Committee must have made the decision to use the McCann Funds knowing that Cash Store and Cash Store Financial were acting in breach of the Broker Agreement and that they had misrepresented that McCann's monies had been properly segregated.

[54] McCann states that it is undisputed that Cash Store received approximately $42 million of TPL monies to broker but, in the Monitor's pre-filing report, the Monitor reported that only $18.66 million of brokered loans were outstanding and that Cash Store had only $2.94 million cash on hand. Combined, these two figures equal $21.6 million, which results in the remaining $20.4 million being misappropriated.

Increased Risk Created by the May 13 Order

[55] Subsequent to the granting of the Initial Order, McCann complains that the order of May 13, 2014 (the "May 13th Order") put the TPLs at further risk. The May 13th Order approved the cessation of the Applicants brokered loan business in all jurisdictions in which they operated that business. Also, the Chief Restructuring Officer (the "CRO"), in consultation with the Monitor, was authorized to take steps to conduct an orderly cessation of that business.

[56] The TPLs contend that not only did they not agree to allow their monies and receivables to be held and used by an insolvent Cash Store, the May 13th Order puts the TPLs in even greater jeopardy as it purports to create charges against the TPLs' property and treat it as if it is the Applicants' property.

[57] Paragraph 13 of the May 13th Order provides that the TPL charge is capped at $2.94 million and ranks third (*pari passu* the DIP Lenders) after the Administration Charge and the Director's Charge (up to a maximum of $1,250,000). They contend that this increases the risk that the costs of these proceedings would be paid out of the TPLs' remaining monies, after many millions of dollars of TPL Funds were already misappropriated by Cash Store for payment of costs not authorized by the TPLs leading up to the CCAA filing.

Trimor's Submissions

[58] Counsel to Trimor supported the submissions of counsel to McCann, as applicable to Trimor.

[59] Trimor transferred funds totalling $27,002,000 to Cash Store under the Broker Agreements for the sole purpose of brokering loans to customers (the "Trimor Funds").

[60] Trimor is a party to the following broker agreements with Cash Store (the "Broker Agreements"):

a. Broker Agreement between Trimor and Cash Store dated February 1, 2012 and made as of June 5, 2012;

b. Broker Agreement between Trimor and 1693926 Alberta Ltd. dated September 24, 2012 and made as of June 5, 2012.

[61] The Broker Agreements are similar (if not identical) to the broker agreements that Cash Store entered into with other TPLs, including McCann.

[62] Trimor takes the position that when Trimor funds were deployed as loans to customers, the creditor or lender is Trimor and Cash Store takes a brokerage fee. The supporting agreements and disclosure statements signed by customers named Trimor as the credit grantor and the customer as the borrower for the Trimor Loans.

[63] Trimor contends that the TPLs, including Trimor, only made the TPL Funds available as a result of representations that the Funds were segregated, held in trust, and used only for a specific purpose.

[64] Trimor contends that if the interest received by the TPLs was less than 17% of the TPL Funds, Cash Store would make a payment to bring cash received up to 17.5% (a "Retention Payment") and that Cash Store made the Retention Payments as an inducement to ensure that TPLs were receiving a return that was commensurate with the risk of lending.

[65] In January 2012, Cash Store offered $132.5 million in Senior Secured Notes due in 2017 through a private placement (the "Secured Note Offering"). Cash Store's offering circular dated January 12, 2012 (the "Circular") for the Secured Note Offering advised potential investors that Cash Store "currently acts primarily as a broker of short-term advances between our customers and third party lenders, the effect of which is that the loan portfolio we service is not financed on our balance sheets".

[66] These statements were repeated in financial statements. Trimor further contends that in its Circular, Cash Store advised potential purchasers of its bond that "we have made the decision to voluntarily make retention payments to the third party lenders as consideration for continuing to advance funds to our customers" and that "the decision has been made to voluntarily make retention payments to the Lenders to lessen the impact of loan losses experienced by the third party lenders".

[67] Trimor further contends that the DIP Lenders/Bond Holders were well aware of this practice and took no issue with it. However, this statement, which was made at paragraph 27 of the Factum, is not referenced to the evidence in the record.

[68] Similar to McCann, the Broker Agreements for Trimor provide that all funds advanced by Trimor were to be held in a designated broker bank account, which is a Cash Store bank account that is "designated by [Cash Store] for the purposes of temporarily receiving funds from [Trimor] ... before they are advanced to a [customer]". Trimor further contends that until January 2014 a separate bank account was used for the deposit of TPL Funds, including the Trimor receipts and the payment of Retention Funds.

[69] Trimor also contends that it received assurances from Cash Store that it would treat the Trimor Funds as being held in trust for Trimor's benefit.

[70] Trimor takes the position that since the CRO has determined, in consultation with the Monitor, that it is necessary and appropriate to implement a cessation of the brokered loan business and cease brokering new loans in all jurisdictions in which Cash Store operates, that Cash Store's intention to cease all brokered loan operations effectively terminates the Broker Agreements. In turn, Trimor now has the option to allow the Applicants to continue to administer the Trimor Loans, transfer their administration to a new service provider, or sell the Trimor Loans to a third party.

[71] Trimor contends that they will be seriously prejudiced if the Trimor Loans are not transferred to their control.

[72] On this motion, Trimor asks the Court to confirm Trimor's ownership of the Trimor Loans and receipts and to allow Trimor or its agent to assume administration of the Trimor Loans to maximize realizations in accordance with Trimor's contractual rights.

c. Submissions of the DIP Lenders

[73] Not surprisingly, the DIP Lenders, supported by the Ad Hoc Committee of Cash Store Noteholders (the "Committee") disagree with the position being taken by both McCann and Trimor. The TPLs base their claim upon the framework of the Broker Agreements. The DIP Lenders take the position that the TPLs' actual practices with Cash Store established that the TPSs varied the Broker Agreements, and in fact, entered into a debtor/creditor, or lending relationship with Cash Store. The focus of the inquiry is, in my view, whether the actual practices followed by the parties had the effect of varying the Broker Agreements.

[74] The DIP Lenders point out that the TPLs received a fixed rate of return on funds provided to Cash Store and did not directly bear the collection risk of any individual customer loan made by Cash Store.

[75] In addition, the DIP Lenders take the position that the funds advanced by the TPLs were comingled with Cash Store's general operating cash from which customer loans were made and there was no way to determine which funds belonged to the TPLs or which loans were made with funds advanced by the TPLs. The DIP Lenders take the position that it is uncontradicted that the funds were comingled and used from general operating accounts.

[76] Simply put, the position of the DIP Lenders is that of the TPLs became creditors and consented to Cash Store having use of all funds received back from customers and they became, in fact, lenders to Cash Store. As a result, Cash Store continues to be entitled to all funds received back from customers. The DIP Lenders contend that the TPLs sought and received the benefit of gratuitous retention payments and capital protections paid by Cash Store and, in so doing, they avoided the risk of their putative broker relationship. They also became creditors. Consequently, the TPLs are not entitled to disavow that creditor relationship and return to the status of broker.

[77] The DIP Lenders recognize that an understanding of the true nature of the relationship between Cash Store and the TPLs starts with the Broker Agreements. However, from their standpoint, it is necessary to review actual practice.

[78] The DIP Lenders concede that had the TPLs chosen to strictly follow their Broker Agreements, they could have had the benefit of specific fund recognition.

[79] The Broker Agreements contain a section entitled "Loan Funding by Financier" that details the means by which the financier (the TPL) can provide the money used by Cash Store to make loans to customers. Those means include payments made:

a. By wire transfer of funds to the designated broker bank account (for redirection/payment to, or for the benefit of, the broker customer); and

b. By cheque drawn by financier payable to broker (Cash Store) for deposit to the designated broker bank account (for redirection/payment to, or for the benefit of the, the broker customer).

[80] Further, the Broker Agreements go on to define "designated broker bank account" as:

> ... the bank account of broker designated by broker for the purposes of temporarily receiving funds from financier (if loans are made by financier way [sic] of cash advances) before they are advanced to a broker customer (...).

[81] With respect to receipts, the Broker Agreements entitle the TPL to designate a bank account for receipt of funds directly from Cash Store customers:

> "Designated financier bank account" means, the bank branch and account designated by financier from time to time where (and into which) deposits of cash and cheques received from broker customers, in respect of such financier funded loans, are to be cleared (deposited) from time to time ..."

[82] The Broker Agreements also grant the TPLs the opportunity to audit the records of Cash Store. The DIP Lenders take the position that the TPLs did not exercise those rights. Instead, they chose to accept variations to these agreements by which they benefited.

[83] As detailed in their factum at paragraph 16, the DIP Lenders describe the basis on which the third party lending business of Cash Store actually functioned:

a. The TPLs provided Cash Store with initial tranches of funds;

b. The funds were lent to Cash Store customers, in the name of the TPL (in Trimor's case, but not McCann's);

c. Cash Store customers, if not in default, repaid the borrowed funds to Cash Store, together with interest of 59%;

d. Cash Store deposited the returned funds and interest to a general account;

e. Cash Store made voluntary payments to the TPLs from Cash Store general revenue, in order to ensure that the TPLs received a fixed 17.5% return;

f. Cash Store provided voluntary "capital protection" to the TPLs, insulating them for customer credit risk;

g. Cash Store made new loans to customers, from the general account, in the name of the TPL; and

h. Cash Store recorded a receivable for the TPL, with respect to the re-lent funds.

[84] The DIP Lenders point out that Trimor and McCann were treated differently under the loan documentation. Specifically, when a customer took out a loan that was to be designated as being made on behalf of Trimor, the loan documentation explicitly stated that Trimor was the lender. When a customer took out a loan that was designated as being made on behalf of McCann, the documentation made no such specification. Rather, the loans listed another party as lender, and were then transferred into McCann's name.

[85] The DIP Lenders also point out that each of the processes described above were accepted by the TPLs, with the disputed exception of the general account comingling.

[86] The DIP Lenders recognize that on their surface the Broker Agreements contemplate a pass-through principal-broker arrangement. However, the practices adopted by the parties with regard to payments made by Cash Store to the TPLs reflected a different reality. The DIP Lenders reference Mr. McCann's email correspondence to Cash Store in which, from their standpoint, it was recognized that the TPLs, in substance, loaned funds to Cash Store and the TPLs were creditors of Cash Store. In an email dated March 14, 2014, Mr. J. Murray McCann stated to Mr. Gordon Reykdal as follows:

> Good morning Gord,
>
> I look forward to our call today and our visit in about a week.
>
> You mentioned that you were meeting with Steve and Craig this morning to discuss our loan to back stop Ontario payday loan customers and the requirements for funds in regulated provinces. We have attempted to redeploy the funds in Ontario since they are no longer being used to backstop payday loans there but so far with no success. Those funds are no longer secured by the payday creditors and the funds from those accounts collected were to be credited to us. It appears that those funds were credited to the account of Cash Store in contravention of our mutual understanding and agreement.
>
> Because the funds we have loaned are from a foundation it is even more important that we not place those funds at risk. As you know we went to considerable effort and legal cost to get the opinion and comfort that we required to assure that funds loaned to Cash Store were an ok investment because they were secured by loans and the promise of Cash Store for proper accounting of those loans. Now that the loans that supported our loans were collected we must ask for repayment. Should Cash Store require further loans as backup to payday loans in regulated provinces and secure those loans with payday loans, as in the past, we will be happy to make

funds available. We are happy with the return received from Cash Store and look forward to continuing our relationship for a very long time.

Please be assured that the interest Cash Store is paying us is going to very worthwhile causes that rely on our funding. We can never let them down. That is the main reason that we make sure that any agreements we enter into on their behalf is never at risk. On the other hand we will always live up to our side of the agreement.

I look forward to our call later today.

Cheers,
Murray

[87] On April 12, 2014, Mr. J. Murray McCann sent another email to Mr. Reykdal as follows:

Good afternoon Gord,

I have attempted to contact you on numerous occasions and have left messages on your cell, office phone with Sandy. Attempting to keep a creditor and friend in the dark by ceasing all communication is neither the way to treat a friend nor a creditor. As mentioned to you, on more than one occasion, the funds Rent Cash is improperly holding are used to support a large school, orphanage and girls residence in Zambia. Without those funds teachers, caregivers, food suppliers etc. cannot be paid and our school of 400 students will have to close. I told you this before and you assured me that Rent Cash was looking after our money diligently and there was no need to worry.

Please Gord do what you know is right and release our funds so that they can continue to be used for the good purposes they have been used for. You know that the money is not Rent Cash's and have stated that on many occasions and even as late as 2 weeks ago when we visited at your club and your home in Scottsdale. You, as president, promised and assured that all was well and our funds were being held by Rent Cash for our benefit.

Please contact me.

Sincerely,
Murray

[88] The DIP Lenders contend that, in reality, the TPLs were effectively guaranteed a rate of return of 17.5% of the advances (though it appears that Trimor earned interest at a rate of 20% prior to May 2011). Further, notwithstanding the actual fluctuations of payments of interest and principle seen by Cash Store's customers, the monthly reconciliations and interest schedule forwarded by Cash Store to each TPL calculate a simple return of 17.5% on the total principal advanced by each TPL.

[89] In order to make this guarantee possible, the DIP Lenders contend that Cash Store made "retention payments" each month. The retention payments effectively made up any shortfall between actual amounts recovered from customers and the 17.5% interest owed to the TPLs. They reference comments of Ms. Erin Armstrong, former Chief Operating Officer of Trimor who stated that these retention payments were in fact a "top up" to make sure Trimor received its expected interest payment each month.

[90] Up to April 2014, Cash Store's retention payments or "top up" ensured that McCann received total interest payments of $3,353,696.92 and Trimor received total interest payments of $7,839,676.14.

[91] The DIP Lenders also argued that in addition to compensating the TPLs with routine retention payments, Cash Store indemnified the TPLs for customer loan losses through use of a capital protection scheme to help the TPLs maintain the broad principal behind their loan portfolios. They contend that that scheme had two components:

a. An expensing mechanism, whereby Cash Store would credit the TPLs with a book entry in the amount of any losses suffered by the TPLs on brokered loans that remain unpaid after 90 days. This protected the TPLs' advances of principal from being eroded by bad loans; and

b. A purchasing mechanism (in Ontario and Manitoba), whereby Cash Store purchased past-due brokered loan fees at face value from the TPLs.

[92] As referenced in the PwC Report, in the summary of Trimor's holdings, the lines of credit assigned to Trimor were broken up by length outstanding, and with zero percent of Trimor's loans having been held for longer than 90 days. As such, the DIP Lenders contend that Cash Store had acquired all of Trimor's bad debt, insulating it completely from the credit risk of the PayDay lending products. The DIP Lenders contend that instead, the TPLs took on the risk of Cash Store's insolvency, and the concomitant effect on these gratuitous mechanisms.

[93] According to the DIP Lenders the simple fact is that in each and every month of the TPLs' relationship with Cash Store, each TPL earned its constant rate of return and experienced little or no erosion of its "restricted cash". In so doing, they converted their Broker Agreements into lending agreements.

[94] Further, the DIP Lenders point out that it was always Cash Store's practice to hold funds related to third party lending activities in its own corporate accounts, comingled with all of its other cash. The DIP Lenders note that this practice was, in Cash Store's view, well known to the TPLs and fully disclosed to the Court on the CCAA filing. The DIP Lenders point out that the TPLs first claimed to believe that the funds were held in accounts designated to be used solely to receive each individual TPL's advances as set out in the Broker Agreements – notwithstanding that the TPLs were aware of and benefited from other "extra contractual" arrangements. The DIP Lenders point out that that evidence varied somewhat under cross-examination and in light of contemporaneous documentary evidence.

[95] For example, in her affidavit, Ms. Fawcett stated that a segregated bank account was represented to be in use:

> As indicated in my prior Affidavit, it was represented to me and Mr. McCann at the time the Broker Agreement was entered into, and it is a term of the Broker Agreement, that all Restricted Cash would be placed in a Designated Broker Bank Account, which would be separate and apart from Cash Store Financial's general operating account.

[96] However, as pointed out by the DIP Lenders, Ms. Fawcett was aware that McCann Funds had been comingled with other funds. They referenced an email sent by Ms. Fawcett to Mr. Michael Zvonkovic, former CFO of Cash Store on July 19, 2012 where Ms. Fawcett asked whether McCann's Funds were actually maintained in an individual segregated account:

> On the Broker Agreement funds, so you keep a separate "designated broker bank account" for each financier such that all of the loans made using our funds are paid from and returned to that account, as well as all related interest and fees?

[97] In response, Mr. Zvonkovic stated:

> In the new agreement, we've tried to combine all these accounts and not to have a designated broker bank account. Your funds specifically would be tracked separately via our accounting system.

[98] The DIP Lenders point out that Ms. Fawcett, on cross-examination, stated that it was always her understanding that the designated broker bank account was to be used to hold the funds provided by or received by all TPLs, and not merely those related to McCann.

[99] The DIP Lenders point out that Trimor, for its part, asserted that it was assured its funds would be held in trust:

> ... [Cash Store] consistently assured Trimor that Trimor's funds were not used for any purpose other than advancing loans in accordance with the Broker Agreement. In addition [Cash Store] assured Trimor that it would treat the Trimor funds as being held in trust for Trimor's benefit.

[100] On cross-examination, Ms. Armstrong stated that:

a. This statement was made regarding an earlier form of broker agreement which did contain trust language; and

b. The current Broker Agreement contained no such trust language whatsoever.

Restricted Cash and Assigned Loans

[101] The DIP Lenders also contend that a review of the monthly reconciliation process undertaken by Cash Store for the benefit of the TPLs suggested that the funds advanced by the TPLs were not segregated from Cash Store's general funds.

[102] The affidavit of Mr. Carlstrom points out that if the overall cash balance in Cash Store accounts fell below the recorded balance of theoretical restricted cash, Cash Store would assign its non-brokered loans to the TPLs to offset this deficiency. When made, these offsets were set out in each of the monthly reconciliations provided by Cash Store, and were distinguished from purchases of loan portfolios or other loans designated to the TPLs.

[103] Accordingly, from the standpoint of the DIP Lenders, the TPLs understood or ought to have understood that Cash Store would sometimes assign receivables for the benefit of the TPL rather than use TPL advances to actually make or purchase customer loans.

IV. Analysis

The Preference Issue and Cash Store's Insolvency

Cash Store's Insolvency

[104] The DIP Lenders contend that based upon book values, the value of Cash Store's liabilities exceeded the value of Cash Store's assets as at September 30, 2013 and the insolvency became increasingly severe and by December 31, 2013, Cash Store's liabilities exceeded assets on a book value basis by over $8 million.

[105] The DIP Lenders raise the issue of whether the designation or assignment of loans in the name of the TPLs was a preference.

[106] In my view, these issues are not properly before the court at this time. The issue properly before the court is the question of ownership of the funds advanced by the TPLs.

[107] In arriving at this conclusion, I am in agreement with the submissions put forth by counsel to McCann.

[108] Under ss. 95 and 96 of the *Bankruptcy and Insolvency Act* ("BIA"), a trustee in bankruptcy has the right to challenge a payment or transaction as a preference or transfer under value. Section 36.1 of the CCAA extends this right to a CCAA monitor. It does not extend it to individual creditors of the CCAA debtor.

[109] At this point, the Monitor is currently reviewing transactions involving the TPLs. The Monitor has not reported its findings in this regard. The right of the Monitor to challenge these transactions has not been the subject of any assignment to a specific creditor of the type contemplated by s. 38 of the BIA.

[110] In the absence of some form of assignment of the Monitor's rights, which has yet to take place, I have reached the conclusion that the DIP Lenders are not in a position to challenge transactions as preferences or transfers at under value pursuant to the provisions of the CCAA.

[111] With respect to the potential challenge under the *Fraudulent Conveyances Act*, or *Assignments and Preferences Act*, there is a degree overlap with respect to the statutory test and the remedies provided by these statutes and the use of the preference and transfer at undervalue provisions of the BIA and the CCAA.

[112] With respect to challenges under the *Assignments and Preferences Act*, an inquiry has to be undertaken as to whether or not the debtor was insolvent at the time of the transaction. The specific date of insolvency of Cash Store has not, in my view, been fully explored in the record. Rather, the record has focussed on the nature of the relationship between the TPLs and Cash Store which will be the subject of further discussion below. It seems to me that if the DIP Lenders wish to pursue the issue of whether certain transactions were preferential in nature, a formal trial of the issue will have to be directed on this point.

[113] Similarly, in considering whether a designation or assignment of loans in the names of the TPLs were fraudulent conveyances, the focus of the inquiry has to be on the intention of the parties. I am not satisfied that the record before me would enable such an inquiry to be undertaken. Again, it would seem more appropriate to address this issue through the direction of a formal trial of the issue.

[114] In summary, the Monitor can report further with respect to its inquiries on this issue and the DIP Lenders shall have the opportunity to revisit the issues arising out of the *Assignments and Preferences Act* and the *Fraudulent Conveyances Act* at a future date.

[115] The cross-motion of the DIP Lenders is accordingly dismissed, without prejudice for the DIP Lenders to renew their motion taking into account the foregoing comments.

Status of and Funds Advanced by McCann/Trimor

[116] Both McCann and Trimor made significant amounts of money available to the Applicants. The Broker Agreements expressly provides that McCann and Trimor own the funds, loans and receivables. McCann and Trimor requested declarations in respect of the funds each made available to the Applicants, that McCann and Trimor are the legal and beneficial owners of these funds, loans and receivables, as reflected in the Broker Agreements.

[117] The DIP Lenders take the position that the TPLs do not have a proprietary right to the funds, but rather, the TPLs are creditors of Cash Store.

[118] In order to determine the issue, it is necessary to examine the relationship as originally set out in the Broker Agreements and to trace the relationship between the Applicants and the TPLs subsequent to the execution of the Broker Agreements.

[119] The Broker Agreements expressly recognize that ownership of TPL property was intended to remain with the TPLs.

[120] The TPLs advanced funds to Cash Store for the purpose of enabling Cash Store to broker loans to its customers. At the outset, the TPLs understood that their funds were segregated from Cash Store's operating funds. This was provided for in the Broker Agreements and was confirmed in certain representations made by Cash Store and Cash Store Financial that TPL Funds would be maintained in a designated TPL account.

[121] The TPLs take the position that even if the Funds had been co-mingled with Cash Store's operating funds in breach of the Broker Agreement and without their knowledge, the TPL Funds have always been accounted for separately. Further, they take the position that Cash Store's creditors could always discern the amount of the TPL Funds that were deployed as loans to customers or held as a float for future loans.

[122] However, in practice, the Funds were not segregated from Cash Store's operating funds. The funds were co-mingled with Cash Store's operating funds. The TPLs may disagree based on the documents and what they were led to believe, but the TPLs' internal knowledge and belief does not determine the issue. Rather, the determining fact is that the Funds were co-mingled with Cash Store funds in the operating account. As such, regardless of what the TPLs believed, there was one account and it is not possible to identify the source of the funds.

[123] It is also necessary to look at the basis upon which the relationship between the TPLs and Cash Store developed. Pursuant to the Broker Agreements, the TPLs would provide funding to Cash Store and Cash Store would broker loans to its customers. The customers would pay a rate of interest of 59%. The interest payments were to flow through to the TPLs. However, in reality, this did not happen. By their nature, the type and quality of the loans made to Cash Store customers would be characterized as high-risk loans. There was a significant default rate. The practice developed that Cash Store would effectively provide a rate of return equivalent to 17.5% per annum to the TPLs and Cash Store made "voluntary payments" to the TPLs in this amount.

[124] It is also clear that the TPLs were aware that they were receiving this 17.5% payment. Indeed, such a payment was expected. The TPLs received monthly payments at a 17.5% rate of return and regardless of the status of the brokered loans obtained by Cash Store, the TPLs received their 17.5% and were insulated from any credit risk as a result of the capital protections used by Cash Store.

[125] During the period of time that Cash Store was making these payments of 17.5% to the TPLs, there is no evidence of any complaint being made by the TPLs to Cash Store. Rather, these payments were accepted by the TPLs and for all intents and purposes, gave the appearance of an "ordinary course" payment. There is no evidence that the TPLs ever took steps to challenge why interest at 59% was not being received. To state the obvious, this interest rate differential of 41.5% (less an amount to be written off as bad loans) is significant. It raises a question for which there is no recorded explanation, namely why were the TPLs apparently content to receive a return of 17.5%, when customers of Cash Store, borrowing funds supposedly

belonging to the TPLs, were paying 59% interest, in addition to Cash Store's brokerage fee. The inescapable conclusion is that the relationship as between the TPLs and Cash Store was such that the 59% interest payments were never expected to flow through to the TPLs. It also raises another question, namely whether the operations of Cash Store complied with payday loan regulations generally. I note, however, that this question is not before me on this motion.

[126] From the standpoint of the DIP Lenders, this ongoing payment equivalent to 17.5% of outstanding amounts is significant and leads me to a finding that the relationship between the TPLs and Cash Store was debtor-creditor relationship and that the payments which are equivalent to 17.5% of outstanding funding reflect a payment of interest. A payment of interest is clearly inconsistent with the position being put forth by the TPLs, namely that there was no debtor-creditor relationship.

[127] In this case, I have reached the conclusions that the parties did alter the relationship from what was set out in the Broker Agreements. I am satisfied that the evidence establishes that, in practice, the TPL business of Cash Store involved:

a. making of loans by Cash Store to retail customers that were either designated as being made on behalf of a TPL or assigned to a TPL (see references at footnote 59 of DIP Lenders Factum);

b. receipt of repaid retail loans and interest back into Cash Store's general accounts (see references at footnote 60); and

c. Cash Store paying the TPLs a guaranteed interest rate of 17.5% (see references at footnote 61).

[128] The presence of an "entire agreement" clause in the Broker Agreement does not assist the TPLs. The "entire agreement" clause has application with respect to various arrangements and agreements entered into by parties up to the time of entering into an agreement with such a clause. However, it does not follow that the parties cannot modify their arrangements subsequent to the execution of the Broker Agreement.

[129] As noted in the submissions of counsel to the DIP Lenders, notwithstanding the presence of a "non-waiver" clause in the contract, parties can still waive their contractual rights by election. Specific reference was made to *Barkley's Bank PLC* v. *Devonshire Trust (Trustee of)*, 2011 ONSC 5008, where Newbould J. explained the presence of an non-waiver clause is "not the end of the matter", going on to quote Swinton J.'s reasons in *Fitkid (York) Inc.* v. *1277633 Ontario Limited* (2002), O.J. No. 3959 (SCJ) as follows:

> Even where there is a term in the lease governing waiver, the cases on waiver indicate that courts look at the conduct of the landlord to determine whether it has elected not to terminate the lease in the circumstances after the right of forfeiture arises.

V. Disposition

[130] I conclude that the relationship as between the TPLs and Cash Store is one of debtor and creditor.

[131] The consequences of this finding is that the motion of the TPLs is dismissed. The TPLs are creditors of Cash Store.

[132] An order shall issue that the Applicants are the beneficial owners of funds described as the Disputed Post-Filing Receipts in the TPL Notices of Motion and neither Trimor nor McCann shall take any steps to collect any advances or loans made to the Applicants' customers, irrespective of whether such loans or advances have been designated in the name of Trimor or McCann or otherwise assigned to Trimor or McCann by the Applicants, and any recoveries or collections on such advances or loans by Trimor or McCann shall be deemed to be held in trust for the Applicants.

[133] With respect to McCann's request that its professional fees in connection with the CCAA proceeding be paid by the Applicants and be included in the Administration Charge, the treatment accorded to Trimor outlined in [34] should also be provided to McCann.

MORAWETZ R.S.J.

Date: August 5, 2014

TAB 2

Court File No. CV-14-10518-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE REGIONAL	)	TUESDAY, THE 15TH
	)	
SENIOR JUSTICE MORAWETZ	)	DAY OF APRIL, 2014

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 THE CASH STORE FINANCIAL SERVICES INC., THE CASH STORE INC., TCS CASH STORE INC., INSTALOANS INC., 7252331 CANADA INC., 5515433 MANITOBA INC., 1693926 ALBERTA LTD. DOING BUSINESS AS "THE TITLE STORE". (each one and all of the above, collectively, the "**Applicants**")

AMENDED AND RESTATED INITIAL ORDER

THIS APPLICATION, made by the Applicants, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of Steven Carlstrom sworn April 14, 2014 and the Exhibits thereto (the "**Carlstrom Affidavit**") and the affidavits of Patrick Riesterer and the Exhibits thereto, and on being advised that the secured creditors who are likely to be affected by the charges created herein were given notice, and on hearing the submissions of counsel for the Special Committee, the DIP Lenders (as defined in the Term Sheet (as defined herein)), the *ad hoc* committee of holders of the Applicants' 11 ½% senior secured notes (the "**Ad Hoc Committee**"), FTI Consulting Canada Inc. ("**FTI**") in its capacity as Monitor (the "**Monitor**") and such other counsel present, no other person appearing although duly served as appears from the affidavit of service of Karin Sachar sworn April 14, 2014 and on reading the Pre-Filing

Report of the Monitor dated April 14, 2014, the consent of FTI to act as the Monitor and the First Report of the Monitor dated April 15, 2014,

SERVICE

1. THIS COURT ORDERS that the time for service of the Notice of Application and the Application Record is hereby abridged and validated so that this Application is properly returnable today and hereby dispenses with further service thereof.

APPLICATION

2. THIS COURT ORDERS AND DECLARES that the Applicants are companies to which the CCAA applies.

PLAN OF ARRANGEMENT

3. THIS COURT ORDERS that the Applicants shall have the authority to file and may, subject to further order of this Court, file with this Court a plan of compromise or arrangement (hereinafter referred to as the "**Plan**").

POSSESSION OF PROPERTY AND OPERATIONS

4. THIS COURT ORDERS that the Applicants shall remain in possession and control of their current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof, and including for greater certainty all cash held in the Applicants' accounts (the "**Property**"), subject to paragraphs 30 to 35. The Applicants shall continue to carry on business and use the Property, the Filing Date Cash (as defined below), and the TPL Funds (as defined in the Carlstrom Affidavit) in a manner consistent with the preservation of its business, including the making of brokered loans pursuant to the Applicants' past practices as modified by paragraphs 30 to 35 (the "**Business**"), and Property. The Applicants are authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively "**Assistants**") currently retained or employed by it, with liberty to retain such further Assistants as it deems reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order.

5. THIS COURT ORDERS that the Applicants shall be entitled to continue to utilize the central cash management system currently in place as described in the Carlstrom Affidavit or, with the consent of the Monitor and the DIP Lenders, replace it with another substantially similar central cash management system (the "**Cash Management System**") and that any present or future bank providing the Cash Management System shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken under the Cash Management System, or as to the use or application by the Applicants of funds transferred, paid, collected or otherwise dealt with in the Cash Management System, shall be entitled to provide the Cash Management System without any liability in respect thereof to any Person (as hereinafter defined) other than the Applicants, pursuant to the terms of the documentation applicable to the Cash Management System, and shall be, in its capacity as provider of the Cash Management System, an unaffected creditor under the Plan with regard to any claims or expenses it may suffer or incur in connection with the provision of the Cash Management System.

6. THIS COURT ORDERS that the Applicants shall be entitled but not required to pay the following expenses whether incurred prior to or after this Order:

(a) all outstanding and future wages, salaries, employee and pension benefits, vacation pay (excluding any change of control or similar termination payments without the consent of the DIP Lenders) and reasonable employee expenses (the reasonableness of which will be determined by the CRO (as defined herein)) payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements; and

(b) subject to the terms and conditions of the debtor-in-possession loan facility (the "**DIP Facility**") as provided for in the Term Sheet, including the applicable terms therein that refer to the cash flow projections approved by the DIP Lenders pursuant to the terms and conditions of the DIP Facility (the "**Cash Flow Projections**"), the reasonable fees and disbursements of any Assistants retained or employed by the Applicants in respect of these proceedings, at their standard rates and charges.

7. THIS COURT ORDERS that, subject to the terms and conditions of and availability under the DIP Facility and the Term Sheet, including the applicable terms therein that refer to the

Cash Flow Projections, and except as otherwise provided to the contrary herein, the Applicants shall be entitled but not required to pay all reasonable expenses incurred by the Applicants in carrying on the Business in the ordinary course after the date of this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

(a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance (including directors and officers insurance), maintenance and security services;

(b) payment for goods or services actually supplied to the Applicants following the date of this Order; and

(c) payments to critical vendors with the consent of the Monitor.

8. THIS COURT ORDERS that the Applicants shall remit, in accordance with legal requirements, or pay:

(a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, (iii) Quebec Pension Plan, and (iv) income taxes;

(b) all goods and services or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Applicants in connection with the sale of goods and services by the Applicants, but only where such Sales Taxes are accrued or collected after the date of this Order, or where such Sales Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order, and

(c) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured

creditors and which are attributable to or in respect of the carrying on of the Business by the Applicants.

9. THIS COURT ORDERS that until a real property lease is disclaimed in accordance with the CCAA, the Applicants shall pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable to the landlord under the lease) or as otherwise may be negotiated between the Applicants and the landlord from time to time ("**Rent**"), for the period commencing from and including the date of this Order, twice-monthly in equal payments on the first and fifteenth day of each month, in advance (but not in arrears). On the date of the first of such payments, any Rent relating to the period commencing from and including the date of this Order shall also be paid.

10. THIS COURT ORDERS that, except as specifically permitted herein, the Applicants are hereby directed, until further Order of this Court: (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Applicants to any of their creditors as of this date, other than interest payments under the Credit Agreement (as defined in the Carlstrom Affidavit) and the retention payments to TPLs (as described below), both as set out in the Cash Flow Projections; (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of their Property; and (c) to not grant credit or incur liabilities except in the ordinary course of the Business.

RESTRUCTURING

11. THIS COURT ORDERS that the Applicants shall, subject to such requirements as are imposed by the CCAA and such covenants as may be contained in the term sheet governing the DIP Facility (the "**Term Sheet**") and the Definitive Documents (as hereinafter defined), have the right to:

(a) permanently or temporarily cease, downsize or shut down any of their business or operations and to dispose of redundant or non-material assets not exceeding $25,000 in any one transaction or $75,000 in the aggregate;

(b) terminate the employment of such of their employees or temporarily lay off such of their employees as they deem appropriate on such terms as may be agreed upon

between the applicable employer and such employee or, failing such agreement, to deal with the consequences thereof in accordance with applicable law;

(c) pursue all avenues of refinancing of their Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing; and

(d) in consultation with the Monitor, solicit non-binding letters of intent for the sale of the Business by May 15, 2014 (or such later date as the Applicants, with the consent of the Monitor, shall determine) through Rothschild Inc. ("**Rothschild**"), in furtherance of the mergers and acquisitions process described in the Carlstrom Affidavit,

all of the foregoing to permit the Applicants to proceed with an orderly restructuring of the Business (the "**Restructuring**").

12. THIS COURT ORDERS that the Applicants shall provide each of the relevant landlords with notice of the Applicants' intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the Applicants' entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Applicant, or by further Order of this Court upon application by the Applicants on at least two (2) days notice to such landlord and any such secured creditors. If the Applicants disclaim the lease governing such leased premises in accordance with Section 32 of the CCAA, they shall not be required to pay Rent under such lease pending resolution of any such dispute (other than Rent payable for the notice period provided for in Section 32(5) of the CCAA), and the disclaimer of the lease shall be without prejudice to the Applicants' claim to the fixtures in dispute.

13. THIS COURT ORDERS that if a notice of disclaimer is delivered pursuant to Section 32 of the CCAA, then (a) during the notice period prior to the effective time of the disclaimer, the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the Applicants and the Monitor 24 hours' prior written notice, and (b) at the

effective time of the disclaimer, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the Applicants in respect of such lease or leased premises, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

FINANCIAL ADVISORS

14. THIS COURT ORDERS that the engagement of (i) Rothschild as financial advisor pursuant to the engagement letter dated February 20, 2014 and (ii) Conway MacKenzie ("**Conway**") as financial advisor pursuant to the engagement letter dated January 29, 2014 are hereby approved.

15. THIS COURT ORDERS that Rothschild is authorized to continue the mergers and acquisitions process as described in the Carlstrom Affidavit, in consultation with the Monitor.

NO PROCEEDINGS AGAINST THE APPLICANTS OR THE PROPERTY

16. THIS COURT ORDERS that until and including May 14, 2014, or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**") shall be commenced or continued against or in respect of the Applicants, the CRO, or the Monitor, or affecting the Business or the Property, except with the written consent of the Applicants and the Monitor, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Applicants or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

17. THIS COURT ORDERS that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of the Applicants, the CRO, or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended except with the written consent of the Applicants and the Monitor, or leave of this Court, provided that nothing in this Order shall (i) empower the Applicants to carry on any business which the Applicants are not lawfully entitled to carry on, (ii) affect such investigations,

actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

NO INTERFERENCE WITH RIGHTS

18. THIS COURT ORDERS that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Applicants, except with the written consent of the Applicants and the Monitor, or leave of this Court.

CONTINUATION OF SERVICES

19. THIS COURT ORDERS that during the Stay Period, all Persons having oral or written agreements with the Applicants or statutory or regulatory mandates for the supply of goods and/or services, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Business or the Applicants, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Applicants, and that the Applicants shall be entitled to the continued use of their current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Applicants in accordance with normal payment practices of the Applicants or such other practices as may be agreed upon by the supplier or service provider and each of the Applicants and the Monitor, or as may be ordered by this Court.

NON-DEROGATION OF RIGHTS

20. THIS COURT ORDERS that, notwithstanding anything else in this Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of lease or licensed property or other valuable consideration provided on or after the date of this Order, nor shall any Person be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the Applicants. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA. For greater

certainty, nothing in this Order shall prejudice the rights of the TPLs under their broker agreements (the "**Broker Agreements**") with the Applicants, or their right to assert any arguments in this proceeding in relation to the matters contemplated hereby.

PROCEEDINGS AGAINST CRO, DIRECTORS AND OFFICERS

21. THIS COURT ORDERS that during the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Applicants with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Applicants whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, until a compromise or arrangement in respect of the Applicants, if one is filed, is sanctioned by this Court or is refused by the creditors of the Applicants or this Court.

22. THIS COURT ORDERS that no member of the Special Committee nor the CRO shall have any liability with respect to any losses, claims, damages or liabilities, of any nature or kind, to any Person from and after the date of this Order except to the extent such losses, claims, damages or liabilities result from the gross negligence or wilful misconduct on the part of such member of the Special Committee or the CRO, as the case may be.

23. THIS COURT ORDERS that BlueTree Advisors Inc. be and is hereby appointed Chief Restructuring Officer of the Applicants ("**CRO**"). The CRO shall have the authority to direct the operations and management of the Applicants and the Restructuring, and the officers (including the executive management team of the Applicants) of the Applicants shall report to the CRO. For greater certainty, the CRO shall be entitled to exercise any powers of the Applicants set out herein, to the exclusion of any other Person (including any board member of the Applicants). The CRO shall provide timely updates to the Monitor in respect of its activities.

24. THIS COURT ORDERS that the CRO shall not be or be deemed to be a director, officer or employee of any of the Applicants.

25. THIS COURT ORDERS that (i) any indemnification obligations of the Applicants in favour of the CRO and (ii) the payment obligations of the Applicants to the CRO shall be entitled to the benefit of and shall form part of the Administration Charge set out herein.

26. THIS COURT ORDERS that any claims of the CRO shall be treated as unaffected in any plan of compromise and arrangement filed by the Applicants under the CCAA, any proposal filed by the Applicants under the *Bankruptcy and Insolvency Act* of Canada (the "BIA") or any other restructuring.

DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE

27. THIS COURT ORDERS that the Applicants shall indemnify their directors and officers against obligations and liabilities that they may incur as directors or officers of the Applicants after the commencement of the within proceedings, except to the extent that, with respect to any officer or director, the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct.

28. THIS COURT ORDERS that the directors and officers of the Applicants shall be entitled to the benefit of and are hereby granted a charge (the "**Directors' Charge**") on the Property, which charge shall not exceed an aggregate amount of $2,500,000 as security for the indemnity provided in paragraph 27 of this Order. The Directors' Charge shall have the priority set out in paragraphs 53 and 55 herein.

29. THIS COURT ORDERS that, notwithstanding any language in any applicable insurance policy to the contrary, (a) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge, and (b) the Applicants' directors and officers shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 27 of this Order.

THE THIRD PARTY LENDERS

30. THE COURT ORDERS that the TPLs (as defined in the Carlstrom Affidavit) shall be entitled to the benefit of and are hereby granted a charge (the "**TPL Charge**") on the Property, which charge shall equal the amount of the Applicants' cash-on-hand as of the effective time of the Initial Order granted in these proceedings (the "**Filing Date Cash**"). The TPLs shall only be entitled to the benefit of the TPL Charge in the event that this Court determines that the TPLs were entitled to the Filing Date Cash in priority to any other Person, or that the Filing Date Cash was not Property as of the effective time of the Initial Order granted in these proceedings.

Notwithstanding the granting of the TPL Charge, subject to the reservation of rights in paragraph 20, above, nothing in this order shall grant the TPLs any new, additional, or greater rights to the Filing Date Cash than the TPLs would have had immediately prior to the effective time of the Initial Order granted in these proceedings.

31. THIS COURT ORDERS and directs that the Applicants shall keep records of all receipts and disbursements in connection with the TPL brokered loans (the "**TPL Brokered Loans**") and any amounts received by the Applicants in respect of same subsequent to the effective time of the Initial Order granted in these proceedings (the "**TPL Post-Filing Receipts**"), separate and apart from the Applicants' direct loans, and shall report to the TPLs with respect to the TPL Post-Filing Receipts in a manner and on a basis as agreed upon by the relevant TPL, the Applicants and the Monitor, or as subsequently ordered by this Court. The Applicants shall provide information reasonably requested by a TPL in respect of its TPL Brokered Loans and funds paid to the Applicants by the TPLs, in each case whether before or after the effective time of the Initial Order granted in these proceedings and shall give the TPLs or their agents reasonable access to their records for the purpose of preparing an accounting of such TPL Brokered Loan and funds and monitoring the Applicants' compliance with the Broker Agreements. In both cases the reasonableness of such requests shall be determined by the CRO and the Monitor.

32. THIS COURT ORDERS that the Applicants shall continue to receive amounts in connection with the repayment of TPL Brokered Loans and shall be entitled to use such TPL Post-Filing Receipts for the sole purpose of brokering new TPL Brokered Loans. The Applicants shall be entitled to continue their practice of depositing repayments of TPL Brokered Loans into the Applicants' general bank accounts; however, no party (including the Applicants, TPLs and any lender, including a DIP lender), shall be entitled to rely on such treatment of TPL Post-Filing Receipts in connection with the determination of the relevant TPL's entitlement to, or ownership of, any TPL Post-Filing Receipts, the TPL Net Receipt Minimum Balance (as defined below) or any TPL Brokered Loans advanced therefrom. Moreover, the treatment of the TPL Post-Filing Receipts set out in this Order shall be without prejudice to any argument by a TPL that but for the CCAA Proceedings such TPL would have required the Applicants to physically segregate such funds.

33. THIS COURT ORDERS that the Applicants shall maintain a minimum cash balance in an amount equal to the aggregate amount of any TPL Post-Filing Receipts less the aggregate amount of any Post-Filing TPL Receipts subsequently redeployed, from time to time, as new TPL Brokered Loans (the "**TPL Net Receipt Minimum Balance**").

34. THIS COURT ORDERS that to the extent a TPL claims a priority entitlement to the TPL Brokered Loans in existence at or after the effective time of the Initial Order granted in these proceedings and/or to the Post-Filing TPL Receipts, the TPL's entitlement thereto shall be determined based on the legal rights as they existed immediately prior to the effective time of the Initial Order granted in these proceedings, including that each TPL's entitlement to any portion of the TPL Net Receipts Minimum Balance will be determined by reference to such TPL's entitlement to and interest in the TPL Brokered Loans giving rise to such portion of Post-Filing TPL Receipts. To the extent a TPL is able to establish a trust, ownership or other proprietary interest in any Post-Filing TPL Receipts and/or any TPL Brokered Loans such that they do not form part of the Property of the Applicants then, for greater certainty, the Charges (defined below) shall not apply to such TPL's portion of the TPL Net Receipt Minimum Balance or such TPL's then-existing TPL Brokered Loans to the extent of such established entitlement. Notwithstanding the foregoing, nothing in this paragraph shall affect the rights of any TPL arising from or related to any registration to preserve or protect a security interest pursuant to paragraph 17.

35. THIS COURT ORDERS the Applicants shall continue to ensure that TPLs receive a return of approximately 17.5% per year (or such lesser amount as may be agreed to) with respect to TPL Brokered Loans that are repaid and available for redeployment from and after the Initial Order date and any capital protection (as described in the Carlstrom Affidavit).

APPOINTMENT OF MONITOR

36. THIS COURT ORDERS that FTI is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the business and financial affairs of the Applicants with the powers and obligations set out in the CCAA or set forth herein and that the Applicants and their shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Applicants pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the

assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

37. THIS COURT ORDERS that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

(a) monitor the Applicants' receipts and disbursements;

(b) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein;

(c) assist the Applicants, to the extent required by the Applicants, in their dissemination, to the DIP Lenders and their counsel at the times required under the DIP Facility, of financial and other information as agreed to between the Applicants and the DIP Lenders which may be used in these proceedings, including reporting on a basis as agreed with the DIP Lenders under the DIP Facility;

(d) advise the Applicants in their preparation of the Applicants' cash flow statements and reporting required by the DIP Lenders, which information shall be reviewed with the Monitor and delivered to the DIP Lenders and their counsel on a periodic basis, as provided under the DIP Facility;

(e) advise the Applicants in their development of the Plan and any amendments to the Plan;

(f) assist the Applicants, to the extent required by the Applicants, with the holding and administering of creditors' or shareholders' meetings for voting on the Plan;

(g) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the Applicants, to the extent that is necessary to adequately assess the Applicants' business and financial affairs or to perform its duties arising under this Order;

(h) assist the Applicants, to the extent required by the Applicants, with any and all restructuring activities and/or any sale of the Property and the Business or any part thereof;

(i) assist Rothschild with respect to the mergers and acquisitions process of the Applicants' Business;

(j) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order; and

(k) perform such other duties as are required by this Order or by this Court from time to time.

38. THIS COURT ORDERS that the Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof.

39. THIS COURT ORDERS that nothing herein contained shall require the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the Ontario *Environmental Protection Act*, the *Ontario Water Resources Act*, or the Ontario *Occupational Health and Safety Act* and regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

40. THIS COURT ORDERS that the Monitor shall provide any creditor of the Applicants and the DIP Lenders with information provided by the Applicants in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Applicants is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Applicants may agree.

41. THIS COURT ORDERS that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this 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, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

42. THIS COURT ORDERS that, subject to the terms and conditions of and availability under the DIP Facility and the Term Sheet, including the applicable terms therein that refer to the Cash Flow Projections, the CRO, the Monitor, counsel to the Monitor, counsel to the Applicants, counsel to the Special Committee and the CRO, Rothschild, Conway, Michele McCarthy (the "**CCRO**") and counsel to the DIP Lenders and Coliseum Capital Management, LLC (in its capacity as Agent under the DIP Facility (the "**Agent**")) shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the Applicants as part of the costs of these proceedings. The Applicants are hereby authorized and directed to pay the accounts of the CRO, the Monitor, counsel to the Monitor, counsel to the Applicants, counsel to the Special Committee and the CRO, Rothschild, Conway, and counsel to the DIP Lenders and Agent on a weekly basis, or on such basis as otherwise agreed by the Applicants and the applicable payee. The Applicants shall also be entitled to pay the reasonable fees and disbursements of Goodmans LLP, Houlihan Capital LLC and McMillan LLP.

43. THIS COURT ORDERS that the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

44. THIS COURT ORDERS that the CRO, the Monitor, counsel to the Monitor, the Applicants' counsel, the Special Committee's and CRO's counsel, Rothschild, Conway, the

CCRO, counsel to the DIP Lenders and Agent, Goodmans LLP and Houlihan Capital LLC shall be entitled to the benefit of and are hereby granted a charge (the "**Administration Charge**") on the Property, which charge shall not exceed an aggregate amount of $1,500,000, as security for their professional fees and disbursements incurred at their standard rates and charges, both before and after the making of this Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 53 and 55 hereof.

DIP FINANCING

45. THIS COURT ORDERS that the Applicants are hereby authorized and empowered to obtain and borrow under the DIP Facility from the DIP Lenders in order to finance the Applicants' working capital requirements, other general corporate purposes and capital expenditures and allow them to make such other payments as permitted under this Order and the Term Sheet, provided that borrowings under the DIP Facility shall not exceed the amounts prescribed in the Term Sheet.

46. THIS COURT ORDERS that the DIP Facility shall be on the terms and subject to the conditions set forth in the Term Sheet.

47. THIS COURT ORDERS that the DIP Facility and the Term Sheet be and are hereby approved and the Applicants are hereby authorized and directed to execute and deliver the Term Sheet.

48. THIS COURT ORDERS that the Applicants are hereby authorized and empowered to execute and deliver such credit agreements, mortgages, charges, hypothecs and security documents, guarantees and other definitive documents (collectively, the "**Definitive Documents**"), as are contemplated by the Term Sheet or as may be reasonably required by the DIP Lenders pursuant to the terms thereof, and the Applicants are hereby authorized and directed to pay and perform all of their indebtedness, interest, fees, liabilities and obligations to the DIP Lenders under and pursuant to the Term Sheet and Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

49. THIS COURT ORDERS that the DIP Lenders shall be entitled to the benefit of and are hereby granted a charge (the "**DIP Priority Charge**") on the Property as security for any and all obligations of the Applicants under the DIP Facility, the Term Sheet and the Definitive

Documents (including on account of principal, interest, fees, expenses and other liabilities) (the aggregate of all such obligations being the "**DIP Obligations**"), which DIP Priority Charge shall be in the aggregate amount of the DIP Obligations outstanding at any given time. The DIP Priority Charge shall not secure an obligation that exists before this Order is made. The DIP Priority Charge shall have the priority set out in paragraphs 53 and 55 hereof.

50. THIS COURT ORDERS that, notwithstanding any other provision of this Order:

(a) the DIP Lenders may take such steps from time to time as they may deem necessary or appropriate to file, register, record or perfect the DIP Priority Charge or any of the Definitive Documents;

(b) upon the occurrence of an event of default under the Term Sheet, the other Definitive Documents or the DIP Priority Charge, (A) the DIP Lenders may cease making advances to the Applicants, (B) the DIP Lenders may (i) set off and/or consolidate any amounts owing by the DIP Lenders to the Applicants against the obligations of the Applicants to the DIP Lenders under the Term Sheet, the Definitive Documents or the DIP Priority Charge, and make demand, accelerate payment, and (ii) following an Order of the Court, granted on at least two (2) days' notice to the Applicants and the Monitor, exercise any and all of their respective rights and remedies against the Applicants or the Property under or pursuant to the Term Sheet, the other Definitive Documents, the DIP Priority Charge, or the *Personal Property Security Act* of Manitoba, *Personal Property Security Act* of Alberta, *Personal Property Security Act* of Ontario or any other legislation of similar effect applicable, including without limitation, to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Applicants and for the appointment of a trustee in bankruptcy of the Applicants; and

(c) the foregoing rights and remedies of the DIP Lenders shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Applicants or the Property.

51. THIS COURT ORDERS AND DECLARES that the DIP Lenders shall be treated as unaffected in any plan of arrangement or compromise filed by the Applicants under the CCAA,

or any proposal filed by the Applicants under the BIA ("**Proposal**"), with respect to any advances made under the DIP Facility, the Term Sheet and the Definitive Documents.

52. THIS COURT ORDERS that the obligations under the DIP Facility, Term Sheet and the Definitive Documents shall be treated as unaffected by any Plan or Proposal and the Applicants shall not file a Plan in these Proceedings or any Proposal that does not provide for the indefeasible payment in full in cash of the obligations outstanding in respect of the DIP Facility, the Term Sheet and the Definitive Documents as a pre-condition to the implementation of any such Plan or Proposal.

VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER

53. THIS COURT ORDERS that the priorities of the Directors' Charge, the Administration Charge, the DIP Priority Charge, and the TPL Charge as among them, shall be as follows:

First – Administration Charge;

Second – Directors' Charge (up to a maximum of $1,250,000);

Third – DIP Priority Charge and the TPL Charge on a *pari passu* basis;

Fourth – the liens securing obligations under the Credit Agreement;

Fifth – Directors' Charge (for the remaining amount of $1,250,000) (the "**Directors' Subordinated Charge**").

54. THIS COURT ORDERS that the filing, registration or perfection of the Directors' Charge, the Administration Charge, the DIP Priority Charge or the TPL Charge (collectively, the "**Charges**") shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

55. THIS COURT ORDERS that each of the Directors' Charge, the Administration Charge, the DIP Priority Charge, and the TPL Charge (all as constituted and defined herein) shall constitute a charge on the Property and such Charges shall rank in priority to all other security

interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person, except that the Directors' Subordinated Charge shall rank behind the liens securing obligations under the Credit Agreement.

56. THIS COURT ORDERS that except as otherwise expressly provided for herein, or as may be approved by this Court, the Applicants shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Directors' Charge, the Administration Charge, the TPL Charge or the DIP Priority Charge, unless the Applicants also obtains the prior written consent of the Monitor, the DIP Lenders and the beneficiaries of the Directors' Charge and the Administration Charge, or further Order of this Court.

57. THIS COURT ORDERS that the Directors' Charge, the Administration Charge, the TPL Charge, the DIP Loan Agreement, the Definitive Documents and the DIP Priority Charge shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "**Chargees**") and/or the DIP Lenders thereunder shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds the Applicant, and notwithstanding any provision to the contrary in any Agreement:

(a) neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of the Term Sheet or the Definitive Documents shall create or be deemed to constitute a breach by the Applicants of any Agreement to which they are a party;

(b) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the Applicants' entering

into the Term Sheet, the creation of the Charges, or the execution, delivery or performance of the Definitive Documents; and

(c) the payments made by the Applicants pursuant to this Order, the Term Sheet or the Definitive Documents, and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

58. THIS COURT ORDERS that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the Applicants' interest in such real property leases.

SERVICE AND NOTICE

59. THIS COURT ORDERS that the Monitor shall (i) without delay, publish in the Edmonton *Journal*, the Calgary *Sun* and the *Globe and Mail* a notice containing the information prescribed under the CCAA, (ii) within five days after the date of this Order, (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, in the prescribed manner, a notice to every known creditor who has a claim against the Applicants of more than $1000, and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder.

60. THIS COURT ORDERS that the E-Service Protocol of the Commercial List (the "**Protocol**") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List website at http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/e-service-protocol/) shall be valid and effective service. Subject to Rule 17.05 this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules of Civil Procedure. Subject to Rule 3.01(d) of the Rules of Civil Procedure and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission. This Court further orders that a Case Website shall be established in accordance with the Protocol with the following URL: http://www.cfcanada.fticonsulting.com/cashstorefinancial.

61. THIS COURT ORDERS that if the service or distribution of documents in accordance with the Protocol is not practicable, the Applicants and the Monitor are at liberty to serve or

distribute this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or facsimile transmission to the Applicants' creditors or other interested parties at their respective addresses as last shown on the records of the Applicants and that any such service or distribution by courier, personal delivery or facsimile transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

GENERAL

62. THIS COURT ORDERS that the Applicants or the Monitor may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

63. THIS COURT ORDERS that nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Applicants, the Business or the Property.

64. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada, the United Kingdom, or in the United States, to give effect to this Order and to assist the Applicant, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.

65. THIS COURT ORDERS that each of the Applicants and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Monitor is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

66. THIS COURT ORDERS that any interested party (including the Applicants and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order; provided however, that the DIP Lenders shall be entitled to rely on this Order as issued for all advances made under the Term Sheet, the DIP Priority Charge and the Definitive Documents up to and including the date this Order may be varied or amended.

67. THIS COURT ORDERS that the come-back hearing is scheduled for April 28, 2014.

68. THIS COURT ORDERS that this Order and all of its provisions are effective as of 12:01 a.m. Eastern Standard/Daylight Time on the date of this Order.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

APR 17 2014

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 The Cash Store Financial Services Inc., The Cash Store Inc., TCS Cash Store Inc., Instaloans Inc., 7252331 Canada Inc., 5515433 Manitoba Inc., and 1693926 Alberta Ltd. Doing Business as "The Title Store"

Court File No: CV-14-10518-00CL

Ontario
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

AMENDED AND RESTATED INITIAL ORDER

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Counsel to the Special Committee of the Board of Directors of Cash Store Financial Services Inc.

TAB 3

Court File No. CV-14-10518-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE REGIONAL	)	WEDNESDAY, THE 30TH
	)	
SENIOR JUSTICE MORAWETZ	)	DAY OF APRIL, 2014

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 THE CASH STORE FINANCIAL SERVICES INC., THE CASH STORE INC., TCS CASH STORE INC., INSTALOANS INC., 7252331 CANADA INC., 5515433 MANITOBA INC., 1693926 ALBERTA LTD. DOING BUSINESS AS "THE TITLE STORE". (each one and all of the above, collectively, the "**Applicants**")

ORDER (ADDITIONAL TPL PROTECTIONS)

ON READING the affidavit of William Aziz sworn April 28, 2014 and the Exhibits thereto, Affidavit of Murray McCann sworn April 22, 2014 and the Exhibits thereto, the Affidavit of Sharon Fawcett sworn April 22, 2014 and the Exhibits thereto, the second report of the Monitor and on hearing the submissions of counsel for the CRO, the DIP Lenders, the Ad Hoc Committee, the Monitor, Trimor Annuity Focus Limited Partnership #5 ("Trimor"), 0678786 B.C. Ltd. ("**McCann**"), such other counsel present, no other person appearing although duly served as appears from the affidavit of service of Karin Sachar sworn April 30, 2014,

DEFINED TERMS

1. THIS COURT ORDERS that all capitalized but undefined terms used in this Order shall have the meanings given in the amended and restated initial order of the Honourable Mr. Senior Regional Justice Morawetz in these proceedings dated April 15, 2014 (the "**Initial Order**").

ADDITIONAL THIRD PARTY LENDER PROTECTIONS

2. THIS COURT ORDERS that where, from and after the date of the Initial Order, any of the Applicants receive any amounts in connection with the repayment of any TPL Brokered Loan (i) for which McCann is listed as the lender; (ii) which is attributable to McCann according to the Applicants' records; or (iii) which has been assigned to McCann (collectively, the "**McCann Loans**"),

(a) the Applicants shall keep detailed records of all such amounts and identify them as receipts in respect of TPL Brokered Loans for the McCann Loans (the "**Post-Filing McCann Receipts**");

(b) pending segregation in accordance with paragraph (c) below, the Post-Filing McCann Receipts shall be included in, and treated in accordance with the provisions contained in the Initial Order governing the TPL Net Receipt Minimum Balance;

(c) the Applicants shall, without delay, open a separate bank account, separate and apart from the Applicants' operating or other accounts, and, after the account is opened, shall deposit the Post-Filing McCann Receipts into such account from time to time as soon as possible after receipt thereof;

(d) the Applicants shall not be entitled to use such Post-Filing McCann Receipts for the purpose of brokering new TPL Brokered Loans or for any other purpose without a further Order of the Court or the prior written consent of McCann; and

(e) none of the charges created by the Initial Order, or otherwise in this CCAA Proceeding, shall apply to the Post-Filing McCann Receipts without a further Order of the Court.

3. THIS COURT ORDERS that where, from and after the date of the Initial Order, any of the Applicants receive any amounts in connection with the repayment of any TPL Brokered Loan connected to the Applicants' Ontario operations (i) for which Trimor is listed as the lender; (ii) which are attributable to Trimor according to the Applicants' records; or (iii) which has been assigned to Trimor (collectively, the "**Trimor Ontario Loans**"),

(a) the Applicants shall keep detailed records of all such amounts and identify them as receipts in respect of TPL Brokered Loans for the Trimor Ontario Loans (the "**Post-Filing Trimor Ontario Receipts**");

(b) pending segregation in accordance with paragraph (c) below, Post-Filing Trimor Receipts shall be included in, and treated in accordance with the provisions contained in the Initial Order governing the TPL Net Receipt Minimum Balance;

(c) the Applicants shall, without delay, open a separate bank account, separate and apart from the Applicants' operating or other accounts, and, after the account is opened, shall deposit the Post-Filing Trimor Ontario Receipts into such account from time to time as soon as possible after receipt thereof;

(d) the Applicants shall not be entitled to use such Post-Filing Trimor Ontario Receipts for the purpose of brokering new TPL Brokered Loans or for any other purpose without a further Order of the Court or the prior written consent of Trimor; and

(e) none of the charges created by the Initial Order, or otherwise in this CCAA Proceeding, shall apply to the Post-Filing Trimor Receipts without a further Order of the Court.

4. THIS COURT ORDERS from the date of this Order, to the extent any of the Applicants receive any amounts in connection with the repayment of any TPL Brokered Loan connected to the Applicants' operations outside Ontario (i) for which Trimor is listed as the lender; (ii) which are attributable to Trimor according to the Applicants' records; or (iii) which has been assigned to Trimor (collectively, the "**Trimor Non-Ontario Loans**"),

(a) the Applicants shall keep detailed records of all such amounts and identify them as receipts in respect of TPL Brokered Loans for the Trimor Non-Ontario Loans (the "**Post-Filing Trimor Non-Ontario Receipts**");

(b) such Post-Filing Trimor Non-Ontario Receipts shall be included in and treated in accordance with the provisions contained in the Initial Order governing the TPL Net Receipt Minimum Balance;

(c) the Applicants shall only be entitled to use such Post-Filing Trimor Non-Ontario Receipts:

(i) for the purpose of brokering new TPL Brokered Loans in the name of Trimor provided that, with effect upon any such new TPL Brokered Loan being made, it is hereby declared that Trimor shall be the owner of such new TPL Brokered Loan and all proceeds therefrom and such TPL Brokered Loan and all proceeds therefrom shall not form part of the Property and shall not be subject to the Charges; or

(ii) on any other basis as may be agreed in writing between Trimor, the DIP Lender, the Applicants and the Monitor.

5. THIS COURT ORDERS that the Applicants shall maintain a minimum cash balance in an amount equal to $3,500,000 (in addition to the Post-Filing McCann Receipts and the Post-Filing Trimor Ontario Receipts) subject to further Order of the Court or the consent of the Monitor.

6. THIS COURT ORDERS that , with the exception of the declaration in paragraph 4(c)(i), nothing in this Order shall prejudice the rights of any of the parties to assert any arguments in this proceeding in relation to the matters contemplated hereby, provided however that any such arguments shall be dealt with on a reasonable timeline to be agreed to by the Monitor or further ordered by this Court.

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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 The Cash Store Financial Services Inc., The Cash Store Inc., TCS Cash Store Inc., Instaloans Inc., 7252331 Canada Inc., 5515433 Manitoba Inc., and 1693926 Alberta Ltd. Doing Business as "The Title Store"

Court File No: CV-14-10518-00CL

Ontario
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

ORDER (ADDITIONAL TPL PROTECTIONS)

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Counsel to the Chief Restructuring Officer of
The Cash Store Financial Services Inc.

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TAB 4

Court File No. CV-14-10518-00CL

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 THE CASH STORE FINANCIAL SERVICES INC., THE CASH STORE INC., TCS CASH STORE INC., INSTALOANS INC., 7252331 CANADA INC., 5515433 MANITOBA INC., 1693926 ALBERTA LTD. DOING BUSINESS AS "THE TITLE STORE"

This is the Cross-Examination of ERIN VERONICA ARMSTRONG, on her affidavits sworn April 13, 2014 and May 8, 2014 herein, taken at the offices of Bennett Jones LLP, 1 First Canadian Place, 100 King St. West, Suite 3400, Toronto, Ontario, on Wednesday, May 21, 2014.

A P P E A R A N C E S :

Alan B. Merskey, Andrew McCoomb	for DIP Lenders
Gannon G. Beaulne	for 0678786 B.C. Ltd., Formerly The McCann Family Holding Corporation
Sharon A. Kour	for FTI Consulting, the Monitor
Karin Sachar	for the Chief Restructuring Officer of the Applicants
Brett Harrison	For Trimor Annuity Focus LP #5
Adrian Scotchmer	for Tim Yeoman, Class Plaintiff

was not identical to the current form?

A. That's correct.

63. Q. And did the previous form contain any reference to a trust agreement or arrangement?

A. I believe so.

64. Q. And is it your belief that the current form contains any reference to a trust agreement or arrangement?

A. Our understanding of the current agreement is that the processes were to remain the same.

65. Q. That wasn't quite my question, Ms. Armstrong. My question was, is it your understanding that anywhere in the text of the current agreement there is a reference or a description of a trust agreement or arrangement?

A. I'd have to review the agreement.

66. Q. Sure. Let's go to it. It's back at tab A.

MR. HARRISON: I think, just to shorten this up, I think we'll agree that we have not seen the word "trust" in that agreement. If we come to a different understanding, we'll let you know.

MR. MERSKEY: Thank you. That will be

TAB 5

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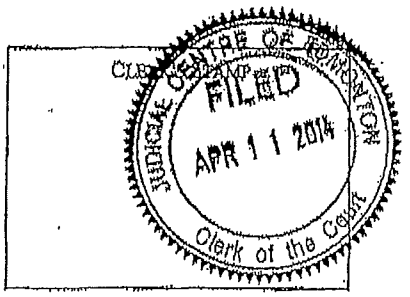


1403-05471

COURT FILE NUMBER	1401 -
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
PLAINTIFF	0678786 B.C. Ltd.
DEFENDANTS	THE CASH STORE INC. and THE CASH STORE FINANCIAL SERVICES INC.
DOCUMENT	AFFIDAVIT
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	BENNETT JONES LLP Barristers and Solicitors 4500, 855 – 2nd Street SW Calgary, Alberta T2P 4K7 Attention: Ken Lenz Telephone No.: (403) 298-3317 Facsimile No.: (403) 265-7219 Client File No.: 951.5

AFFIDAVIT OF SHARON FAWCETT

Sworn on April 11, 2014

I, Sharon Fawcett, Chartered Accountant, of Calgary, Alberta, SWEAR AND SAY THAT:

1. I am the Secretary of the Plaintiff 0678786 B.C. Ltd. ("0678786"), and have a personal knowledge of the matters hereinafter deposed to save where otherwise stated to be based upon information and belief.

2. The Plaintiff 0678786, formerly known as McCann Family Holding Corporation, is a British Columbia corporation extra-provincially registered in Alberta.

3. The Cash Store Financial Services Inc. ("Cash Store Financial") is an Alberta corporation that is publicly listed on the Toronto Stock Exchange. The Cash Store Inc. ("Cash Store") is an Alberta corporation and a subsidiary of Cash Store Financial. Both corporations were initially established in Edmonton, Alberta and continue to have their head offices there. Cash Store Financial and Cash Store are in the business of acting as a broker for customers requiring short-term loans. Cash Store Financial operates in excess of 500 retail consumer loan outlets in Canada and the United Kingdom. The Cash Store owns approximately 300 (of the total Cash Store Financial 500) retail outlets in nine provinces and two territories, and employs approximately 2,300 people. Attached to this Affidavit as **Exhibit "1"** is an Investor Fact Sheet taken from Cash Store Financial's website.

4. Cash Store and Cash Store Financial appear to have the same officers and present financial statements on a consolidated basis. I am not aware of whether any separation between these corporations is maintained. 0678786 has always dealt with Cash Store Financial and its officers and all correspondence has been from this entity.

5. As a result of a court decision in Ontario in February 2014, it appears that Cash Store Financial can no longer carry on business in that jurisdiction. As Cash Store Financial had a significant number of leased premises and employees in Ontario, I understand this has created serious financial distress. A Special Committee of Directors was appointed to review "strategic alternatives". Attached as **Exhibit "2"** are copies of Press Releases dated February 19, February 20 and March 28, 2014 concerning these events. Since these events, 0678786 has been proactive in maintaining its accounts and has had regular communications and information from Cash Store Financial.

6. Pursuant to a Broker Agreement dated June 19, 2012, between 0678786 and Cash Store (the "Broker Agreement"), a copy of which is attached to this Affidavit as **Exhibit "3"**, 0678786 placed over time an aggregate of $13,350,000 (the "Restricted Cash"), as Financier, with the Cash Store, as Broker, for the sole purpose of those funds being loaned to customers. Extensive loan selection criteria must be met or specific approval by 0678786 must be obtained, before any Restricted Cash is loaned. Furthermore, the

Restricted Cash is to be used for no other purpose, as set out in paragraph 2.10 of the Broker Agreement:

> 2.10 USAGE OF LOAN ADVANCES
>
> For greater certainty, funds from time to time advanced to Broker from Financier are solely intended to be utilized for the purposes of making advances to Broker Customers on Financier's behalf as contemplated hereunder. Broker agrees that any funds not otherwise being held by the Broker as a "float" in anticipation of Loan approvals shall not, without the consent of Financier, be advanced or utilized for any other purpose.

7. In discussions with Michael Zvonkovic leading up to the execution of the Broker Agreement and throughout administering the funds on behalf of 0678786, it was expressed to be important to the Plaintiff that its funds were kept separate and apart from the general operating funds of Cash Store Financial in accordance with the Broker Agreement. The segregation of funds from general operating funds was at all times assured.

8. Cash Store represented and the Broker Agreement provides that all funds advanced are to be held in a Designated Broker Bank Account, defined in paragraph 1.1(g) of the Broker Agreement as follows: "the bank account of Broker designated by Broker for the purposes of temporarily receiving funds from Financier (if loans are made by Financier way of cash advance) before they are advanced to a Broker Customer".

9. I have administered the accounts of the Plaintiff in connection with the Broker Agreement primarily through the V.P. Finance of The Cash Store, Mr. Steve Carlstrom. In February 2014, upon learning of the difficulties of the Cash Store operation in Ontario, I requested an updated listing of the Plaintiff's loan portfolio and advised Mr. Carlstrom that given the suspension of the line of credit product in Ontario, the Plaintiff would prefer to reduce its loan portfolio balance as at February 12, 2014, and that as amounts were collected by the Cash Store, funds would be returned to the Plaintiff along with the unexpended capital balance of the Plaintiff's funds. The Cash Store would not be obligated to pay 17.5% interest on the returned funds from the date of return. It was my information and belief that this was the arrangement which had been struck by the Plaintiff's former officer, Mr. Murray McCann and the Defendant's President, Gord

Reykdal. I confirmed these arrangements to Mr. Carlstrom in writing on February 26, 2014, however, funds were not repaid to the Plaintiff.

10. Until March 2014, 0678786 received monthly statements indicating the cash available and the amount deployed. Attached as **Exhibit "4"** is a copy of the statement from February 2014. This statement shows that as of February 28, 2014, the sum of $6,449,420 in undeployed cash remained available to 0678786. Subsequent to that statement, I was advised that a further $831,000 had been collected on our third party loan portfolio during the period from March 1, 2014 to March 16, 2014, increasing our undeployed cash balance to $7,280,420. Further collections would have occurred from March 17, 2014 to date, increasing our undeployed cash balance accordingly. While I have requested that information, I have not yet received it.

11. The financial statements of Cash Store further reaffirms that the money we advanced was "Restricted Cash". As of December 31, 2013, for example, the Balance Sheet of the Cash Store indicates $6,408,009 of Restricted Cash. Attached as **Exhibit "5"** is a copy of the December 31, 2013 Balance Sheet and Note 4 which pertains to this item.

12. Cash Store has repeatedly, since the Funds were advanced, confirmed that they were held in accordance with the Broker Agreement in a segregated bank account, but has recently refused to confirm that they are so segregated and held.

13. Approximately 3 – 4 weeks ago, and following up on my February 26, 2014 email, I had a conversation with the Cash Store Financial Vice-President Steve Carlstrom (previously noted above in paragraph 9) in which he expressed concerns if the monies which we had requested to be repaid (and which I understood had been agreed to be repaid) there would be liquidity issues with Cash Store Financial. Nonetheless, in response to my concern about the security of undeployed cash, I was assured by Mr. Carlstrom that the money remained available and was being administered in accordance with the Broker Agreement.

14. I am also Corporate Secretary of 8028702 Canada Inc., which holds $5,000,000 of Cash Store Financial's senior secured debt. On April 1, 2014 Cash Store Financial failed to

pay the interest on its senior secured indebtedness, which failure constitutes a default pursuant to the terms of that indenture if not cured within 30 days.

15. I believe that the Defendants are either insolvent or near insolvent, and that they intend to use the money of 0678786 for general corporate purposes, when it is not their money to use and such action would be contrary to the Credit Agreement. All of the factors listed above are indications of a seriously distressed company and I fear that unless immediate action is taken, the money of 0678786 will be converted or taken in breach in trust.

16. By letter dated April 4, 2014, 0678786 requested of counsel for the Special Committee that there be confirmation that the Restricted Cash was kept segregated, or for return of the Funds (attached as **Exhibit "6"**). A copy of this letter was also sent to counsel for Cash Store Financial. The Defendants have refused to confirm the segregation of the Restricted Cash, and instead responded by letter dated April 8, 2014 alleging it is not trust money (attached **Exhibit "7"**). That letter was responded to on April 8, 2014 (**Exhibit "8"**).

17. The Broker Agreement further provides in paragraph 5.1 as follows:

> 5.1 INSPECTIONS & AUDITS
>
> Financier shall have the right, at any time upon written demand made by Financier to Broker, to inspect, during normal business hours, all Records (wherever located). Qualified third party consultants, as determined by Financier at Financier's sole discretion, may be employed by Financier for the purpose of any such inspection. Broker shall have the right, as a condition of such inspection, to require any such consultants to execute such form of confidentiality agreement as Broker may reasonably require and in any event such consultants shall be deemed to acting as agents for and on behalf of Financier for purposes of Article 4 hereof. The cost of any such inspection shall be the sole responsibility of Financier and any such consultant so employed will be required to create reports, which are accessible only to Financier and if permitted by Financier, Broker.

18. Pursuant to paragraph 5.1, 0678786 by letters dated April 4, 2014 (Exhibit "6") and April 8, 2014 (Exhibit "7") requested that PricewaterhouseCoopers Inc. ("PWC") be appointed to inspect the books and records of the Cash Store. Although PWC prepared Cash Store Financial's tax returns, I am not aware of any conflict or other reason why they may not undertake this task. As of the date of this Affidavit, Cash Store, Cash Store Financial and

the Special Committee have refused to permit PWC to investigate the books and records of the Cash Store as permitted under the Broker Agreement.

19. As a result of the concerns referenced above, the Plaintiff has cancelled the Broker Agreement in accordance with its terms and requested return of its funds. A copy of the cancellation notice is attached hereto as **Exhibit "9"**.

20. Unless steps are immediately taken to permit access by PWC, 0678786 will suffer irreparable harm in that its Restricted Cash may be dissipated, without any ability to trace these funds.

21. Furthermore, unless the Cash Store is restrained from using any Restricted Cash which are or should be contained in a segregated account, which are in fact either the property of the 0678786, or trust funds held on its behalf, 0678786 will suffer irreparable harm due to the financial circumstances of the Defendants.

22. The Plaintiff undertakes to pay damages associated with any wrongful granting of any interim relief which it seeks in this case.

23. I make this Affidavit in support of the relief requested in the Application.

SWORN BEFORE ME
at Calgary, Alberta, this 11th
day of April, 2014.

A Commissioner for Oaths
in and for the Province of Alberta

DONNA M. KATHLER
My Commission Expires
December 24, 2015

SHARON FAWCETT

TAB 6

Court File No.

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 THE CASH STORE FINANCIAL SERVICES INC., THE CASH STORE INC., ET AL

AFFIDAVIT OF ERIN ARMSTRONG

Sworn/~~Affirmed~~ on April 13, 2014

I, Erin Armstrong, of the City of Calgary, in the Province of Alberta, SWEAR/~~AFFIRM~~ AND SAY THAT:

1. I am a former Chief Operating Officer of 1518534 Alberta Ltd., the general partner ("**General Partner**") of Trimor Annuity Focus Limited Partnership #5 ("**Trimor LP**"). I was Chief Operating Officer of the General Partner from June 2012 until I resigned in January of 2014. I continue to assist the General Partner in an administrative capacity with respect to Trimor LP's relationship with The Cash Store Inc. ("**TCSI**"), as described below. Accordingly, I have personal knowledge of the facts and matters hereinafter deposed to, except where the same are stated to be upon information and belief and as to these last-mentioned matters, I verily believe them to be true.

2. Trimor LP is a limited partnership registered pursuant to the laws of Alberta, with its head office in Calgary, Alberta.

3. The General Partner is an Alberta Corporation with its head office is in Calgary, Alberta.

4. There are approximately 150 beneficial unit holders in Trimor LP, most of whom are individuals, trusts, or corporations resident in Alberta.

5. Trimor LP was created for the purpose of advancing and making loans to customers of TCSI (the "**Customers**") pursuant to an arrangement whereby funds are advanced by

Trimor LP, as financier, to TCSI or a TCSI-related entity, as broker, for the purpose of making loans to the Customers on Trimor LP's behalf pursuant to broker agreements.

6. Attached collectively hereto as **Exhibit "A"** is a copy of the broker agreement between Trimor LP and TCSI, dated February 1, 2012 and made as of June 5, 2012 (the "**TCSI Agreement**"), along with an amendment to the TCSI Agreement, which was executed on or around April 10, 2013.

7. Attached hereto as **Exhibit "B"** is a true copy of the broker agreement between Trimor LP and 1693926 Alberta Ltd. ("**169**"), dated September 24, 2012 and made as of June 5, 2012 (the "**169 Agreement**" and with the TCSI Agreement, the "**Broker Agreements**").

8. As set out in greater detail below, the Broker Agreements provide that any funds advanced to TCSI or 169 (collectively, the "**Broker**") by Trimor LP are to be held by the Broker in a segregated account and that such funds may not be utilized by the Broker for any purpose other than making loans to the Customers on behalf of Trimor LP.

9. Pursuant to the Broker Agreements, Trimor LP, as Financier (as that term is defined in the Broker Agreement), has currently placed with the Broker the amount of $27,002,000 (the "**Trimor LP Funds**") for the sole purpose of the Trimor LP Funds being loaned to the Customers.

10. Attached hereto as **Exhibit "C"** is a true copy of a consolidated lender statement of account for January 2014 with respect to $25,502,000 of the Trimor LP Funds advanced pursuant to the TCSI Agreement.

11. Attached hereto as **Exhibit "D"** is a true copy of a consolidated lender statement of account for January 2014 with respect to $1,500,000 of the Trimor LP Funds advanced pursuant to the 169 Agreement.

12. Pursuant to the Broker Agreements, specific loan selection criteria must be met or specific approval by Trimor LP must be obtained, before any of the Trimor LP Funds are loaned.

13. Section 2.3 of the Broker Agreements provide that Trimor LP may provide notice to the Broker that funds held in the "float" should not be advanced by Broker to Customers and that Trimor LP is under no obligation to approve any particular loan or amount of loans. It specifically states:

> 2.3 LOAN SELECTION
>
> Broker shall not present to Financier any proposed loan unless such loan and such Broker Customer meets the Loan Selection Criteria but Financier shall, subject to Section 2.2, be deemed to have approved a loan to any Broker Customer meeting such criteria. For greater certainty, ***unless and until Broker has received written notice to the contrary*** any of Financier's funds then being held by the Broker as a "float" in anticipation of Loans may, where Financier approval is deemed to have been given hereunder, be advanced by Broker to Broker Customers on Financier's behalf in accordance with 2.5.
>
> ...
>
> Financier shall be under no obligation to approve any particular loan or amount of loans.

14. Pursuant to the Broker Agreements, the Trimor LP Funds are to be used for no other purpose than as set out in paragraph 2.10 of the Broker Agreement, which provides as follows:

> 2.10 USAGE OF LOAN ADVANCES
>
> For greater certainty, funds from time to time advanced to Broker from Financier are solely intended to be utilized for the purposes of making advances to [Customers] on Financier's behalf as contemplated hereunder. Broker agrees that any funds not otherwise being held by the Broker as a "float" in anticipation of Loan approvals shall not, without the consent of Financier, be advanced or utilized for any other purpose.

15. As of January 2014, approximately $4.7 million of the Trimor LP Funds were not being used to fund loans to Customers and were therefore as I understand to be held in trust by the Broker for the benefit of Trimor LP pursuant to the terms of the Broker Agreements.

16. TCSI has continuously assured Trimor LP that its funds were not used for any other purpose than advancing loans in accordance with Broker Agreements.

17. I have always believed and the Broker Agreements provide that all funds advanced by Trimor LP are to be held in the Designated Broker Bank Account, defined in paragraph 1.1(g) of the Broker Agreements as follows: "the bank account of Broker designated by Broker for the purposes of temporarily receiving funds from Financier (if loans are made by Financier way of cash advance) before they are advanced to a Broker Customer."

18. I have always believed and the Broker Agreements provide that all payments made by Customers on account of any loans made with the Trimor LP Funds are to be deposited into the Designated Financier Bank Account, defined in paragraph 1.1(h) of the Broker Agreements as follows: "the bank branch and account designated by Financier from time to time where (and into which) deposits of cash and cheques received from Broker Customers, in respect of such Financier funded loans, are to be cleared (deposited) to from to time."

19. Attached hereto as **Exhibit "E"** is a copy of a letter from Geoff Whitlam, on behalf of Trimor LP, to TCSI dated January 24, 2014 providing notice that the amount Trimor is prepared to fund is reduced to $23,000,000 and requesting confirmation as to when the principal would be returned.

20. I understand that as a result of a court decision in Ontario in February 2014, TCSI can no longer advance payday loans in Ontario and I understand that TCSI has serious liquidity issues. Attached as **Exhibit "F"** are copies of Press Releases dated February 19, February 20 and March 28, 2014 concerning these events.

21. TCSI represented to Trimor LP that it would be making a payment to Trimor LP on March 28, 2014 which as I understand it should have included interest collected on loans made to Customers with Trimor LP Funds. TCSI has a long history of making such

payments when it represented it would do so, however the March 28, 2014 payment was not made to Trimor LP.

22. On April 4, 2014, Trimor LP sent a letter TCSI requesting an immediate and complete accounting of all loans facilitated by the Broker on Trimor LP's behalf and giving formal notice that Trimor was reducing the amount of funding made available under the Broker Agreements to zero. Attached hereto as **Exhibit "G"** is a copy of the letter dated April 4, 2014 from Kurt Soost, president of the General Partner, to TCSI.

23. On April 9, 2014, Trimor LP received a letter from Marc Wasserman of Osler Hoskin & Harcourt LLP, counsel to the Special Committee of the Board of Directors of The Cash Store Financial Services Inc. (the "**Cash Store Financial**") in response to Mr. Soost's April 4, 2014 letter. Attached hereto as **Exhibit "H"** is a copy of Mr. Wasserman's letter. The letter is very concerning to Trimor LP in that, contrary to the terms of the Broker Agreements and Trimor LP understanding and belief that TCSI was acting and always had acted in accordance with terms of the Broker Agreements, Mr. Wasserman advises that the funds collected from the Customers are comingled.

24. Attached hereto as **Exhibit "I"** is a true copy of an email from Brett Harrison of McMillan LLP, counsel for Trimor LP, to Mr. Wasserman dated April 12, 2014 stating that Trimor believes that any proceedings commenced under the *Companies Creditors' Arrangement Act* (the "**CCAA**") be commenced in Alberta and that any Initial Order made in such proceedings provide certain protections to Trimor LP.

25. In light of the Broker's many connections to Alberta, the Court of Queen's Bench of Alberta (the "**Alberta Court**") is the most convenient forum for a CCAA proceeding in respect of TCSI, the Cash Store Financial and any related entities. I am advised by Mr. Soost and I believe it to be true that:

    a. the head office of both TCSI and the Cash Store Financial is in Edmonton, Alberta;

    b. TCSI and the Cash Store Financial have material ongoing operations in Alberta;

c. the providers of approximately $41 Million in third party debt (including Trimor LP) are resident in Alberta and have, pursuant to broker agreements (including the Broker Agreements), attorned to the courts of the province of Alberta;

d. the holder of at least $5 Million of secured debentures is resident in Alberta; and

e. there is a pending application for an injunction against TCSI and the Cash Store Financial brought by 0678786 B.C. Ltd. before the Alberta Court.

26. Attached hereto as **Exhibit "J"** is a copy of a notice dated April 13, 2014 from Trimor LP to the Brokers notifying the Brokers that:

a. the Broker Agreements will not be renewed at the end of their term; and

b. Trimor LP would no longer be deemed to have approved loans to the Customers in accordance with section 2.3 of the Broker Agreements.

27. I make this affidavit in support of the position of Trimor LP on this application and for no other purpose.

SWORN/~~AFFIRMED~~ BEFORE ME at the City of Calgary, in the Province of Alberta, this 13th day of April, 2014.

(Notary Public in and for the Province of Alberta)

Erin Armstrong

Mitchell R. Allison
Student-at-Law

TAB 7

Court File No. CV-14-10518-00CL

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 THE CASH STORE FINANCIAL SERVICES INC., THE CASH STORE INC., TCS CASH STORE INC., INSTALOANS INC., 7252331 CANADA INC., 5515433 MANITOBA INC., 1693926 ALBERTA LTD DOING BUSINESS AS "THE TITLE STORE"

Applicants

SUPPLEMENTARY AFFIDAVIT OF ERIN ARMSTRONG
(sworn May 8, 2014)

I, Erin Armstrong, of the City of Calgary, in the Province of Alberta, SWEAR OATH AND SAY THAT:

1. I am a former Chief Operating Officer ("**COO**") of 1518534 Alberta Ltd., the general partner ("**General Partner**") of Trimor Annuity Focus Limited Partnership #5 ("**Trimor**"). I was Chief Operating Officer of the General Partner from June 2012 until I resigned in January 2014 and I continue to assist the General Partner in an administrative capacity with respect to Trimor LP's relationship with The Cash Store Inc. ("**TCSI**"). Accordingly, I have personal knowledge of the facts and matters hereinafter deposed to, except where the same are stated to be upon information and belief and as to these last-mentioned matters, I verily believe them to be true.

2. I swear this affidavit as a supplement to my affidavit sworn on April 13, 2014 (the "**April 13 Affidavit**"). Where this affidavit contains capitalized terms that are not defined herein, those terms have the meaning given to them in the April 13 Affidavit.

TCSI PUBLIC DISCLOSURE OF TPL FUNDS

3. TCSI disclosures state that the funds advanced by third party lenders ("**TPLs**"), such as Trimor (the "**TPL Funds**"), for the purpose of making TCSI-brokered loans ("**TPL Brokered Loans**") are not assets of TCSI.

4. In or about January 2012, TCSI offered $132.5 million in senior secured notes due in 2017 through a private placement (the "**Secured Note Offering**"). Attached as **Exhibit "A"** to my affidavit is a copy of TCSI's Confidential Preliminary Canadian Offering Circular dated January 12, 2012 (the "**Preliminary TCSI Circular**") in support of the Secured Note Offering and the cover email under which it was sent. This Preliminary TCSI Circular was provided to Trimor by TCSI and at that time it was indicated to me that it was the final version.

5. The Cash Store Financial Services Inc. is a publically traded company which prepares and produces publically available annual audited financial statements and management's discussion and analyses. The following publically available audited financial statements and management's discussion and analyses of TCSI are attached hereto:

a. Attached as **Exhibit "B"** to my affidavit is a copy of TCSI's financial statements for the fifteen months ended September 30, 2010 and for the year ended June 30, 2009;

b. Attached as **Exhibit "C"** to my affidavit is a copy of TCSI's Management's Discussion and Analysis for the three and twelve months ended September 30, 2011;

c. Attached as **Exhibit "D"** to my affidavit is a copy of TCSI's Management's Discussion and Analysis for the three months and year ended on September 30, 2012;

d. Attached as **Exhibit "E"** to my affidavit is a copy of TCSI's Management's Discussion and Analysis for the three months and year ended September 30, 2013; and

e. Attached as **Exhibit "F"** to my affidavit is a copy of TCSI's Management's Discussion and Analysis for the three months ended December 31, 2013.

TCSI's REPRESENTATIONS TO TRIMOR REGARDING THE TRIMOR FUNDS

6. As stated in paragraph 16 of the April 13 Affidavit, TCSI consistently assured Trimor that Trimor's funds were not used for any purpose other than advancing loans in accordance with the Broker Agreement. In addition, TCSI assured Trimor that it would treat the Trimor funds as being held in trust for Trimor's benefit. Attached as **Exhibit "G"** to my affidavit is an email from Michael Zvonkovic (former Vice-President, Financial Reporting at TCSI) dated November 9, 2011 which provides an example of these representations.

PAYMENTS AND CAPITAL PROTECTION

7. From the time that Trimor began making loans to TCSI until March 2014, TCSI made cash payments to Trimor ("**Payments**"). Until January, 2014, the Payments were made to Trimor four times per month in accordance with a schedule that TCSI emailed to me (the "**Payment Schedule**") each month. The Payments were calculated so that Trimor received a 17.5% return per year on the full amount of the Trimor TPL Funds advanced to TCSI. Attached as **Exhibit "H"** to my affidavit is a copy of the Payment Schedule provided to by TCSI for May 2010 to March 2014, inclusive. To the best of my recollection, other than the payments shown on the Payment Schedule for March, all of the payments listed on the Payment Schedule were made by TCSI to Trimor in accordance with the schedule.

8. TCSI has also represented that they provided Trimor with protection against the erosion of Trimor's TPL Funds (referred to as "capital protection" in the affidavit of Stephen Carlstrom sworn April 14, 2014). During my tenure as COO of the General Partner, I had numerous discussions with TCSI's senior management, including Gordon Reykdal (Chief Executive Officer), Craig Warnock (Chief Financial Officer), and Steve Carlstrom (Vice-President, Financial Reporting) ("**Senior Management**"). From these discussions, it was my understanding that TCSI was effectively purchasing the past due loans from Trimor (the "**Capital Protection Purchases**").

9. The affidavit of Craig Warnock sworn September 30, 2013, was filed in the Court of Queen's Bench of Alberta proceeding bearing court file no. 130-11081 (the

"**Warnock Affidavit**"). Attached as **Exhibit "I"** to my affidavit is a copy of the Warnock Affidavit.

10. I have reviewed the statements made in paragraphs 25-27, 35, 37 and 43 of the Warnock Affidavit and they accord with the statements made to me by TCSI's senior management. Where those paragraphs of the Warnock Affidavit make reference to Assistive Financial Corp., another TPL of TCSI, my understanding was that those facts were true in respect of all TPLs.

PREJUDICE TO TRIMOR

11. I believe Trimor risks suffering serious financial losses unless the Trimor Property (as defined in the Notice of Motion) is returned to Trimor immediately.

12. Cash Store is no longer a licensed payday lender in Ontario, and as a result, my understanding is that it cannot broker any TPL Brokered Loans or make any direct loans in Ontario. As a result, my understanding is that there is little incentive for Ontario customers to repay the TPL Brokered Loans.

13. To my knowledge, the Applicants have provided no indication that they have a viable plan for the continuation of their operations in Ontario or elsewhere. I believe that there is a real possibility that the Applicants will cease operations in the near future in those jurisdictions where they broker third party loans. Should Cash Store cease operations in any of these non-Ontario jurisdictions before the administration of the Trimor-owned Loans and Advances are transferred, I believe it could have a devastating impact on the ability of Trimor to collect these loans.

14. I swear this affidavit in support of the position of Trimor LP on this motion and for no other or improper purpose.

SWORN BEFORE ME at the City of Calgary, in the Province of Alberta, this 8th day of May, 2014.

(Notary Public in and for the Province of Alberta)

Erin Armstrong

Mitchell R. Allison
Student-at-Law

TAB 8

Court File No. CV-14-10518-00CL

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 THE CASH STORE FINANCIAL SERVICES INC., THE CASH STORE INC., TCS CASH STORE INC., INSTALOANS INC., 7252331 CANADA INC., 5515433 MANITOBA INC., 1693926 ALBERTA LTD DOING BUSINESS AS "THE TITLE STORE"

APPLICANTS

AFFIDAVIT OF SHARON FAWCETT

I, Sharon Fawcett, Chartered Accountant, of Calgary, Alberta, SWEAR AND SAY THAT:

1. I am the Secretary of the Plaintiff 0678786 B.C. Ltd. ("0678786"), and have a personal knowledge of the matters hereinafter deposed to save where otherwise stated to be based upon information and belief.

2. In Alberta Court of Queen's Bench Action No. 1403-05471, I swore an Affidavit on April 11, 2014 which sets out most of the details with respect to the placement of $13,350,000 (the "Restricted Cash") by 0678786 with The Cash Store Inc. (the "Cash Store"). I attach a copy of that Affidavit without Exhibits as **Exhibit "1"**. I repeat and adopt the statements set out therein and use the terms defined in that Affidavit.

Further Details with Respect to Misrepresentation of Segregation of Cash

3. As indicated in my prior Affidavit, it was represented to me and Mr. McCann at the time the Broker Agreement was entered into, and it is a term of the Broker Agreement, that all Restricted Cash would be placed in a Designated Broker Bank Account, which would be separate and apart from Cash Store Financial's general operating account. It is my understanding from discussions with Cash Store Financial V.P. Financial Reporting at the time, Michael Zvonkovic, that such an account did exist at the time the Broker Agreement was entered into, that it was a trust account, and that the Bank required the names of the brokers who owned the money. Attached as **Exhibit "2"** is a 2012 email

exchange confirming this fact. At no time did anyone from Cash Store or Cash Store Financial advise me that Restricted Cash would be handled differently than as set out above.

4. In paragraph 9 of my prior Affidavit, I indicate that there were numerous discussions concerning the 0678786 Restricted Cash in February to March 2014. Attached to this Affidavit as **Exhibit "3"** are emails between me and Cash Store executives, including Mr. Carlstrom discussing the Restricted Cash. Attached as **Exhibit "4"** are emails between Mr. McCann and Mr. Reykdl between February 27, 2014 and April 12, 2014, with respect to the Restricted Cash. Never in these emails or the conversations surrounding them was there any mention that the Restricted Cash of Cash Store was now commingled with general funds. In fact, I was led to believe the funds were still segregated as promised.

5. As set out in the Affidavit of Mr. McCann, the decision to use the Restricted Cash of 0678786 was likely made before the CCAA. I am concerned that the Special Committee made the decision knowing that Cash Store and Cash Store Financial were in breach of the Broker Agreement and that the company had misrepresented the facts to 0678786.

6. Furthermore, I am concerned that the Special Committee took steps to ensure that the owners of the Restricted Cash were not apprised of the misrepresentations to enable Cash Stores and Cash Store Financial to spend most of the Restricted Cash. On or about March 31, 2014, the Special Committee instructed management to not speak with me or Mr. McCann. Attached as **Exhibit "5"** is an email from Mr. Reykdal confirming this fact. Although a request was made April 4, 2014 to allow PWC to inspect the records of Cash Stores pursuant to its rights under the Broker Agreement, only as of last Friday, April 18, 2014 was this finally agreed to be permitted.

7. While this was ongoing, I am concerned that much of the Restricted Cash has been spent, presumably in part on professional and other fees related to these proceedings. Had 0678786 been notified earlier, it would have immediately attended at Court to protect its position.

8. I am advised that advance notice of an application regarding the Restricted Cash was given to counsel for the Special Committee on or about April 9, 2014. Our application materials were served on Friday, April 11, 2014. The first our counsel heard about a CCAA application was on Sunday, April 13, 2014 at 10:34 p.m. when a draft Order was sent to the attention of our counsel in Calgary, for a Monday, April 14, 2014 at 9:00 a.m. Toronto application.

Collection and Re-Loaning Funds

9. I understand that the Initial Order in these proceedings provides that money from the collection of loans owned by 0678786 is eligible to be re-loaned by Cash Store and Cash Store Financial. This is highly prejudicial to 0678786. The loans made by Cash Store and Cash Store Financial are risky when ordinary business operations are in place. The chance of default is high.

10. The chance of loss to 0678786 is immeasurably higher in the present circumstances. If Cash Store or Cash Store Financial were to go into bankruptcy or receivership, there would be virtually no chance of collecting any of the money lent. I believe that debtors would be reluctant to pay and that the costs of collection would far exceed the revenues from these same loans. The Broker Agreement provides that the cash cannot be loaned if Cash Store is insolvent and the reason is that this fact makes the loans much more risky than they are in the ordinary course. It is highly prejudicial to 0678786 to allow its cash to continue to be loaned in these circumstances.

11. This Affidavit is made prior to the cross-examination of Mr. Carlstrom to comply with the Ontario Court rules. Further Affidavit evidence may be required when information is received from PWC about the state of the Restricted Cash, and the evidence of Mr. Carlstrom on the cross-examination is received.

SWORN BEFORE ME
at Calgary, Alberta, this 27
day of April, 2014.

A ~~Commissioner for Oaths~~ Notary Public
in and for the Province of Alberta
KENNETH T. LENZ
BARRISTER AND SOLICITOR

SHARON FAWCETT

TAB 9

Court File No.

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 THE CASH STORE FINANCIAL SERVICES INC., THE CASH STORE INC., TCS CASH STORE INC., INSTALOANS INC., 7252331 CANADA INC., 5515433 MANITOBA INC., 1693926 ALBERTA LTD. DOING BUSINESS AS "THE TITLE STORE"

APPLICANTS

AFFIDAVIT OF STEVEN CARLSTROM

(Sworn April 14, 2014)

I, Steven Carlstrom, of the County of Strathcona, in the Province of Alberta, the Vice President, Financial Reporting of the Applicant, The Cash Store Financial Services Inc. ("Cash Store Financial"), MAKE OATH AND SAY:

Introduction

1. This Affidavit is made in support of an Application by Cash Store Financial and its affiliated companies The Cash Store Inc., TCS - Cash Store Inc., Instaloans Inc., 7252331 Canada Inc., 5515433 Manitoba Inc., and 1693926 Alberta Ltd. doing business as "The Title Store" (collectively "Cash Store" or the "Applicants") for an Initial Order and related relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA").

2. I joined Cash Store Financial on August 27, 2012 as Vice President, Financial Reporting. In my role I report directly to the Chief Financial Officer and I am responsible for all of Cash Store Financial's external financial reporting obligations. My duties also include oversight of payroll, corporate accounting, and accounting for Cash Store Financial's off balance sheet arrangements with third-party lenders ("TPLs"), as described below. As such, I have personal knowledge of the matters deposed to herein. Where I have relied on other sources for information, I believe them to be true. In preparing this affidavit I have also consulted with other members of Cash Store Financial's senior management team (the "Senior Management"), and the Special Committee (as defined below) and reviewed certain information provided by financial advisors to the Special Committee as well as Cash Store's public disclosure documents filed on SEDAR.

3. Cash Store is a leading provider of alternative financial products and services, serving individuals for whom traditional banking may be inconvenient or unavailable. Cash Store owns and operates Canada's largest network of retail branches in the alternative financial products and services industry, with 509 branches across Canada operating under the banners "Cash Store Financial", "Instaloans" and "The Title Store." Cash Store also owns and operates 27 branches in the United Kingdom (the "UK") under the banner "Cash Store Financial". Cash Store Financial is listed on the Toronto Stock Exchange (TSX:CSF). Cash Store Financial was traded on the New York Stock Exchange until it voluntarily delisted on February 28, 2014 (NYSE: CSFS).

4. Cash Store acts as both a broker and lender of short-term advances and offers a range of other products and services to help customers meet their day to day financial service needs. Cash Store uses a combination of payday loans and lines of credit as its primary consumer

lending product offerings and earns fees and interest income on these consumer lending products. Cash Store also offers a wide range of financial products and services including bank accounts, prepaid MasterCard, private label credit and debit cards, cheque cashing, money transfers, payment insurance and prepaid phone cards. Cash Store has arrangements with a variety of companies to provide these products.

5. Cash Store employs approximately 1,840 hourly and salaried employees in Canada and the UK who rely on the continued existence of Cash Store for their livelihoods. Other stakeholder groups (discussed in greater detail below) include Cash Store Financial's senior secured lenders under its credit agreement, holders of Cash Store Financial's 11.5% senior secured notes, TPLs, other creditors, customers, shareholders, landlords, and contingent creditors such as class action plaintiffs. Cash Store's corporate headquarters and Senior Management are located in Edmonton, Alberta.

6. Cash Store is facing immediate and multiple challenges to its continued operations, including regulatory issues that affect its core business strategy, multiple class actions requiring defence across Canada and in the U.S., cash flow issues, and the resulting deterioration of its liquidity position. Significantly, on February 13, 2014, the Ontario Registrar of the Ministry of Consumer Services ("Ontario Registrar") issued a proposal to refuse to issue a lender's license to Cash Store Financial's subsidiaries, The Cash Store Inc. and Instaloans Inc., under the *Payday Loans Act, 2008*, S.O. 2008, Ch. 9 ("Payday Loans Act"). On March 27, 2014, the Ontario Registrar issued a final notice of its decision not to grant a license under the Payday Loans Act. Further, a recent decision of the Ontario Superior Court of Justice determined that Cash Store could not sell its line of credit products in Ontario. Cash Store is therefore not currently permitted to sell any payday loan products or line of credit products in Ontario.

7. Over the course of the past several months, Cash Store engaged in significant efforts to pursue a restructuring outside of a formal insolvency proceeding. These efforts include changes to the composition of Cash Store Financial's Board of Directors, the creation of a Special Committee of the Board of Directors to examine and pursue strategic alternatives, hiring of legal and financial restructuring advisors, lengthy negotiations with the Ontario Registrar with respect to the Applicants' licenses to act as a lender under the Payday Loans Act, the commencement of a mergers and acquisition process to seek a sale or significant investment in Cash Store and negotiations with the Applicants' stakeholders. Each of these efforts is described in more detail below.

8. Cash Store's liquidity position continues to significantly deteriorate and the current situation is dire. There is too much uncertainty and too many legal and business impediments to continue the strategic alternatives process outside of an insolvency proceeding. Senior Management and the Special Committee have expressed concerns regarding Cash Store's ability to sustain adequate liquidity to fulfill current business objectives and maintain going concern operations without commencing a CCAA process. Cash Store is unable to meet its liabilities as they become due and is therefore insolvent.

9. Subject to certain conditions including the granting of the proposed Initial Order, the DIP Lenders (defined below) have agreed to provide the Applicants with an interim financing facility (the "DIP Facility") of up to approximately $20.5 million. The DIP Facility is intended to provide the Applicants with adequate liquidity to satisfy their working capital requirements and to seek to complete a restructuring as part of this CCAA proceeding. Cash Store is facing the stark reality that it is unable to continue going concern operations to preserve enterprise value without the DIP Facility.

10. Based on my own knowledge of Cash Store's business and my discussions with Senior Management and the financial advisors to the Special Committee, it is my belief that Cash Store can be a viable business after undergoing a restructuring under the CCAA. In order to continue going concern operations during Cash Store's transition to a new business model or a potential sale, the Applicants require a stay of proceedings and related relief under the CCAA. The Applicants are seeking CCAA protection to enable Cash Store to continue to operate as a going concern and be provided with the breathing space to restructure its affairs. Cash Store intends to continue its stakeholder discussions with the assistance of the proposed Monitor should the Initial Order be granted. A stay will enable the Applicants to evaluate restructuring options concurrently with a potential sale of all or a portion of the Cash Store business, with the ultimate goal of developing a plan of arrangement or compromise to restructure the business in a manner designed to maximize value to the extent possible for its stakeholders.

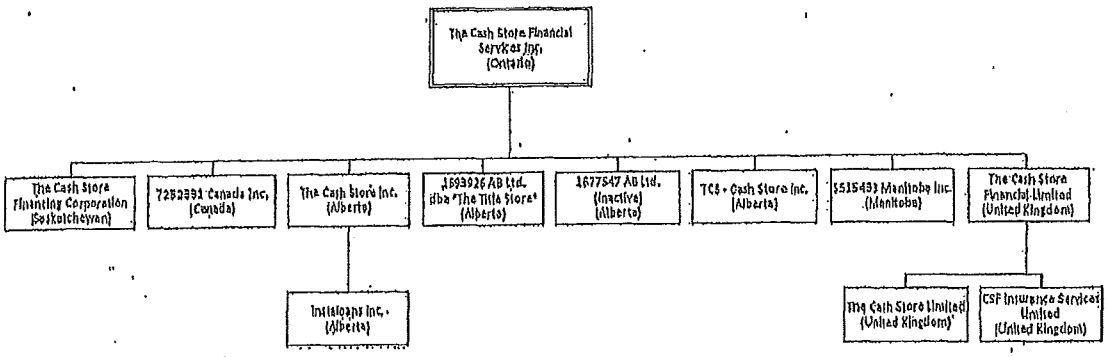
Corporate Structure of the Applicants

11. Cash Store Financial is a publicly-held Ontario corporation. The other Applicants are all privately-held corporations that are direct or indirect subsidiaries of Cash Store Financial. Cash Store Financial is the only broker of short-term advances and provider of other financial services in Canada publicly traded on the Toronto Stock Exchange (TSX:CSF). Cash Store Financial was traded on the New York Stock Exchange until it voluntarily delisted on February 28, 2014 (NYSE: CSFS).

12. As of December 31, 2013, Cash Store Financial had issued and outstanding share capital of 17,571,813 common shares. Cash Store Financial is authorized to issue unlimited common shares with no par value. As at December 11, 2013, Cash Store Financial's directors

and senior executive officers together beneficially owned 3,915,700 (22.2%) of the outstanding common shares. Of that, 3,640,300 (20.7%) of the outstanding common shares are beneficially owned by Gordon Reykdal, a Director and the Chief Executive Officer of Cash Store Financial. Coliseum Capital Management, LLC ("Coliseum") owns 19.27% of the common shares of Cash Store Financial.

13. The chart set out below shows the organizational structure of the Applicants and related companies. Cash Store Financial directly or indirectly owns 100% of the issued and outstanding shares of each of the Applicants. Included in parentheses within the corporate organization chart is the respective jurisdiction of incorporation of each entity.



(a) **Description of Entities**

14. Cash Store Financial is the holding company for Cash Store. Eugene Davis is Chairman of the Board, and the Board of Directors includes Cash Store Financial's CEO Gordon Reykdal, Edward McClelland, Timothy Bernlohr, Thomas Fairfield, and Donald Campion. Mr. Reykdal founded Cash Store in 2001 and has been on the Board of Directors since that time. Mr. McClelland joined the Board of Directors in 2005 and was appointed the Chief Executive Officer of Cash Store Australia in January 2008. Mr. Davis joined the Board of Directors on June 26, 2013, and Mr. Bernlohr, Mr. Fairfield, and Mr. Campion all joined the Board of Directors on

August 13, 2014, Mr. Davis is also the Chairman of the Special Committee and Mr. Bernlohr, Mr. Fairfield, and Mr. Campion are also members of the Special Committee (discussed below).

15. The Cash Store Inc. and Instaloans Inc. both act as lenders and/or brokers. These two companies are the main active subsidiaries of Cash Store Financial, operating in all of the provinces and territories where Cash Store has a presence.

16. The following are the remaining Canadian subsidiaries:

(a) **1693926 Alberta Ltd.** runs The Title Store, which offers loans where the customer provides a motor vehicle title as collateral. This company is unable to meet its liabilities as they come due.

(b) **The Cash Store Financing Corporation** was incorporated in Saskatchewan to act as a lender for Cash Store's "Elite" Line of Credit, however, this subsidiary was never used, is inactive, and is not an Applicant in these proceedings.

(c) **7252331 Canada Inc.** was incorporated to act as a direct lender for payday loans in British Columbia and act as the lender for Cash Store's "Elite" Line of Credit, which Cash Store recently ceased offering. While 7252331 Canada Inc. is not active, it holds some defaulted payday loans receivable that are held at a zero value as well as the Elite Line of Credit receivables.

(d) **1677547 Alberta Ltd.** was created to maintain the "Apply Pronto" internet lender banner, however Cash Store never launched the internet lending business and this entity is only used to maintain a website that aggregates customer leads and directs them to Cash Store's physical branches. It is not an Applicant in these proceedings.

(e) **TCS – Cash Store Inc.** acts as the lessee for all of the leased corporate stores.

(f) **5515433 Manitoba Inc.** holds real property in Manitoba and is the landlord for two Manitoba corporate stores.

17. Gordon Reykdal is the sole director of the three UK companies: The Cash Store Financial Limited (a holding company), The Cash Store Limited (the lender), and CSF Insurance Services Limited (a service provider). The UK companies are not currently Applicants in these proceedings, however, Cash Store may seek to include them in these proceedings should circumstances warrant.

(b) <u>Investments in Foreign Operations</u>

18. Cash Store Financial also has investments in the following foreign operations:

- 18.3% of the outstanding common shares of The Cash Store Australia Holdings Inc. ("AUC"), which operated payday loan branches in Australia under the name "The Cash Store Pty", Gordon Reykdal and Edward McClelland are directors of AUC. AUC is publicly listed on the TSX Venture exchange under the symbol "AUC". In December of 2012 the Alberta, Ontario and British Columbia Securities Commissions issued cease trade orders in respect of the shares of AUC for failure to file financial statements. On September 13, 2013, The Cash Store Pty appointed a voluntary administrator pursuant to Section 436A of the *Australian Corporations Act* 2001. The Administrator has taken control of the operations and assets of The Cash Store Pty and an application to have the cease trade orders revoked has been withdrawn by AUC.

- 15.7% of the outstanding common shares of RTF Financial Holdings Inc., a private company in the business of short-term lending by utilizing highly automated mobile

technology (SMS text message lending). RTF Financial Holdings Inc. currently operates in the UK but is not granting new loans at this time.

(c) Banking and Cash Management System

19. Cash Store Financial's active subsidiaries have their own bank accounts with CIBC and each branch's account has its own bank account identifiers. The bank accounts do not segregate the cash belonging to each subsidiary into Unrestricted and Restricted Cash (discussed below). Unrestricted and Restricted Cash are comingled. There is a central cash management system in place, including all bank reconciliations, all accounts payable and payroll (with the exception of the UK corporations, which processes their own accounts payable and payroll).

20. In order to maintain minimum bank balances and prevent overdrafts (which are not permitted by CIBC), cash is transferred between legal entities and bank accounts as necessary on a daily basis.

21. In addition to its accounts with CIBC, Cash Store has certain bank accounts with RBC and BMO which accept deposits from branches in certain locations where a CIBC branch is not available. As needed, cash is swept from the RBC and BMO accounts to CIBC operating accounts. As funding is required for the UK operations, Cash Store will purchase British Pounds Sterling and transfer funds from CIBC to the UK companies' bank accounts with Barclays.

22. The chart set out below summarizes the movement of funds:

Outgoing Cash Flows - Consumer Lending	
Prepaid Debit/ Credit Card	If a customer elects to receive his/her loan on a prepaid card product, the card is loaded by a third-party service provider, Direct Cash Payments Inc. The cash for the total card loads is settled to Cash Store's operating accounts by Direct Cash Payments Inc. daily, one day in arrears via a pre-authorized debit. The reconciliation process is done centrally.

EFT	If a customer elects to receive his/her loan via EFT, Cash Store's internal system aggregates the EFTs and they are processed centrally twice per day.
Cheque	If a customer elects to receive his/her loan via Cheque, each branch is equipped with blank cheque stock and prints the cheque itself.
Incoming Cash Flows - Consumer Lending	
POS Payments	Customers may elect to repay obligations through POS terminals at each branch. Funds are collected by a third-party payment processor, Direct Cash Payments Inc. on Cash Store's behalf. The funds are remitted via EFT to Cash Store on a daily basis one day in arrears.
Pre-Authorized debits	Pre-authorized debits to customer accounts are processed by a third-party, DC Bank, on behalf of Cash Store. PAD collections are settled to Cash Store 5 business days after the effective date of the PAD.
Cash/Cheques	Cash and cheques may be received by the branches or the centralized collections centre. Each branch performs its own physical daily deposits of cash and cheques.
Other Payment Methods	Customers are also able to pay via other electronic means, such as bill payment functionality with their financial institution. These payments are processed centrally.
Outgoing Cash Flows - Corporate (Accounts Payable)	
Wire transfer	All wire transfers are processed centrally by treasury through CIBC or Barclays.
EFT	All EFT's are processed centrally through CIBC or Barclays.
Cheque	All accounts payable cheques are processed centrally either via the Canadian or UK head office.

(d) **Chief Place of Business**

23. Cash Store's chief place of business is the Province of Ontario. There are 176 Cash Store branches located in Ontario, which is the largest number of Cash Store branches in any province or territory where Cash Store operates. Currently, Cash Store has approximately 470 employees in Ontario, more people than Cash Store employs in any other province or territory. Cash Store's Chief Compliance and Regulatory Affairs Officer is located in Toronto

because Cash Store is facing its most significant regulatory challenges in Ontario (discussed in more detail below).

24. The Ontario operations of Cash Store accounted for $57.6 million in revenue for FY 2013, roughly 30% of Cash Store's total revenue, more revenue than any other province or territory. Furthermore, Cash Store Financial is listed on the TSX and files all of its public disclosure documents in Ontario. Cash Store Financial is a corporation incorporated under the Ontario *Business Corporations Act*, R.S.O. 1990, c. B16 and its registered office is located in Toronto. The impact of court and regulatory decisions (discussed below) has significantly curtailed Cash Store's Ontario revenues. Addressing the Ontario regulatory issues will be one of the key aspects of Cash Store's proposed CCAA proceeding.

The Business of Cash Store Financial

(a) Canadian and UK Payday Lending Industries

25. The Canadian payday lending market is $2.5 billion in loan volume annually, and consists of 1.8 – 2.5 million consumers. It has been a stable market with regard to market size and risk profile and remained stable through recent macroeconomic fluctuations. Neither demand for Cash Store services nor loss rates were negatively affected through the 2008/2009 recession.

26. The Canadian market is not growing and is largely saturated by a number of providers. Significant new entrants to the Canadian market have been on-line rather than branch based. The payday lending market in Canada is dominated by two main providers, Cash Store and Money Mart, each of which had approximately 35.0% market share before the recent suspension of Cash Store's brokering activities in Ontario. The rest of the market is made up of

various smaller providers of loans. Two U.S. providers have or are currently withdrawing from the market. Advance America (the largest U.S. payday lender) withdrew in 2012 and currently Cash Max is converting 29 branches in Ontario from payday lending to Cash Converters.

27. The UK payday lending market is still developing. The estimated market is £2 to £2.2 billion in 2011/12, up from an estimated £900 MM in 2008/09. This corresponds to between 7.4 million and 8.2 million new loans issued.

(b) Cash Store Customers

28. It is estimated that forty-seven percent of Canadians live from paycheck to paycheck. Of this forty-seven percent segment, approximately twenty percent (seven to ten percent of Canadians) experience cash flow problems and use payday loans. Cash Store customers rely on the services Cash Store provides, as they often are unable to access traditional bank products from other financial institutions.

29. Cash Store's branches made or arranged over 1.3 million individual advances in FY 2013. Cash Store's customer satisfaction rating is high, at 88% in Canada and 93% in the UK.

(c) Products and Services.

30. Cash Store acts as both a broker and lender of short-term advances and offers a range of other products and services to help customers meet their day to day financial service needs. The chart set out below summarizes the products offered by Cash Store:

Consumer Loans & Line of Credit	
Payday	- Bridge loans to help customers span temporary cash shortfalls or meet emergency or unexpected expenses

	- Short-term non-collateralized loans - Typically range from $100 to $1,500.
Signature	- Short-term loan against a government source of income (Child Tax, Disability, Pension, Employment Insurance)
Title	- Secured against vehicle, up to 12 months in duration - Can be refinanced or paid out
Lines of Credit	- Up to $5,000 unsecured - Helps customers to rebuild their credit - Customers borrow as needed and repay at any time - Minimum payments are due at regular intervals - Introduced early in FY 2012
Injury Claims	- Immediate cash for personal injury claims awaiting payout - Provided by Rhino Legal Finance Inc., a third-party provider who contracts with Cash Store Financial to provide this service
Diversified Financial Products	
Bank Accounts: Standard & Premium	- Provided by DC Bank, a schedule 1 bank that has a contract with Cash Store Financial to provide this service - Gives customers access to a variety of services - CDIC insured
Cheque Cashing	- Fast turn around - Funds transferred electronically; branches do not hold cash
Prepaid Credit Card	- Supplied by DC Bank and MasterCard - Provides the convenience of a credit card without interest - Can be used online - Preloaded with funds for daily transactional needs and access to cash at ATMs
Prepaid Debit Card	- Supplied by DC Bank - Preloaded with funds for daily transactional needs and access to cash at ATMs
Money Transfer	- Provided by RIA Financial Services, a third party provider who contracts with Cash Store Financial to provide this service - Provides an easy and reliable way to pay bills or send and receive funds worldwide
Payment Insurance	- Covers outstanding loan balances in the event of unexpected

	events such as: involuntary unemployment, accidental injury, critical illness, death, dismemberment

(i) **Payday Loans – Direct Lending: Alberta, British Columbia, Nova Scotia, Saskatchewan, UK**

31. In January 2012, Cash Store Financial completed a private placement of $132.5 million of 11.5% senior secured notes (the "Notes") and used most of the net proceeds of this offering to acquire a portfolio of consumer loans from TPLs. The Notes are discussed in more detail below. With the acquisition of the loan portfolio, Cash Store began funding payday loans directly in Alberta, British Columbia, Nova Scotia, and Saskatchewan. Cash Store also funded payday loans directly in Ontario and Manitoba until the product offering in those provinces was switched to brokered lines of credit. These six provinces all enacted payday loan legislation (discussed below).

32. Cash Store typically arranges for advances to customers that range from $100 to $1,500. In order to receive an advance, a customer is generally required to provide proof of income, copies of recent bank statements, and identification. The customer must then either write a cheque or execute a pre-authorized debit agreement for the amount of the advance plus loan fees. Where customers pay by cheque, Cash Store defers depositing the cheque until the due date of the loan; which is the customer's next payday (normally between 14 days and 31 days; but no later than 62 days as prescribed by regulations).

(ii) **Payday Loans – Brokering: New Brunswick, Newfoundland, Northwest Territories, Prince Edward Island, Yukon**

33. For loans that Cash Store brokers on behalf of customers, the application process and documentation requirements are similar to those for direct lending. After an application is

completed and other relevant information is obtained from a customer, Cash Store brokers the customer's loan request to TPLs. Based on approval criteria established by the TPLs, the customer's eligibility for an advance is assessed. If the customer is approved, Cash Store provides the TPL's loan documentation to the customer. Upon fulfillment of the loan documentation requirements, Cash Store is authorized by the lender to forward the cash advance to the customer on behalf of the lender. When an advance becomes due and payable, the customer must make repayment of the principal and interest owing to the lender through Cash Store, which, is then retained in Cash Store's operating bank account until redeployed to new borrowers. Cash Store earns fees on these transactions. If there is difficulty with the collection process, the customer's account may be turned over to an independent collection agency.

(iii) **Line of Credit Products – Brokering: Manitoba, Ontario**

34. On October 1, 2012 in Manitoba and February 1, 2013 in Ontario, Cash Store launched new line of credit products and stopped offering payday loans in those provinces. The lines of credit are unsecured, medium term revolving credit lines, with regular minimum payments tailored to customers' needs and profiles. The line of credit products are all brokered products, except a small number of Cash Store's "Elite" lines of credit, which Cash Store ceased offering in March 2014. Similar to what is described above for brokered payday loans, TPLs provide the funds for the line of credit, Cash Store arranges the line of credit, and Cash Store earns fees on these transactions. The proceeds from the brokered line of credit products are handled in the same way as the proceeds from the brokered payday loans. Cash Store ceased to offer its line of credit products in Ontario as of February 12, 2014 (discussed below).

(d) Branch Locations

35. Cash Store owns and operates Canada's largest network of retail branches in the alternative financial products and services industry, with 509 branches across Canada operating under the banners "Cash Store Financial", "Instaloans" and "The Title Store." Cash Store has a market share of approximately one third of all payday loan branches in Canada.

36. On April 14, 2010, Cash Store opened its first branch in the UK and has since expanded its operations to include 27 branches in the UK under the banner "Cash Store Financial".

37. The typical format for a branch is a small, strategically located storefront in a strip mall. Substantially all of Cash Store's branches are in facilities leased from third party landlords, as is Cash Store's corporate headquarters. Many of Cash Store's branch leases are with large retail landlords who lease several locations to Cash Store. The leases for branches are generally for terms of 5 years with some granting Cash Store options to renew beyond such a term.

38. Cash Store's corporate headquarters are located in Edmonton, Alberta and Cash Store Financial's registered office is located in Toronto, Ontario. Cash Store has branches in all of Canada's provinces and territories except Quebec and Nunavut. The following chart sets out Cash Store's current branch locations by geographical region:

Location	Number of Cash Store Locations
Ontario	176
Alberta	120
British Columbia	97
Saskatchewan	33
United Kingdom	27

Location	Number of Cash Store Locations
Manitoba	25
Nova Scotia	25
New Brunswick	14
Newfoundland & Labrador	13
P.E.I.	3
Northwest Territories	2
Yukon Territory	1
Total	536

(e) Employees

39. Cash Store employs approximately 1,700 hourly and salaried active employees in Canada and approximately 140 employees in the UK who rely on the continued existence of Cash Store for their livelihoods. 170 of Cash Store's active employees are located at the headquarters in Edmonton.

40. A typical branch is staffed by 3 to 4 employees, including both full and part-time associates and a branch manager. Branch managers are compensated through base salary and company-paid benefits, while associates are paid hourly wages. In addition, some of these individuals are eligible to receive profitability bonuses. Cash Store has also established a group RRSP for employees with over one year of service.

41. In addition to the above, Cash Store has a stock option plan for certain employees, officers and directors. In November 2013, Cash Store introduced a share unit plan for senior executives, vice presidents, and/or members of the management team to reduce its reliance on stock options and to incentivize management through payment of compensation related to

appreciation of Cash Store Financial shares and performance goals. No share units have yet been issued. Cash Store also introduced a director deferred share unit plan to link a portion of annual director compensation to the future value of Cash Store Financial shares. Cash Store has issued 219,073 units under the director deferred share unit plan.

42. There are no registered pension plans for Cash Store management or other employees.

(f) Community Work

43. Cash Store is committed to social responsibility and to supporting the communities in which it does business. Its fundraising efforts for various charitable organizations make a difference in the lives of Canadians. In the past, Cash Store has partnered with the Canadian Diabetes Foundation to raise money for diabetes research and to build national understanding about the disease. In FY 2013, Cash Store hosted 15 Freedom Runs and sponsored 5 runs for diabetes, helping to contribute over $1 million to this cause.

The Financial Position of Cash Store

44. As a publicly traded company listed on the TSX, Cash Store Financial's consolidated financial statements are filed on SEDAR. A copy of Cash Store Financial's audited consolidated financial statements for the fiscal year ended September 30, 2013 is attached as Exhibit "A". A copy of Cash Store Financial's interim consolidated financial statements for the three months ended December 31, 2013 is attached as Exhibit "B". Certain information contained in the December 31, 2013 consolidated financial statements is summarized below. All amounts in this affidavit are in Canadian Dollars.

(a) Assets

45. As at December 31, 2013, Cash Store had total assets of $176,255,000.

(i) Current Assets

46. Cash Store's current assets (as at December 31, 2013) represented $78,364,000 of its total assets and consisted of:

(1) Unrestricted Cash - $10,553,000;

(2) Restricted Cash - $6,408,000;

(3) Consumer advances receivable, net - $34,804,000;

(4) Other receivables, net - $8,332,000;

(5) Prepaid expenses and other assets - $2,584,000; and

(6) Income taxes receivable - $15,683,000.

47. The majority of Cash Store's current assets consisted of consumer advances receivable and income taxes receivable. With respect to consumer advances receivable, the above number incorporates appropriate aging of the receivables.

48. "Restricted Cash" (discussed below) can only be used for consumer lending. As at December 31, 2013, $6,408,000 of Restricted Cash included $706,000 of funds held by a financial institution as security related to banking arrangements and $5,702,000 transferred from TPLs in excess of consumer loans written to customers and cumulative losses. As of February 28, 2014, the total amount of Restricted Cash had climbed to $12,961,000.

49. The amounts transferred from TPLs to Cash Store Financial are reflected in the Restricted Cash amounts and certain off-balance sheet accounts receivable. A corresponding liability is recognized to the TPLs in accrued liabilities equal to Restricted Cash.

(ii) **Non-Current Assets**

50. Cash Store's non-current assets (as at December 31, 2013) represented $97,891,000 of its total assets and consisted of:

(1) Deposits and other assets - $2,792,000;

(2) Deferred financing costs - $5,836,000;

(3) Property and equipment, net of accumulated depreciation - $16,735,000;

(4) Intangible assets, net of accumulated amortization - $32,843,000; and

(5) Goodwill - $39,685,000.

51. The majority of Cash Store's non-current assets are made up of property and equipment, intangible assets, and goodwill.

(b) **Liabilities**

52. As at December 31, 2013, Cash Store's total liabilities were approximately $184,984,000. These liabilities consisted of current liabilities of approximately $35,979,000, and non-current liabilities of approximately $149,005,000.

(i) **Current Liabilities**

53. Current liabilities as at December 31, 2013 included the following:

(1) Accounts payable - $2,242,000;

(2) Accrued liabilities - $31,263,000;

(3) Current portion of deferred revenue - $1,000,000;

(4) Current portion of deferred lease inducements - $355,000; and

(5) Current portion of obligations under capital leases and other obligations - $1,119,000.

(ii) **Non-Current Liabilities**

54. Cash Store's non-current liabilities (as at December 31, 2013) included:

(1) Deferred revenue - $ 2,668,000;

(2) Deferred lease inducements - $596,000;

(3) Obligations under capital leases and other obligations - $3,386,000;

(4) Long-term debt - $139,496,000; and

(5) Deferred income taxes - $2,859,000.

55. The $139.5 million owing in respect of long-term debt is made up of the $12.0 million advanced by the Senior Lenders under the Credit Agreement (discussed below) and $127.5 million owing to the Senior Secured Noteholders (also discussed below). The Notes are recorded at a discount to the face value ($132.5 million) and accreted to the par value over the five year term using the effective interest rate method.

56. The $31.3 million of accrued liability includes an amount of $6.4 million "due to TPLs" in respect of the reported Restricted Cash amount.

(c) Revenue

57. Cash Store has experienced a sharp drop in financial results over the past two years, despite the fact that net revenues have remained steady. Net revenue decreased from $189.9 million in FY 2011 to $187.4 million in FY 2012 and increased to $190.8 million in FY 2013. Net revenue decreased from $49.5 million for the three months ended December 31, 2012 to $45.2 million for the three months ended December 31, 2013. Earnings before interest taxes depreciation and amortization (EBITDA) decreased from positive $27.4 million in FY 2011 to negative $31.7 million in FY 2012 and increased to negative $1.0 million in FY 2013. EBITDA for the three months ended December 31, 2013 was $1.0 million as compared to $6.5 million for the three months ended December 31, 2012.

(d) Stakeholder Amounts

58. The chart below sets out the relationship of certain stakeholders to Cash Store:

Stakeholder	Maturity Date	Amount	Rate of Return
Senior Secured Lenders ("Senior Lenders")	November 29, 2016	$12 million	12.5%
Senior Secured Notes ("Noteholders")	January 31, 2017	$132.5 million Subordinated to Senior Lenders	11.5%
Third Party Lenders ("TPLs")		$42.0 million Consisting of the TPL Funds originally advanced, including funds deployed in brokered loans, Restricted Cash, and cumulative losses	Effectively 17.5%

(i) Senior Lenders

59. On November 29, 2013, Cash Store Financial entered into a credit agreement (the "Credit Agreement") with Coliseum, 8028702 Canada Inc. and 424187 Alberta Ltd. (collectively, the "Senior Lenders"), pursuant to which the Senior Lenders have to date provided $12.0 million of secured loans. The loans are guaranteed by Cash Store Financial, The Cash Store Inc., TCS - Cash Store Inc., Instaloans Inc., 7252331 Canada Inc., 5515433 Manitoba Inc., The Cash Store Limited, The Cash Store Financial Limited, and CSF Insurance Services Limited (collectively, the "Guarantors"). A copy of the Credit Agreement (without schedules) is attached as Exhibit "C". A copy of the press release dated December 5, 2013 announcing that Cash Store Financial had entered into the Credit Agreement is attached as Exhibit "D".

60. 424187 Alberta Ltd., which loaned $2.0 million of the $12.0 million drawn, is a company controlled by Cash Store Financial's CEO and a director, Gordon Reykdal. Coliseum, which loaned $5.0 million of the $12.0 million drawn, owns 19.27% of the common shares of Cash Store Financial and is also a Noteholder. 8028702 Canada Inc., which loaned the remaining $5.0 million of the $12.0 million drawn, is a company controlled by the same person who controls McCann Family Holding Corporation, one of Cash Store Financial's principal TPLs. The loans under the Credit Agreement were used to fund operations and growth in key business areas.

61. Pursuant to the Credit Agreement, 424187 Alberta Ltd. (the "Agent") acts as agent for the Senior Lenders. The loans made under the Credit Agreement bear interest at 12.5% per annum, payable monthly in arrears, on the 29th day of each month. If a default occurs under the Credit Agreement, the interest rate is increased by 2% after the occurrence and during the continuance of such default.

62. The Credit Agreement provides that an additional $20.5 million may be advanced for a total maximum loan amount of $32.5 million. The Senior Lenders have a right of first refusal in respect of any additional advances. If the Senior Lenders do not exercise their right of first refusal, Cash Store Financial is free to obtain loan advances from other lenders who agree to become party to the Credit Agreement. The loans outstanding at any time are subject to the requirement that the maximum amount outstanding cannot exceed 75% of the Unrestricted Cash of Cash Store Financial plus 75% of the net consumer advances receivable of Cash Store Financial not more than 90 days in arrears (the "Borrowing Base"). If the total amount outstanding under the loan at any time exceeds the Borrowing Base, Cash Store Financial must repay to the Senior Lenders, on a pro rata basis, an amount which will result in the loans not being in excess of the Borrowing Base. Such payment must be made within 20 days of the month-end in which the Borrowing Base was exceeded.

63. Loans made under the Credit Facility mature on November 29, 2016 or on such earlier date as the principal amount of all loans owing from time to time plus accrued and unpaid interest and all other amounts due under the Credit Agreement may become payable under the Credit Agreement. Cash Store Financial may repay the loans at any time subject to payment of specified prepayment fees.[1]

64. Cash Store Financial agreed to designate the loans made under the Credit Agreement as priority lien debt and obtain the benefit of the security granted by Cash Store Financial pursuant to the Collateral Trust and Intercreditor Agreement ("Collateral Trust

[1] The prepayment fees are as follows: (a) If the prepayment is on or before November 29, 2014, the greater of (A) the interest that would accrue if the prepaid amount were to remain outstanding until November 29, 2014 and (B) 4% of the prepaid amount; (b) If the prepayment is after November 29, 2014 but on or prior to November 29, 2015, 3% of the prepaid amount; and (c) If the prepayment is after November 29, 2015, no fee.

Agreement") entered into in connection with the Notes. A copy of the Collateral Trust Agreement is attached as Exhibit "E".

65. In addition to certain covenants relating to the repayment of the loans and the authority of Cash Store Financial to enter into the Credit Agreement, Cash Store Financial has covenanted in favour of the Senior Lenders:

(a) to comply with the covenants granted to the 11.5% Noteholders;

(b) not to designate any additional debt under the Collateral Trust Agreement; and

(c) to meet certain Adjusted EBITDA targets on a quarterly basis over the term of the Credit Agreement.

66. Upon the occurrence and during the continuance of a default, the Senior Lenders have a right to accelerate the obligations under the Credit Agreement, the right to instruct the Agent to begin the process to realize on the security under the Collateral Trust Agreement and the right, but not the obligation, to appoint a financial advisor to review the affairs of Cash Store Financial and to appoint a director to the Board.

67. Cash Store Financial was in compliance with the financial covenants of the Credit Agreement as at December 31, 2013 and therefore, the amounts drawn were classified as long-term debt on Cash Store Financial's balance sheet. However, Cash Store Financial breached a number of covenants in the Credit Agreement at the end of March 2014, which breaches are either defaults under the Credit Agreement or will give rise to defaults under the Credit Agreement with the passage of time. Senior Lenders may rely on the defaults to exercise their remedies under the Credit Agreement, including demanding immediate repayment of the amounts drawn and exercising their rights under the security if Cash Store cannot reach an

agreement with the Senior Lenders to amend or waive the covenant breaches, Cash Store does not have the ability to immediately repay the amounts owing to the Senior Lenders.

68. On March 31, 2014, Cash Store requested a Waiver from the Senior Lenders of the following: (i) the failure to pay interest when due on March 29, 2014; (ii) the failure to achieve the $10 million minimum Adjusted EBITDA for the first 6 months of fiscal 2014; (iii) exceeding the Borrowing Base and not being able to make the required repayment within 20 days of same; and (iv) Cash Store's inability to represent that it is duly qualified to carry on business in all jurisdictions in which it carries on business unless such failure to so qualify would not constitute a material adverse effect under the Credit Agreement. To date, no response has been received.

(ii) **Noteholders**

69. On January 31, 2012, Cash Store Financial issued, through a private placement in Canada and the U.S., $132.5 million of 11.5% Senior Secured Notes. A copy of the Note Indenture is attached as Exhibit "F".

70. The Notes mature on January 31, 2017 and bear interest on the aggregate principal amount from the date of issue at 11.5% per annum payable on a semi-annual basis in equal installments on January 31 and July 31 of each year, commencing in July of 2012. The Notes were issued at a price of 94.608% resulting in an effective interest rate of 13.4%. Cash Store Financial used the majority of the proceeds of the Notes to acquire a portfolio of consumer loans and certain intangible assets, and to settle pre-existing relationships with certain TPLs.[2]

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[2] On January 31, 2012, Cash Store Financial acquired a portfolio of short-term advances from TPLs for total consideration of $116,334,000. At the date of acquisition, the gross contractual principal and accrued interest of the acquired short-term advances was $319,906,000.

71. The Notes are guaranteed, jointly and severally, by the same entities that are Guarantors under the Credit Agreement. Pursuant to the Collateral Trust Agreement, the Notes are secured on a second-priority basis by liens on all of Cash Store Financial's and its restricted subsidiaries' existing and future property, subject to specified permitted liens and exceptions. The Credit Agreement is secured by a first-priority lien on this collateral.

72. The Notes are redeemable at the option of Cash Store Financial, in whole or in part, at any time on or after July 31, 2014 at the redemption prices (expressed as percentages of principal amount) set forth below, plus accrued and unpaid interest:

For the Period Below	Percentage
On or after July 31, 2014	103.084%
On or after January 31, 2015	102.091%
On or after July 31, 2015	101.127%
On or after January 31, 2016	101.194%
On or after July 31, 2016	100%

73. Prior to July 31, 2014, Cash Store Financial is entitled at its option, in certain circumstances, on one or more occasions to redeem up to 35% of the aggregate principal amount of the Notes at a redemption price of 111.5% of the principal amount of the Notes redeemed, plus accrued and unpaid interest.

74. If a change in control of Cash Store Financial occurs, the Noteholders will have the right to require Cash Store Financial to purchase all or a portion of the Notes, at a purchase price in cash equal to 101% of the principal amount of the Notes offered for repurchase plus accrued interest to the date of purchase.

75. Upon the commencement of the CCAA proceeding, Cash Store will no longer be in compliance with the covenants in the Note Indenture and the $139.5 million owing in respect of long-term debt will become immediately due and payable. Cash Store does not have the ability to repay the Notes at this time.

(iii) **Third Party Lenders**

76. Cash Store has entered into written business agreements with a number of TPLs who are prepared to lend to Cash Store's customers or to purchase advances originated by Cash Store (the "Broker Agreements"). Pursuant to the Broker Agreements, the TPLs make loans to Cash Store's customers and Cash Store provides services to the TPLs related to the collection of documents and information from Cash Store's customers, as well as loan repayment services. Cash Store collects fees for brokering these transactions. Copies of the Broker Agreements for Trimor Annuity Focus Limited Partnership #5 ("Trimor"), McCann Family Holding Corporation ("McCann"), 1396309 Alberta Ltd., Omni Ventures Ltd., and L-Gen Management Inc. are attached as Exhibits "G","H","I","J", and "K".

77. The Broker Agreements also provide that the TPLs are responsible for losses suffered due to uncollectible advances, provided Cash Store has fulfilled the duties required under the terms of the Broker Agreements. If Cash Store does not properly perform its duties and the TPLs make a claim under the Broker Agreements, Cash Store may be liable to the TPLs for losses they have incurred. However, pursuant to section 7.1 of the Broker Agreements, if any loss is as a result of any act or omission of Cash Store in reliance on any bona fide interpretation of Applicable Law or upon the advice of legal counsel, no liability shall attach to Cash Store.

(A) Restricted Cash

78. Cash Store has received approximately $42.0 million from the TPLs (the "TPL Funds"). The total TPL Funds are comprised of the Restricted Cash (defined below) plus the outstanding balance of the brokered loans and cumulative losses. The Broker Agreements stipulate that the TPL Funds are to be utilized by Cash Store for making advances to broker customers on the TPLs' behalf. The TPL Funds are deployed by Cash Store to broker customers, subsequently received by Cash Store as repayment for such broker loans (subject to loan losses), and then redeployed, repeating the process. In FY 2013, Cash Store deployed the TPL Funds multiple times for total short term advances of $241.4 million, representing 30.9% of Cash Store's total loan volume of $781.8 million.

79. Any TPL Funds received by Cash Store as repayment for any brokered loan that are not currently deployed to Cash Store customers are deposited in Cash Store's bank accounts and are referred to in Cash Store's financial statements as "Restricted Cash". While the Broker Agreements permit the TPLs to require Cash Store to hold the TPL Funds in accounts designated for that purpose, no TPL has designated any account as a Designated Financier Bank Account or a Designated Broker Bank Account. The Restricted Cash is comingled with all of Cash Store's other cash (the "Unrestricted Cash"), and the aggregate of Cash Store's Restricted and Unrestricted Cash is the total cash reported on Cash Store's balance sheet. Cash Store keeps detailed records of the amounts loaned to and repaid by the broker loan customers and the direct loan customers. The funds received from broker loan customers representing principal and interest of the broker loan are included in the Restricted Cash, and funds received from the direct loan customers are included in Unrestricted Cash (along with any broker and other ancillary fees). Since all of these funds are comingled in multiple accounts, it is not possible to know which dollar represents Restricted Cash and which dollar represents Unrestricted Cash.

Furthermore, the exact amount of Restricted and Unrestricted Cash is not calculated by Cash Store until it completes its month-end reconciliation. The month-end reconciliation is usually completed on or about the tenth day after month-end.

(B) Assigning Receivables to TPLs to Free Up Restricted Cash

80. Once the month-end reconciliation is complete, Cash Store compares the amount of total cash in its accounts and the amount of Restricted Cash that should be held on account of TPL Funds. On several occasions, Cash Stores has completed its month-end reconciliation and has found that the amount of Restricted Cash exceeds its total cash (meaning that Cash Store has used the Restricted Cash to fund its intra-month working capital needs). On these occasions, Cash Store has assigned its own direct loan receivables to the TPLs in an amount equal to the difference between Cash Store's total cash and the amount of Restricted Cash recorded on account of the TPLs plus an additional amount to permit Cash Store to meet its anticipated working capital needs for the next month with Unrestricted Cash. These assignments are permitted under the terms of the Credit Agreement and the Note Indenture provided that they are made in the ordinary course of business. These assignments are also permitted under the Broker Agreements and the assignments are disclosed to the TPLs as part of the monthly account statements and reconciliations provided to the TPLs.

81. For example, if at month-end total cash is $15 million and Restricted Cash is $18 million, then Unrestricted Cash is negative $3 million. To address this issue, Cash Store would assign $3 million of direct loan receivables to the TPLs to ensure there is sufficient Restricted Cash, plus an additional $5 million dollars of direct loan receivables to meet its anticipated minimum working capital needs for the next month, resulting in $10 million of Restricted Cash and $5 million of Unrestricted Cash. Cash Store could then make $10 million of brokered loans

using Restricted Cash and use the $5 million of Unrestricted Cash to fund operating expenses and make direct loans. Total cash never changes when implementing these assignments.

82. The assignment of receivables essentially results in a greater portion of the TPL Funds being deployed to Cash Store's customers. For every dollar of receivables assigned to the TPLs, there is a dollar for dollar increase in the amount of Unrestricted Cash. During FY 2013 and FY 2012, as part of the normal course of operations, Cash Store assigned $14.3 and $17.6 million (respectively) of net consumer advances receivable to TPLs in exchange for cash.

(C) Amount of Restricted Cash

83. As of February 28, 2014, there was $12.2 million in Restricted Cash available for consumer lending and Unrestricted Cash of $0.2 million. Since Cash Store has been receiving repayments of loans in Ontario but not re-lending, the amount of Restricted Cash has increased dramatically. Final accounting is not yet available as at March 31, 2014 however, it is estimated that the amount of Restricted Cash has increased to approximately $14.9 million and exceeded the total amount of cash in Cash Store's bank accounts. In light of the circumstances facing Cash Store, the decision of whether to make assignments to address this issue was deferred.

(D) Voluntary Retention Payments

84. Cash Store has historically made voluntary retention payments to TPLs in order to lessen the impact of loan losses. Since I have been at my role at the company the TPL Funds have been managed in the following manner:

(1) **Monthly Lender Distributions:** Cash Store pays TPLs cash payments so that, when combined with portfolio returns (interest collected, net of losses), the TPLs receive approximately 17.5% return per year on the total TPL Funds.

(2) **Capital Protection:** (a) Expensing Mechanism – Cash Store provides protection to the TPLs in respect of losses arising from brokered loans that remain unpaid after 90 days. The protection consists of crediting the TPLs with a retention payment as a book entry in the amount of the losses suffered by the TPLs. Cash Store in turn records these retention payments as an expense on its balance sheet. No cash is paid to the TPLs by the Cash Store in respect of these retention payments. The effect of these book entry retention payments is that (i) the TPL Funds are not eroded by losses; (ii) the Restricted Cash balance is increased by the amount of the retention payment; and (iii) the Unrestricted Cash balance is decreased by the amount of the retention payment.

(b) Purchasing Mechanism – In Ontario and Manitoba, Cash Store also effects retention payments by purchasing past due brokered loans (including any past due direct loans that were previously transferred to the TPLs) at face value to prevent any erosion of the TPL Funds. These purchases are an additional mechanism (and an alternative to the expensing mechanism described above) to prevent the TPLs from incurring any of the losses inherent in the past due brokered loans. Cash Store incurs losses equal to the difference between the purchase price and the fair value of the purchased brokered loans and recognizes the losses as retention payments. Cash Store's purchase of past due brokered loans also has the benefit of allowing Cash Store to collect the past due amounts without engaging a third-party agency for collection and without itself being licensed as a collections agency.

85. The Broker Agreements between Cash Store and the TPLs do not contemplate retention payments. The Broker Agreements also do not guarantee repayment or a specified rate of return on the TPL Funds. However, if the TPLs were to no longer participate in the brokering of advances to Cash Store's customers, Cash Store would lose the anticipated future revenue related to the brokering of advances. Under the broker model, Cash Store makes voluntary retention payments to the TPLs to encourage them to continue making funds available to Cash Store. The Board of Directors regularly approves a resolution authorizing Cash Store to pay up to a certain amount of retention payments per quarter to TPLs. Retention payments are recorded in the period in which a commitment is made to a lender.

86. In March 2014, given Cash Store's liquidity issues and ongoing stakeholder discussions, Cash Store did not make any voluntary retention payments to TPLs, including the monthly lender distribution of approximately 17.5% per year.

Urgent Need for Relief

87. Cash Store is facing multiple challenges to its continued operations, including regulatory issues that affect its core business strategy, multiple class actions requiring defence across Canada and in the U.S., and immediate and dire liquidity challenges.

(a) **Regulatory Issues**

88. With respect to the completeness and accuracy of the information in the regulatory and litigation sections of my affidavit, I have specifically relied on information provided to me by Michael Thompson, Senior Vice President & Corporate Affairs, and Jerry Roczkowsky, Vice President of Compliance, of Cash Store Financial.

89. Regulations affecting Cash Store's primary product offerings of payday loans and lines of credit significantly affect Cash Store's ability to successfully operate and execute its business strategy.

90. In May 2007, the federal government enacted a bill clarifying that the providers of certain payday loans were not governed by the criminal interest rate provisions of the *Criminal Code*, R.S.C., 1985, c. C-46 (the "Criminal Code"), granting lenders (other than most federally-regulated financial institutions) an exemption from the criminal interest rate provisions of the Criminal Code if their loans fell within certain dollar amount and time frame maximums. In order for payday loan companies to rely on the exemption, provincial governments are required to enact legislation that includes a licensing regime for payday lenders, measures to protect consumers and maximum allowable limits on the total cost of borrowing.

91. Since late 2009, the Canadian payday loan market has been in transition from an unregulated market to varying states of regulation. The provinces that have enacted specific payday loans legislation pursuant to the federal exemption are British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, and Nova Scotia. The key components of payday loans regulation are caps on the loan size, length and fees that can be charged. Typically regulations limit payday loans to a maximum of $1,500 and 62 days in duration as well as providing a rate cap.

92. While regulatory issues have affected the industry as a whole, they have had a more severe impact on Cash Store due to its particular business model. Cash Store's strategic objective was to achieve a single platform universally deployed across jurisdictions with its line of credit product suite. The operational impacts of multiple regulatory environments have been numerous, creating significant additional costs. Senior Management has been required to devote

significant resources to these matters and has retained a Chief Compliance and Regulatory Affairs Officer (the "CCRO") and legal counsel to address these issues (discussed below).

(i) **Ontario Regulatory Issues**

(A) Regulatory Litigation

93. On February 1, 2013, Cash Store launched its suite of line of credit products in Ontario and ceased offering payday loans in that province. With respect to the new line of credit offerings, on April 29, 2013, Cash Store filed an application in the Ontario Superior Court of Justice (the "Ontario Court") seeking a declaration that its basic line of credit was not subject to the Payday Loans Act.

94. On February 4, 2013, the Ontario Registrar issued a proposal to revoke the payday lending licenses of the Cash Store Inc. and Instaloans Inc. Cash Store filed an Appeal with the License Appeal Tribunal on February 19, 2013. However, as Cash Store allowed its payday licenses to expire in Ontario effective July 4, 2013 (since Cash Store was of the view that it could offer lines of credit without such a license), this appeal was withdrawn effective August 15, 2013.

95. Previous to the February 4, 2013 proposal of the Registrar for payday loans, Cash Store submitted an application for judicial review in the Ontario Court, seeking a declaration that certain provisions of the regulations made under the Ontario Payday Loans Act are void and unenforceable. This application was heard on October 2, 2013. On November 5, 2013, the Ontario Court dismissed the application. Cash Store has not appealed this decision.

96. On June 7, 2013, the Director designated under the Ontario Ministry of Consumer and Business Services Act filed an application in the Ontario Court seeking a declaration that Cash Store's basic line of credit is subject to the Payday Loans Act and that Cash Store must

obtain a broker license to offer this product. This application was heard on November 29, 2013 and the decision was rendered on February 12, 2014. The Ontario Court concluded that the basic line of credit is subject to the Payday Loans Act and ordered that Cash Store Financial's subsidiaries, The Cash Store Inc. and Instaloans Inc., are prohibited from acting as a loan broker in respect of its basic line of credit product without a broker's license under the Payday Loans Act. On March 14, 2014, Cash Store commenced an appeal of this decision.

97. On February 12, 2014, Cash Store ceased offering all line of credit products offered to its customers in Ontario branches. A copy of the press release reporting the outcome of the application and the decision to stop offering line of credit products in Ontario is attached as Exhibit "L".

(B) Additional Regulations

98. Additionally, on December 17, 2013, Ontario Regulation 351/13 was filed by the Government of Ontario. Regulation 351/13, made under the Payday Loans Act, prescribes certain categories of credit such that the Payday Loans Act applies to line of credit products offered through the Cash Store's retail banners. Regulation 351/13 required Cash Store to obtain licenses pursuant to the Payday Loans Act in order to continue providing access to certain line of credit products in the Ontario market after February 15, 2014. These regulations are now in force. To comply with the new requirements of the Payday Loans Act, Cash Store applied for the requisite licenses through its operating subsidiaries. A copy of the press release dated December 20, 2013 regarding the announcement of the regulations is attached as Exhibit "M".

(C) Ontario Regulator Refuses to Grant License to Cash Store

99. In response to Cash Store's license application, on February 13, 2014, the Ontario Registrar issued a proposal to refuse to issue a lender's license to Cash Store Financial's

subsidiaries, The Cash Store Inc. and Instaloans Inc., under the Payday Loans Act. A copy of the press release dated February 13, 2014 regarding the proposal to refuse a lender's license is attached as Exhibit "N". The Payday Loans Act provides that applicants are entitled to a hearing before the License Appeal Tribunal in respect of a proposal by the Ontario Registrar to refuse to issue a license.

100. The Cash Store Inc. and Instaloans Inc. allowed the time for appealing this decision to lapse while it was in negotiations with the Ontario Registrar. These negotiations failed to produce a favourable result and on March 27, 2014, the Ontario Registrar issued a final notice of its decision not to grant a license under the Payday Loans Act. Cash Store will not be eligible to re-apply for a license for 12 months from the date of issuance of the final order. If Cash Store chooses to re-apply for a license after such time, Cash Store will be required to provide new or additional evidence for the Ontario Registrar to consider or demonstrate that material circumstances have changed. Cash Store is not currently permitted to sell any payday loan products in Ontario. A copy of the press release dated March 28, 2014 regarding the final order refusing to grant a license is attached as Exhibit "O".

101. All of Cash Store's 172 Ontario branches that operated under the Instaloans and the Cash Store banners have remained open and Cash Store incurred significant operating expenses while it pursued discussions with the Ontario Registrar regarding obtaining a license under the Payday Loans Act. Cash Store intends to keep the majority of its branches open while considering its strategic options. Since Cash Store is unable to make new loans in Ontario, its ability to collect outstanding customer accounts receivable has also been significantly impaired. On April 8, 2014, Cash Store reduced its Ontario staffing to a skeletal staff by commencing a

temporary layoff of approximately 250 Ontario employees, Cash Store is considering closing certain branches in Ontario.

102. As discussed above, the Ontario operations of Cash Store accounted for $57.6 million in revenue for FY 2013, roughly 30% of Cash Store's total revenue. Closure of the Ontario operations will entail significant severance costs for approximately 470 employees.

(ii) **Federal-Provincial Consumer Measures Committee**

103. A federal-provincial Consumer Measures Committee is working collaboratively on a national response to high-cost credit loans. New regulations may affect the title loans and lines of credit offered by Cash Store.

(iii) **Manitoba Regulatory Issues**

104. On October 15, 2013, the Manitoba Consumer Protection Office ("CPO") concluded an investigation of Cash Store. The CPO determined that Cash Store was in violation of Manitoba's maximum legal cost of $17 per $100 on payday loans, which could result in substantial demands for refunds to customers.

105. The CPO issued a refund demand to Cash Store to reimburse 61 identified borrowers for certain fees charged, required or accepted in relation to payday loans in Manitoba during the period of time that it held a valid payday lender licence in the province. The additional fees were charged in relation to cash cards associated with payday loans. More such refund demands may be made.

106. On April 9, 2014, the Manitoba CPO informed Cash Store that it had identified various breaches of *The Consumer Protection Act*, C.C.S.M. c. C200 related to certain disclosure documents issued in respect of broker agreements and advances made to consumers in respect of

lines of credit that had been issued to consumers. The CPO has directed Cash Store to refund roughly $37,000 in brokerage fees paid by consumers in relation to advances made to them by TPLs under 32 lines of credit by April 30, 2014. The CPO also expressed its concern at the number of allegedly non-compliant agreements and the possibility that there are more line of credit agreements that may be in breach of the legislation. The CPO recommended that Cash Store conduct a review of its files to determine whether any other consumers may be owed refunds due to breaches of the legislation.

107. The Government of Manitoba has recently promulgated new legislation that expands the powers of the CPO. Additionally, the government has introduced legislation to regulate high cost credit products. If passed, Cash Store may not be able to profitably make available the line of credit product suite in the Province of Manitoba.

(iv) **British Columbia Regulatory Issues**

108. On March 23, 2012, Cash Store was issued a compliance order (the "Order") and administrative penalty from Consumer Protection BC. The Order directs Cash Store to refund to all borrowers with loan agreements negotiated with Cash Store or its subsidiaries between November 1, 2009 and the date of the Order, the amount of any issuance fee charged, required or accepted for or in relation to the issuance of a cash card.

109. The Order also directed Cash Store to pay an administrative penalty of $25,000 in addition to costs. On November 30, 2012, Consumer Protection BC issued a supplementary compliance order directing that unclaimed refund amounts, to a maximum of $1.1 million be deposited into a consumer protection fund. On December 14, 2012, Cash Store filed a Petition for Judicial Review in the British Columbia Supreme Court seeking an order quashing or setting aside the Order and Supplemental Order, and seeking declarations that it had not contravened

sections 112.04(1)(f) of the *Business Practices and Consumer Protection Act*, [SBC 2004] Ch. 2, or sections 17 and 19 of the Payday Loan Regulation, B.C. Reg. 57/2009. The Petition was heard by the Court on June 26, 27, and 28, 2013 and dismissed in a decision released on January 30, 2014. As at December 31, 2013, the total amount of the supplemental order of $1.1 million was paid by Cash Store and will soon be disbursed to consumers.

(v) **Newfoundland Investigation**

110. There is no provincial regulation of payday loans in Newfoundland. However, the Royal Newfoundland Constabulary and Royal Canadian Mounted Police recently concluded an investigation of Cash Store with regard to alleged violations of the interest provisions in the Criminal Code. While the results of the investigation are not yet known, they have been forwarded to public prosecutors.

(vi) **Nova Scotia**

111. Payday Loan legislation in Nova Scotia requires that licensees offer to deliver to borrower their loan proceeds in cash. Cash Store has attempted to satisfy this requirement by offering to distribute funds to consumers by way of Electronic Fund Transfers. The Province has not been fully satisfied with this approach. If Cash Store cannot resolve related matters, it is possible that an inability to satisfy this regulatory requirement may serve as the basis for a proposal to suspend or revoke the Companies' operating licenses. Any such suspension or revocation would have significant impact on Cash Store's revenues.

(vii) **New Brunswick**

112. In New Brunswick, Cash Store's operating subsidiaries are registered as brokers. This registration is in good standing. In early April, Cash Store received notification that TPLs for which the subsidiaries' broker loans are not properly registered in the province. If registration

is not quickly secured for these TPLs, Cash Store may not be able to broker loans for those TPLs in that province, with the resulting impact on revenue. Since it received this notification, Cash Store has received confirmation that one of the two TPLs who operate in New Brunswick is properly licensed and the other TPL is beginning to take steps to seek a license. Cash Store operates 14 branches in the Province of New Brunswick.

113. In March 2014, the Government of New Brunswick tabled legislation (Bill 55) to regulate the payday loan industry in that province. This legislation, if promulgated, will require the implementation of a licensing regime, various restrictions on business practices by licensed payday lenders and caps on the maximum allowable amount that lenders may charge. It is not known at this time whether or not the legislation will be promulgated and, if rate caps are to be implemented, what they will be and what the impact of such caps will be for licensed lenders. If the legislation is promulgated, Cash Store would have to apply for and be granted a license in order to participate in any lending.

(b) **Significant Litigation**

114. Cash Store's difficult financial position is further threatened by multiple significant litigation matters that Cash Store is defending across Canada and in the United States. As a result of additional legal activity related to the regulatory claims (discussed above) and securities and other class action claims (discussed below), as well as reserves taken for existing litigation and claims, legal expenses have increased significantly from $2.2 million in FY 2012 to $3.8 million in FY 2013. The three months ending December 31, 2013 saw legal expenses of $1.0 million.

(i) Outstanding Settlement Liability – BC Class Proceeding

115. On February 28, 2010, the Supreme Court of British Columbia approved the settlement of two related class actions filed against Cash Store. Under the terms of the court approved settlement, Cash Store is to pay to the eligible class members who were advanced funds under a loan agreement, and who repaid the payday loan plus brokerage fees and interest in full, or who met certain other eligibility criteria, a maximum estimated amount including legal expenses of $18.8 million, consisting of $9.4 million in cash and $9.4 million in credit vouchers. The credit vouchers can be used to pay existing outstanding brokerage fees and interest, to pay a portion of brokerage fees and interest which may arise in the future through new loans advanced, or can be redeemed for cash from January 1, 2014 to June 30, 2014. The credit vouchers are not transferable and have no expiry date. After approved legal expenses of $6.4 million were paid in March 2010, the balance of the settlement amount remaining to be disbursed was $12.4 million, consisting of $6.2 million of cash and $6.2 million of vouchers.

116. By September 30, 2010, Cash Store had received approximately 6,300 individual claims with total valid claims being in excess of the settlement fund. As the valid claims exceed the balance of the remaining settlement fund, under the terms of the settlement agreement, the entire settlement fund of $12.4 million was mailed to claimants in November 2012 in the form of cash and vouchers on a pro-rata basis. To date, $5.3 million of the cash portion of the settlement has been redeemed by claimants while $0.8 million is being held in trust by the administrator for future redemptions or to be handled in accordance with unclaimed property laws. To date, approximately $4.3 million of the $6.1 million of vouchers have been redeemed for services or cash. The total remaining liability related to the settlement is approximately $1.8 million.

(ii) **Ongoing Class Proceedings**

117. There are multiple proposed class proceedings filed against Cash Store. Due to the uncertainty surrounding the litigation process, Cash Store is unable to reasonably estimate the range of loss, if any, in connection with these class actions.

118. Cash Store believes that it has conducted business in accordance with applicable laws and is defending each claim. However, the resolution of any current or future legal proceeding could cause Cash Store to have to refund fees and/or interest collected, refund the principal amount of advances, pay damages or other monetary penalties and/or modify or terminate operations in particular jurisdictions. Cash Store may also be subject to adverse publicity. Defense of any legal proceedings, even if successful, requires substantial time and attention of senior officers and other management personnel that would otherwise be spent on other aspects of the business and requires the expenditure of significant amounts for legal fees and other related costs. Settlements of lawsuits may also result in significant payments and modifications to operations. Any of these events could have a material adverse effect on business prospects, results of operations and the financial condition of Cash Store.

119. Cash Store is currently defending the following class action lawsuits which allege breaches of various provincial Payday Loan Regulations, Consumer Protection Acts, and/or the criminal interest provisions of the Criminal Code:

- **British Columbia, September 11, 2012:** Roberta Stewart on behalf of class members who, on or after November 1, 2009 received a loan from the Applicants in British Columbia.

- **Alberta, January 19, 2010:** Shaynee Tschritter and Lynn Armstrong are the representative plaintiffs in this certified class action alleging that Cash Store is in breach of s. 347 of the Criminal Code.

- **Alberta, September 18, 2012:** Kostas Efthimiou on behalf of all persons who, on or after March 1, 2010, received a payday loan from the Applicants.

- **Saskatchewan, October 9, 2012:** John Ironbow on behalf of all persons who, on or after January 1, 2012, received a payday loan from the Applicants.

- **Manitoba, April 23, 2010:** Scott Meeking on behalf of all persons in Manitoba and others outside the province who obtained a payday loan from the Applicants. A previous settlement approved by the Ontario Court presumptively resolved claims with respect to loans borrowed by Mr. Meeking, and other Manitoba residents, on or before December 2, 2008. The Manitoba Court of Appeal held that the Ontario settlement was unenforceable in part as notice to the Manitoba residents was inadequate. The class action was certified. Leave to appeal to the Supreme Court of Canada has been granted to both parties and the appeal is tentatively scheduled for November 13, 2014.

- **Manitoba, November 1, 2012:** Sheri Rehill on behalf of all persons who, on or after October 18, 2010, borrowed a payday loan from the Applicants in Manitoba.

- **Ontario, August 1, 2012:** Timothy Yeoman on behalf of class members who entered into payday loan transactions with the Applicants in Ontario between September 1, 2011 and the date of judgment. This class action also makes allegations that Cash Store operated an unlawful business model as it did not provide borrowers with the option to

take their payday loan in an immediate liquid form and thereby misrepresented the total cost of borrowing.

120. The above actions generally seek any or all of the following remedies: restitution or damages for allegedly unlawful charges paid by the class members, repayment of unlawful charges paid by the plaintiff and class members, damages for conspiracy, interest on all amounts found to be owing and legal costs.

121. Additionally, Cash Store was facing investor class actions in Alberta, Ontario, and Quebec alleging that Cash Store made misrepresentations during the period from November 24, 2010 to May 24, 2013 regarding its internal controls over financial reporting and the value of the loan portfolio acquired from TPLs, losses on its internal consumer loan portfolio, and its liability associated with the settlement of the British Columbia Class Action (discussed above). The Quebec and Alberta proceedings were stayed pending the outcome of the Ontario claim. A similar securities class action alleging violations of the Securities Exchange Act of 1934, 15 U.S.C. § 78a, is also being defended by Cash Store in the United States.

122. On March 31, 2014, Cash Store Financial announced that it entered into an agreement in principle to settle all four of the proposed securities class actions. A copy of the press release regarding the settlement is attached as Exhibit "P". The agreement in principle covers all claims related to investments in Cash Store Financial's common shares and Notes acquired or disposed of during the expanded period of November 24, 2010 through February 14, 2014, other than certain rights and claims of Noteholders under the Note Indenture dated January 31, 2012.

123. The proposed settlement provides for a payment in the amount of approximately $9.45 million (all-inclusive) by Cash Store to be fully funded by Cash Store Financial's insurers.

The proposed settlement is subject to the fulfillment of customary conditions including, among other things, the parties entering into a definitive settlement agreement, court approvals, approval of parties other than Cash Store Financial, and the fulfillment of conditions relating to the number of opt-outs from the proposed settlement.

(iii) **Claim by Former Third Party Lender, Assistive Financial Corp.**

124. On September 18, 2013, an action in the Court of Queen's Bench of Alberta was commenced against Cash Store, certain of its officers and affiliates, including The Cash Store Inc., certain of its associated companies, including The Cash Store Australia Holdings Inc. and RTF Financial Holdings Inc., and other corporate defendants, seeking repayment of certain funds advanced to Cash Store, its affiliates and the associated companies by Assistive Financial Corp. ("Assistive"), a former related party TPL. An application for interim relief, including the appointment of an inspector, was brought by the Plaintiffs and was heard by the Court of Queen's Bench of Alberta on December 12, 2013 and a decision has not yet been rendered. The action by Assistive also seeks damages equivalent to $110,000,000 together with interest thereon at the rate of 17.5% per year. Assistive filed for bankruptcy on February 3, 2014 and this action has been stayed while the Trustee reviews and considers this litigation.

(c) <u>Audit and Special Investigation Fees</u>

125. Audit and special investigation expenses also jumped significantly in FY 2013 to $4.0 million from $0.9 million in FY 2012. Audit expenses included $1.6 million related to restatements of previously issued financial statements.

126. A special investigation by Cash Store Financial's audit committee resulted in a $2.0 million expense. The audit committee was made aware of written communications that contained questions about the acquisition of the consumer loan portfolio from TPLs in late

January 2012 (the "TPL Transaction") and included allegations regarding the existence of undisclosed related party transactions in connection with the TPL Transaction. In response to this allegation, legal counsel to a previous special committee of independent directors of Cash Store Financial (the "Special Investigation Committee") retained an independent accounting firm to conduct a special investigation. The investigation followed a review conducted by Cash Store Financial's internal auditor under the direction of the audit committee of the Board, and the restatement by Cash Store Financial in December 2012 of its unaudited interim quarterly financial statements and Management's Discussion and Analysis for periods ended March 31, 2012 and June 30, 2012.

127. The investigation covered the period from December 1, 2010 to January 15, 2013 and was carried out over four months. It involved interviews of current and former officers, directors, employees and advisors of Cash Store and a review of relevant documents and agreements as well as electronically stored information obtained from Cash Store computers and those of employees, former employees and directors most likely to have information relevant to the investigation.

128. The Special Investigation Committee has reported its findings on the allegations to the Board of Directors and, consistent with the recommendation made to the Board of Directors by the Special Investigation Committee, the Board of Directors has determined that no further corrections or restatements of previously reported financial statements and other public disclosures are required in relation to the TPL Transaction.

(d) Voluntary Delisting from the NYSE

129. On April 2, 2013, Cash Store Financial received notice from the NYSE that it was not in compliance with the US$50 million market capitalization and stockholders' equity

standard for continued listing of its common shares on the NYSE. On February 24, 2014, Cash Store Financial received an additional notice from the NYSE that it had fallen below the NYSE's continued listing criteria requiring listed companies to maintain an average closing price of its listed common shares of not less than US$1.00 over a consecutive 30 trading-day period.

130. On February 28, 2014, Cash Store Financial voluntarily delisted its stock from the NYSE due, in part, to non-compliance with the NYSE's market capitalization and shareholders' equity, as well as its share price requirements. A copy of the press release regarding the delisting dated February 28, 2014 is attached as Exhibit "Q".

(e) <u>TPL Requests for Return of Restricted Cash</u>

131. As discussed above, Unrestricted Cash and Restricted Cash are comingled in Cash Store's accounts to form its total cash, which is then used to fund operations. The amount of Restricted Cash on Cash Store's balance sheet is expected to exceed the amount of total cash in Cash Store's bank accounts. In light of the circumstances facing Cash Store, the decision of whether to make assignments to address this issue was deferred.

132. Two TPLs have requested returns of TPL Funds. McCann has made a redemption request as of February 26, 2014 to return all of McCann's TPL Funds. As of February 28, 2014, the McCann portion of Restricted Cash was $6,449,000 and by March 31, 2014 had increased to approximately $7,674,000. On January 23, 2014, Trimor initially made a redemption request of $4.0 million, and subsequently made a redemption request for the balance of its funds in the amount of $23 million on April 4, 2014. The Broker Agreements require 120 days' notice of reduced lending limits. As such, the McCann notice takes effect on or about June 26, 2014 and the initial Trimor request takes effect on or about May 23, 2014. The McCann and Trimor requests are attached as Exhibits "R", "S" and "T".

133. Cash Store does not have sufficient liquidity to fulfill these requests, as the amount of total cash as of March 31, 2014 was approximately $12.6 million. Senior Management has had discussions with McCann and Trimor concerning the redemption requests. On March 20, 2014, Trimor signed a non-disclosure agreement ("NDA") and on March 26, 2014, Trimor attended meetings with Cash Store and the advisors to the Special Committee to discuss the liquidity issues faced by Cash Store. Trimor has been provided with a significant amount of non-public, confidential information under the NDA. The advisors to the Special Committee have also been attempting to negotiate an NDA with McCann. However, McCann did not sign an NDA, and therefore could not attend the March 26, 2014 meeting and could not receive any of the confidential information given to Trimor. As of the date of this affidavit, the redemption requests remain outstanding.

134. On April 4, 2014, counsel for McCann wrote to counsel for the Special Committee, requesting that any funds held by Cash Store on behalf of McCann be returned, or else held in a segregated account. McCann's counsel asserted that the funds are held in trust for McCann and that there is a fiduciary relationship between McCann and Cash Store. McCann's counsel stated that McCann would seek personal remedies against anyone responsible for any dissipation of the alleged trust funds. A copy of the April 4, 2014 McCann letter is attached as Exhibit "U".

135. Counsel for the Special Committee replied on April 8, 2014, and clarified that there is no provision in the McCann Broker Agreement that establishes a trust relationship or imposes a trust on any funds. Furthermore, Cash Store's public disclosure does not describe its relationship with TPLs as constituting a trust relationship. Additionally, counsel for the Special Committee noted that McCann is aware that all funds collected from Cash Store's customers,

including funds collected in respect of loans brokered for McCann, are comingled. A copy of counsel for the Special Committee's April 8, 2014 letter is attached as Exhibit "V".

136. McCann's counsel's response of April 8, 2014 is attached as Exhibit "W". In it, he reiterates his request that money advanced by McCann be placed in a segregated account.

137. On April 4, 2014, Trimor made a redemption request for the balance of its funds in the amount of $23 million. Trimor also requested an immediate and complete accounting of loans brokered on Trimor's behalf, including all funds flowing in and out of Trimor's Designated Broker Bank Account and Designated Financier Bank Account. Trimor stated that it did not consent to any comingling of funds and required that any Trimor funds be held and accounted for separately. A copy Trimor's April 4, 2014 letter is attached as Exhibit "X".

138. On April 9, 2014, counsel for the Special Committee wrote to Trimor and noted that Trimor was aware that all TPL funds are comingled. Furthermore, he confirmed that while Cash Store has an account it uses to receive funds from TPLs with respect to their initial advance and will transfer funds to this account to make distributions to the TPLs from time to time, there has never been a Trimor Designated Broker Bank Account or Designated Financier Bank Account. A copy of the April 9, 2014 letter is attached as Exhibit "Y".

139. A copy of an email from counsel for Trimor dated April 12, 2014 with respect to a potential CCAA filing is attached as Exhibit "Z".

(f) <u>McCann Files an Injunction</u>

140. The attempts to negotiate an NDA with McCann continued through the first ten days of April. On the evening of April 10, 2014, the advisors to the Special Committee sent a further revised NDA to McCann which would allow PricewaterhouseCoopers ("PwC") to inspect

Cash Store's documents and records, McCann did not provide a substantive response regarding the NDA. Instead, on April 11, 2014, McCann served Cash Store with an application for an injunction seeking:

(a) An interim and final injunction directing Cash Store to permit PwC to attend at Cash Store's offices to review its books and records in accordance with the Broker Agreement;

(b) An injunction prohibiting Cash Store from (i) comingling, using, converting or otherwise appropriating the funds advanced by McCann pursuant to the Broker Agreement; (ii) directing that the funds be held in a segregated trust account; and (iii) such further and other relief which will preserve the rights of McCann pending the conclusion of the litigation;

(c) An Order directing the Cash Store to account for all funds advanced pursuant to the Broker Agreement; and

(d) A declaration that all funds advanced or subsequently recovered by collection of loans belong to McCann or are held in trust for McCann.

141. McCann also served a statement of claim seeking

(a) A direction that PwC or a suitable alternative accounting firm be granted full and immediate access to the books and records of Cash Store;

(b) The injunction described above;

(c) A declaration or judgment against any parties who have knowingly received the Restricted Cash and an Order for accounting or tracing; and

(d) An Order directing that the Plaintiff's funds be returned by June 19, 2014 or earlier.

142. The Statement of Claim, application for an injunction, and affidavit of Sharon Fawcett are attached as Exhibits "AA", "BB", and "CC".

Restructuring Efforts to Date

(a) Special Committee

143. In light of the difficulties faced by Cash Store, on February 19, 2014, the Board of Directors constituted a special committee of independent directors (the "Special Committee") to:

(i) Review and respond to the regulatory developments in Ontario preventing Cash Store from selling payday loan products in Ontario; and

(ii) Carefully evaluate the strategic alternatives available to Cash Store with a view to maximizing value for all of its stakeholders.

144. The Special Committee engaged Osler, Hoskin & Harcourt LLP as its independent legal advisor and Rothschild Inc. ("Rothschild") as its independent financial advisor to assist it in its strategic alternatives review process. A copy of the two press releases dated

February 19 and February 20, 2014 are attached as Exhibits "DD" and "EE". Additionally, Cash Store has engaged Conway MacKenzie Inc. ("Conway") as a financial advisor to assist the Special Committee in evaluating Cash Store's liquidity position as part of the strategic alternatives review process. The engagement letters for Rothschild and Conway are attached as Exhibits "FF" and "GG".

145. Rothschild has informed me that the Special Committee has explored the possibility of a sale, restructuring, refinancing and liquidation.

(i) **Mergers and Acquisitions Process**

146. During the week of March 3, 2014, Rothschild initiated a mergers and acquisitions process to seek a sale or significant investment in Cash Store. Rothschild contacted numerous parties, including financial buyers and strategic buyers based in both Canada and the U.S. Strategic buyers represent companies in the consumer finance and alternative financial services sectors and financial buyers were selected based on past experience in the financial services sector, investments in turnaround situations and their ability and willingness to deploy capital quickly.

147. Many of the parties contacted have been provided with public teasers and several have requested NDAs. As of March 26, 2014, a number of parties had executed NDAs and started their due diligence of Cash Store. A data room has been set up and parties who have executed NDAs have been granted access. Rothschild will be providing parties who have executed NDAs with Cash Store's business plan and a letter requesting proposals by mid-May.

(b) Appointment of Compliance and Regulatory Affairs Officer

148. On February 27, 2014, Cash Store Financial announced that it had engaged Michèle McCarthy to fill the newly created position of CCRO. A copy of the related press release dated February 27, 2014 is attached as Exhibit "HH".

149. Ms. McCarthy is an experienced senior executive with experience in numerous roles with global financial services companies. She has previously had mandates which included Chief Legal Officer, Chief Privacy Officer, and Chair of the Board of Directors at significant public and private corporations.

150. As CCRO, Ms. McCarthy reports directly to the Special Committee. The mandate of the CCRO includes the following responsibilities:

- Ensure that Cash Store is in compliance with all federal and provincial legislation, regulations and regulatory directives (the "Governing Legislation");
- Ensure that all documents used in the business of Cash Store are compliant with Governing Legislation;
- Develop procedures to identify, assess and communicate internally any changes or proposed changes to Governing Legislation;
- Foster a constructive relationship between Cash Store and its regulators; and
- Oversee and assist business units within Cash Store in the resolution of compliance issues.

151. In her role as CCRO, Ms. McCarthy is leading discussions with Cash Store's Ontario regulator in an effort to address the regulator's concerns regarding the issuance of a lender loan license to Cash Store Financial and its subsidiaries under the Payday Loans Act.

Relief Sought

152. In preparing this section of the affidavit, I have also consulted with and relied on discussions with Tom Fairfield, Cash Store's financial advisor, and the legal and financial advisors to the Special Committee.

153. Cash Store has made efforts to pursue a restructuring outside of a formal insolvency proceeding. Cash Store's liquidity position continues to significantly deteriorate and the current situation is dire. As noted above, there is too much uncertainty and too many legal and business impediments to continue the process outside of an insolvency proceeding. Senior Management and the Special Committee have expressed concerns regarding Cash Store's ability to sustain adequate liquidity to fulfill current business objectives and maintain going concern operations without commencing a CCAA process. Cash Store is unable to meet its liabilities as they become due and is therefore insolvent.

(a) Stay of Proceedings

154. Cash Store urgently requires a stay of proceedings and other protections provided by the CCAA so that it is provided with the breathing space to restructure its affairs and attempt to maximize enterprise value. In particular, the Applicants require a stay of proceedings to prevent the TPLs from attempting to withdraw the TPL Funds pursuant to the terms of the Broker Agreements, the Noteholders from making demands under the Senior Secured Notes and the Senior Lenders from making demands under the Credit Agreement. Such demands would likely result in the cessation of going concern operations for the Applicants absent a stay of proceedings. The Applicants are requesting an initial stay of proceedings until May 14.

155. If the court grants the proposed Initial Order, the Applicants intend to immediately continue the dialogue with its significant stakeholders in an effort to reach agreement on a consensual restructuring plan.

(b) Interim Financing

156. Cash Store's liquidity has declined from $13.1 million of reported total cash at the end of February to $12.6 million at the end of March. As of close of business on April 11, 2014 the total cash in Cash Store's bank accounts was approximately $2.9 million. These cash balances include Restricted Cash. The liquidity shortfall is driven primarily by the cessation of lending in Ontario as well as elevated corporate costs associated with ongoing litigation. Because of the nature of the Company's business as a lender of cash, the Company needs to maintain a minimum cash balance of $5 to $10 million to manage ordinary day to day fluctuations in its lending activities.

157. Because of its current liquidity challenges, and as demonstrated in the cash flow forecast (discussed below), Cash Store requires interim financing on an urgent basis to continue going concern operations and to implement the reorganization of its business as part of this CCAA proceeding. Subject to certain terms and conditions, Coliseum Capital Partners, LP, Coliseum Capital Partners II, LP and Blackwell Partners, LLC have agreed to act as DIP lenders (the "DIP Lenders") and provide an interim financing facility (the "DIP Facility") of approximately $20.5 million to Cash Store Financial. The term sheet is attached to this affidavit as Exhibit "H".

158. The funds available under the DIP Facility will be used to meet Cash Store's immediate funding requirements during the CCAA proceedings in accordance with the cash flow projections, as well as for the payment of professional fees and other costs and expenses in

connection with the CCAA proceedings. The DIP Facility is guaranteed, jointly and severally, by the same entities that are Guarantors under the Credit Agreement and the Notes and by 1693926 Alberta Ltd. doing business as "The Title Store".

159. Cash Store has agreed to pay the DIP Lenders:

(a) For the first $12.5 million borrowed, interest of 12.5% per year, all of which is to be capitalised (not paid in cash) and added to the outstanding principal balance of the loan to become due and payable on the maturity date of the DIP Facility;

(b) For amounts loaned in excess of $12.5 million, interest of 10.5% per year and payable monthly in arrears in cash on the first business day of each month and on the maturity date, plus 7% per year provided that all such accrued and unpaid interest will be capitalised (not paid in cash) and added to the outstanding principal balance of the loan to become due and payable on the maturity date; and

(c) Agency fees of $30,000 per month while the DIP Facility is in place, DIP Financing fees of 3.5% of $12.5 million plus 5% of $8 million, and certain exit fees that are payable in specific circumstances.

160. It is a condition precedent to the availability of the DIP Facility that the Initial Order be in form and substance satisfactory to the DIP Lenders, including in respect of the granting of the DIP Lenders' Charge (as defined below). The DIP Facility is also provided on the condition that there be no Events of Default or Material Adverse Changes (as defined in the term sheet). The maturity date of the DIP Facility is the earlier of (i) 180 days from the granting of the Initial Order, (ii) the date an Approved Transaction is consummated, (iii) the date a demand for payment is made following an Event of Default, or (iv) the date on which the stay of proceedings

pursuant to the Initial Order expires without being extended or on which the CCAA proceedings are terminated.

161. The DIP Facility is proposed to be secured by a Court-ordered security interest, lien and charge (the "DIP Lenders' Charge") on all of the present and future assets, property and undertaking of Cash Store, including any cash on hand at the day of the filing (the "Property") that will secure all post-filing advances. The DIP Lenders' Charge is to have priority over all other security interests, charges and liens other than the Administration Charge (as defined below) and up to an amount of $1.5 million. The DIP Lenders' Charge will not secure any obligation that exists before the Initial Order is made and will be *pari passu* with the TPL Protections.

162. The DIP Facility includes affirmative covenants providing that the DIP Lenders will engage a Chief Restructuring Officer ("CRO") within 10 days from the issuance of the Initial Order. The DIP Facility permits a certain amount in critical vendor payments, which have been incorporated into the Cash Flows.

163. An alternative interim financing proposal (the "Alternative DIP Facility") was also conditional on a CCAA filing and required a priority DIP charge. The Special Committee, in consultation with its advisors, determined that the DIP Facility had more favourable terms than the Alternative DIP Facility and was in the best interests of Cash Store and its stakeholders.

164. The DIP Facility is critical to the successful restructuring of Cash Store, as it will provide Cash Store with the necessary liquidity to operate as a going concern during these proceedings and, absent an injection of cash at this time, Cash Store will be forced to shut down its operations, with a significant loss of employment and disruption to those who rely on its services.

(c) Monitor

165. FTI Consulting Canada Inc. ("FTI") has consented to act as the Monitor of the Applicants under the CCAA. A copy of the Monitor's consent is attached as Exhibit "JJ".

(d) Administration Charge

166. In connection with its appointment, it is proposed that the Monitor, along with its counsel, counsel and the financial advisor to the Special Committee, counsel to the Applicants and counsel and the financial advisor to the DIP Lenders will be granted a Court-ordered charge on all of the present and future assets, property and undertaking of the Applicants (the "Property") as security for their respective fees and disbursements relating to services rendered in respect of the Applicants up to a maximum amount of $1.5 million (the "Administration Charge"). The Administration Charge is proposed to have first priority over all other charges.

(e) Directors' and Officers' Protection

167. A successful restructuring of Cash Store will only be possible with the continued participation of Cash Store Financial's board of directors (the "Directors"), management and employees. These personnel are essential to the viability of Cash Store's continuing business.

168. I am advised by Marc Wasserman of Osler, Hoskin & Harcourt LLP, counsel for the Special Committee, and believe that, in certain circumstances, directors can be held liable for certain obligations of a company owing to employees. Cash Store estimates, with the assistance of its financial advisor, that these obligations may include unpaid accrued wages which could amount to as much as approximately $3.7 million, unpaid accrued vacation pay which could amount to as much as $1.4 million for a total potential director liability of approximately $5.1 million.

169. The amount of insurance remaining under the Director and Officer primary and excess insurance policies is approximately $28 million. As discussed above, Cash Store and its Directors and Officers are subject to significant litigation and it is not certain that there will be sufficient Director and Officer insurance to cover the defence costs and any potential findings of liability on the part of the Cash Store Directors or Officers. Furthermore, Cash Store has not yet been able to finalize a renewal of the Director and Officer insurance, which is due to expire in July 2014. Cash Store has recently purchased one year run-off insurance under the terms of its primary and excess policies, which will commence on the expiry of those policies.

170. The Directors and Officers have indicated that, in light of the uncertainty surrounding available Directors' and Officers' insurance, their continued service and involvement in this restructuring is conditional upon the granting of an Order under the CCAA which grants a charge in favour of the Directors and Officers of Cash Store in the amount of $2.5 million on the Property of Cash Store (the "Directors' Charge"), the priority of which is still under discussion. The Directors' Charge would act as security for indemnification obligations for the Directors' potential liabilities as set out above.

171. The Directors' Charge is necessary so that Cash Store may benefit from its Directors' and Officers' experience with the business and the alternative financial products industry, and guide Cash Store's restructuring efforts.

172. The members of the Special Committee have indicated that, in light of the uncertainty surrounding available Directors' and Officers' insurance, it is their intention to resign after a Chief Restructuring Officer ("CRO") is appointed by the court and a proper transition can be implemented. To that end, the DIP term sheet provides that a CRO be engaged within 10 days. The members of the Special Committee have indicated that they are only willing to assist

In transferring the Special Committee's restructuring duties to the proposed CRO on the condition that they receive protections akin to that of a CRO from and after the date of the Initial Order. Thus, the Special Committee members' continued service and involvement in this restructuring is conditional upon the granting of an Order under the CCAA which provides that no member of the Special Committee will have any liability with respect to any losses, claims, damages or liabilities, of any nature or kind, from and after the date of the Initial Order except to the extent such losses, claims, damages or liabilities result from the gross negligence or wilful misconduct on the part of such member of the Special Committee.

(f) TPL Protections

(i) Existing Cash-on-hand

173. Given the position of certain TPLs with respect to the Cash Store's cash-on-hand, it is proposed in the draft Initial Order that the TPLs be granted a Court-ordered charge on Cash Store's Property in the maximum amount of cash-on-hand at the time of filing (the "TPL Charge"). As stated in the DIP term sheet, the sole purpose of the TPL Charge is to ensure that any claims by the TPLs to Cash Store's cash-on-hand are preserved pending a determination by this court. Further, as stated in the DIP term sheet, the TPL Charge is intended to preserve the claims of the TPLs as they existed immediately prior to the effective time of the Initial Order. However, the term sheet states that the TPL Charge shall not grant the TPLs any new, additional, or greater rights than they would have had absent these protections.

174. The draft Initial Order proposes that the TPL Charge will rank *pari passu* with the DIP Lenders' Charge and will only be enforceable by the TPLs as directed by the Court. Given these protections, it is proposed in the draft Initial Order that Cash Store will be permitted to use all of the cash-on-hand for general operating purposes.

(ii) Post-Filing Brokered Loan Repayments and Post-Filing Brokered Loans

175. On the date of filing there will be approximately $18.7 million of brokered loans (less than 90 days past due), roughly $11.5 million, or 62%, of which are Ontario loans. The TPLs will likely encounter difficulty collecting outstanding Ontario loans, as the Ontario Cash Store branches are currently unable to broker new loans for customers. Cash Store is not able to predict with any certainty the amount of Ontario loans that will be repaid.

176. As customers repay the TPL brokered loans, Cash Store intends to use this liquidity for the sole purpose of brokering new loans (and not for funding operations or other costs). Cash Store will keep sufficiently detailed records of all post-filing repayments of TPL loans, including principal and interest ("TPL Repayments") and any and all re-advances made by Cash Store such that, as at any time post-filing, the company can determine (i) the amount of all TPL Repayments, (ii) any and all re-advances, and (iii) any still outstanding TPL brokered loans. Cash Store will work with the Monitor to accelerate the existing reconciliation process in order to allow Cash Store to identify on a daily basis the TPL brokered loans and any amounts received in respect of same following the Initial Order (as opposed to the month-end reconciliation process now followed).

177. On a go-forward basis, Cash Store will continue its practice of depositing repayments of TPL brokered loans into Cash Store's general bank account. Cash Store is not in a position to physically segregate the TPL Repayments given the manner in which such repayments are made and limitations with Cash Store's cash management process, including Cash Store's cash management software and that belonging to third parties, DC Bank and Direct Cash Payments Inc.

178. Cash Store has had discussions with the proposed Monitor and has agreed to maintain a minimum cash balance in an amount equal to the TPL Repayment received after the Initial Order and not yet redeployed as new brokered loans.

179. Cash Store will continue to ensure that TPLs receive a return of approximately 17.5% per year (or such lesser amount as may be agreed to) with respect to TPL brokered loans that are repaid and available for redeployment from and after the Initial Order date. Based on this approach, the return will be made on any TPL brokered loan existing as of the date of the Initial

Court file no. 5659/14

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

TEMEX RESOURCES CORP.

Applicant

and

MICHELLE WALKER, JAMIESON WALKER,
DAVID BURDA and DARLENE STUBBS

Respondents

APPLICATION UNDER section 107 of the *Mining Act*, RSO 1990, c. M14, section 21.2 of the *Statutory Powers Procedure Act*, RSO 1990, c. S22 and rules 14.05(3)(d) and (g) of the Rules of Civil Procedure

**COSTS SUBMISSIONS OF THE APPLICANT,
TEMEX RESOURCES CORP.**

1 The applicant, Temex Resources Corp. ("Temex"), claims $10,588.33 in costs for the motion to strike heard April 16, 2014, and $70,907.66 for the proceedings before the Mining and Lands Commissioner and the application itself. Enclosed is the costs outline for the motion to strike (tab A), and the bill of costs for the Commissioner's proceedings and the application to this Honourable Court (tab B).

Motion to strike

2 Michelle Walker disclosed communications subject to settlement privilege in her responding application materials, forcing Temex to bring its motion to strike. Temex sought costs on its motion.[1]

3 Michelle Walker acknowledged at the application hearing that her counsel, Richard Butler, had helped her draft responding materials, so the inclusion of privileged communications cannot be attributed to Ms Walker being a self-represented litigant.[2]

[1] Paragraph 1(d) of the notice of motion (to be heard March 26, 2014 at the outset of the within application) dated March 24, 2014 and filed March 25, 2014.

Order that is subsequently repaid and available for redeployment. The return will be calculated so that the 17.5% payment is paid from the Initial Order date on such amounts. These arrangements are also intended to ensure that Cash Store will not make payments on loans in existence on the date of filing that are subsequently defaulted upon.

(g) Cash Flow Forecast

180. Cash Store, with the assistance of its financial advisor Conway, has prepared 13-week cash flow projections as required by the CCAA. FTI has reviewed these cash flow projections. A copy of the cash flow projections is attached as Exhibit "KK". The cash flow projections demonstrate that Cash Store can continue going concern operations during the proposed stay period should the proposed DIP Facility be approved.

181. Cash Store anticipates that the Monitor will provide oversight and assistance and will report to the Court in respect of Cash Store's actual results relative to cash flow forecast during this proceeding. Existing accounting procedures will provide the Monitor with the ability to track the flow of funds among the various Applicants.

182. I am confident that granting the Initial CCAA Order sought by the Applicants is in the best interests of the Applicants and all interested parties. Without the DIP Facility, Cash Store faces a cessation of going concern operations, the liquidation of its assets and the loss of its employees' jobs. Cash Store requires an immediate and realistic dialogue with its stakeholders under the protection of the CCAA with the goal of maximizing the ongoing value of the business and continuing employment for its employees. The granting of the requested stay of proceedings will maintain the "status quo" and permit an orderly restructuring and analysis of the Applicants' affairs, with minimal short-term disruptions to Cash Store's business.

SWORN BEFORE ME at the City of Toronto, in the Province of Ontario, on April 14, 2014.

Commissioner for Taking Affidavits.
Karla Sachar

Steven Carlstrom

TAB 10

Sharon Fawcett

From:	J. Murray McCann
Sent:	March-14-14 12:06 PM
To:	Gordon Reykdal
Cc:	Sharon Fawcett
Subject:	Ontario payday loans

Good morning Gord,
I look forward to our call today and our visit in about a week.

You mentioned that you were meeting with Steve and Craig this morning to discuss our loan to back stop Ontario payday loan customers and the requirements for funds in regulated provinces. We have attempted to redeploy the funds in Ontario since they are no longer being used to backstop payday loans there but so far with no success. Those funds are no longer secured by the payday creditors and the funds from those accounts collected were to be credited to us. It appears that those funds were credited to the account of Cash Store in contravention of our mutual understanding and agreement.

Because the funds we have loaned are from a foundation it is even more important that we not place those funds at risk. As you know we went to considerable effort and legal cost to get the opinion and comfort that we required to assure that funds loaned to Cash Store were an ok investment because they were secured by loans and the promise of Cash Store for proper accounting of those loans. Now that the loans that supported our loans were collected we must ask for repayment. Should Cash Store require further loans as backup to payday loans in regulated provinces and secure those loans with payday loans,as in the past, we will be happy to make funds available. We are happy with the return received from Cash Store and look forward to continuing our relationship for a very long time.

Please be assured that the interest Cash Store is paying us is going to very worthwhile causes that rely on our funding. We can never let them down. That is the main reason that we make sure that any agreements we enter into on their behalf is never at risk. On the other hand we will always live up to our side of the agreement.

I look forward to our call later today.

Cheers,
Murray

3-14-14 – Spoke w/ JMM around 6 PM – he had discussed w/ David and have agreed that the capital will be repaid. SF to call Steve Mon AM to arrange – David will have spoken to him by then

TAB 11

Sharon Fawcett

From: J. Murray McCann
Sent: April-12-14 2:32 PM
To: Gordon Reykdal
Subject: FW: Personal and Important

Importance: High

Good afternoon Gord,
I have attempted to contact you on numerous occasions and have left messages on your cell, office phone and with Sandy. Attempting to keep a creditor and friend in the dark by ceasing all communication is neither the way to treat a friend nor a creditor. As mentioned to you, on more than one occasion, the funds Rent Cash is improperly holding are used to support a large school, orphanage and girls residence in Zambia. Without those funds teachers, caregivers, food suppliers etc cannot be paid and our school of 400 students will have to close. I told you this before and you assured me that Rent Cash was looking after our money diligently and there was no need to worry.

Please Gord do what you know is right and release our funds so that they can continue to be used for the good purposes they have been used for. You know that the money is not Rent Cash's and have stated that on many occasions and even as late as 2 weeks ago when we visited at your club and your home in Scottsdale. You, as president, promised and assured that all was well and our funds were being held by Rent Cash for our benefit.
Please contact me.
Sincerely,
Murray

TAB 12

Sharon Fawcett

From: Michael Zvonkovic <michael.zvonkovic@csfinancial.ca>
Sent: July-23-12 2:58 PM
To: Sharon Fawcett
Subject: RE: Administration Question re Broker Agreement

Hi Sharon,

In the new agreement, we've tried to combine all these accounts and not to have a designated broker bank account. Your funds specifically would be tracked separately via our accounting system.

I hope this is ok,

Mike

From: Sharon Fawcett [mailto:s.fawcett@aristoscorp.com]
Sent: Thursday, July 19, 2012 3:07 PM
To: Michael Zvonkovic
Subject: Administration Question re Broker Agreement

Hi Mike,

On the Broker Agreement funds, so you keep a separate "designated broker bank account" for each Financier such that all of the loans made using our funds are paid from and returned to that account, as well as all related interest and fees? I know that we spoke of a monthly reconciliation of our fund, but wanted to clarify if they would also be tracked through a separate account. Please advise.

Thanks

Sharon

Sharon Fawcett, CA
McCann Family Holding Corporation

T: 403.251.5517
F: 1.888.474.8105
E: s.fawcett@aristoscorp.com

TAB 13

Sharon Fawcett

From: J. Murray McCann
Sent: March-04-14 11:32 PM
To: Sharon Fawcett
Subject: Re: The Family BLOC AR Feb 12, 2014.xlsx

* Called Steve - left voicemail re repmt of $7.0 within 3-6-14 pm
* also 3-7-14 pm

Go for it
M

Sent from my iPhone

On Mar 4, 2014, at 5:41 PM, "Sharon Fawcett" <s.fawcett@aristoscorp.com> wrote:

> Murray – FYI – have not yet called Steve, but he just sent this reply to my Feb 26th e-mail. I will follow up tomorrow with a call to request a repayment of the unexpended capital. Based on a further $2.3 repayment of the Ontario LOCs from Feb 13 to 28, we should have a LOC balance of $6.1 million and unexpended capital of just under $7.3 million. I was thinking that I would suggest a repayment of $7 million to happen right away – leaves a cushion for finalizing the February numbers but stops the interest clock for them now as opposed to waiting a further 2 weeks for the final accounting for February – what do you think?
>
> Sharon
>
> Sharon Fawcett
> T: 403.251.5517
> F: 1.888.474-8105
> E: s.fawcett@aristoscorp.com
>
> The information transmitted is intended only for the addressee and may contain confidential, proprietary and/or privileged material. Any unauthorized review, distribution or other use of or the taking of any action in reliance upon this information is prohibited. If you received this in error, please contact the sender and delete or destroy this message and any copies.
>
> **From:** Steve Carlstrom [mailto:Steve.Carlstrom@csfinancial.ca]
> **Sent:** March-04-14 5:52 PM
> **To:** Sharon Fawcett
> **Cc:** Craig Warnock
> **Subject:** RE: The Family BLOC AR Feb 12, 2014.xlsx
>
> No problem Sharon. We are monitoring the Ontario collections very closely as well. From Feb 13-28 we collected another $2.3 million of your loans. These are approximate numbers and we will get you the final ones over the next couple of weeks once we do the final accounting for February.
>
> Steve
>
> From: Sharon Fawcett [mailto:s.fawcett@aristoscorp.com]
> Sent: Wednesday, February 26, 2014 12:36 PM
> To: Steve Carlstrom

TAB 14

Cash Store Interest Calculation
The Family Trust

June 2012		**Fund Balance**	**Funds for Pyt. calc.**	**Payment Rate**	**Pro-rate for Jun**	**Total Payment**
	June 2012 Opening Balance:	$ -		17.50%	30 of 30 Days	$ -
	Funds Received on 6/19/2012 (12 of 30 Days)	$ 4,000,000.00		17.50%	12 of 30 Days	$ 23,013.70
	Closing Balance June 30, 2012	**$ 4,000,000.00**				$ 23,013.70
	June 2012 Lender Payments					
	June 30, 2012					
	Total	$ -	23,013.70			
July 2012		**Fund Balance**	**Funds for Pyt. calc.**	**Payment Rate**	**Pro-rate for Jul**	**Total Payment**
	July 2012 Opening Balance:	$ 4,000,000.00		17.50%	31 of 31 Days	$ 59,452.05
June Portion	Funds Received on 6/19/2012 (12 of 30 Days)		$ 4,000,000.00	17.50%	12 of 30 Days	$ 23,013.70
	Closing Balance July 31, 2012	**$ 4,000,000.00**				$ 82,465.75
	July 2012 Lender Payments					
	July 31, 2012	$ 82,465.75				
	Total	$ 82,465.75	0.00			
Aug 2012		**Fund Balance**	**Funds for Pyt. calc.**	**Payment Rate**	**Pro-rate for Aug**	**Total Payment**
	Aug 2012 Opening Balance:	$ 4,000,000.00		17.50%	31 of 31 Days	$ 59,452.05
	Funds Received on 8/13/2012 (19 of 31 Days)	$ 1,000,000.00		17.50%	19 of 31 Days	$ 9,109.59
	Closing Balance Aug 31, 2012	**$ 5,000,000.00**				$ 68,561.64
	Aug 2012 Lender Payments					
	August 31, 2012	$ 68,561.64				
	Total	$ 68,561.64	0.00			
Sep 2012		**Fund Balance**	**Funds for Pyt. calc.**	**Payment Rate**	**Pro-rate for Sep**	**Total Payment**
	Sep 2012 Opening Balance:	$ 5,000,000.00		17.50%	30 of 30 Days	$ 71,917.81
	Reclassification of Funding 9/1/2012	$ 4,000,000.00		17.50%	30 of 30 Days	$ 57,534.25
	Lender true-up from 12% to 17.5% for the peirod of 6/19/2012 to 8/31/2012 (74 Days)		$ 4,000,000.00	5.50%	74 Days	$ 44,602.74
	Closing Balance Sep 30, 2012	**$ 9,000,000.00**				$ 174,054.79

Cash Store Interest Calculation
The Family Trust

	Sep 2012 Lender Payments					
		September 28, 2012	$ 174,054.79			
	Total		$ 174,054.79	0.00		
Oct 2012		**Fund Balance**	**Funds for Pyt. calc.**	**Payment Rate**	**Pro-rate for Oct**	**Total Payment**
	Oct 2012 Opening Balance:	$ 9,000,000.00		17.50%	31 of 31 Days	$ 133,767.12
	Closing Balance Oct 31, 2012	**$ 9,000,000.00**				$ 133,767.12
	Oct 2012 Lender Payments					
		October 29, 2012	$ 133,767.12			
	Total		$ 133,767.12	0.00		
Nov 2012		**Fund Balance**	**Funds for Pyt. calc.**	**Payment Rate**	**Pro-rate for Nov**	**Total Payment**
	Nov 2012 Opening Balance:	$ 9,000,000.00		17.50%	30 of 30 Days	$ 129,452.05
	Closing Balance Nov 30, 2012	**$ 9,000,000.00**				$ 129,452.05
	Nov 2012 Lender Payments					
		November 29, 2012	$ 129,452.05			
	Total		$ 129,452.05	0.00		
Dec 2012		**Fund Balance**	**Funds for Pyt. calc.**	**Payment Rate**	**Pro-rate for Dec**	**Total Payment**
	Dec 2012 Opening Balance:	$ 9,000,000.00		17.50%	31 of 31 Days	$ 133,767.12
	Closing Balance Dec 31, 2012	**$ 9,000,000.00**				$ 133,767.12
	Dec 2012 Lender Payments					
		December 31, 2012	$ 133,767.12			
	Total		$ 133,767.12	0.00		
Jan 2013		**Fund Balance**	**Funds for Pyt. calc.**	**Payment Rate**	**Pro-rate for Jan**	**Total Payment**
	Jan 2013 Opening Balance:	$ 9,000,000.00		17.50%	31 of 31 Days	$ 133,767.12
	Closing Balance Jan 31, 2013	**$ 9,000,000.00**				$ 133,767.12
	Jan 2013 Lender Payments					
		January 31, 2013	$ 133,767.12			
	Total		$ 133,767.12	0.00		
Feb 2013		**Fund Balance**	**Funds for Pyt. calc.**	**Payment Rate**	**Pro-rate for Feb**	**Total Payment**
	Feb 2013 Opening Balance:	$ 9,000,000.00		17.50%	28 of 28 Days	$ 120,821.92
	Closing Balance Feb 28, 2013	**$ 9,000,000.00**				$ 120,821.92

Cash Store Interest Calculation
The Family Trust

	Feb 2013 Lender Payments					
		February 28, 2013	$ 120,821.92			
	Total		$ 120,821.92	(0.00)		
Mar 2013		**Fund Balance**	**Funds for Pyt. calc.**	**Payment Rate**	**Pro-rate for Mar**	**Total Payment**
	Mar 2013 Opening Balance:	$ 9,000,000.00		17.50%	31 of 31 Days	$ 133,767.12
	Closing Balance Mar 31, 2013	**$ 9,000,000.00**				$ 133,767.12
	Mar 2013 Lender Payments					
		March 28, 2013	$ 133,767.12			
	Total		$ 133,767.12	0.00		
Apr 2013		**Fund Balance**	**Funds for Pyt. calc.**	**Payment Rate**	**Pro-rate for Apr**	**Total Payment**
	Apr 2013 Opening Balance:	$ 9,000,000.00		17.50%	30 of 30 Days	$ 129,452.05
	Closing Balance Apr 30, 2013	**$ 9,000,000.00**				$ 129,452.05
	Apr 2013 Lender Payments					
		April 30, 2013	$ 129,452.05			
	Total		$ 129,452.05	0.00		
May 2013		**Fund Balance**	**Funds for Pyt. calc.**	**Payment Rate**	**Pro-rate for May**	**Total Payment**
	May 2013 Opening Balance:	$ 9,000,000.00		17.50%	31 of 31 Days	$ 133,767.12
	Closing Balance May 31, 2013	**$ 9,000,000.00**				$ 133,767.12
	Funds Received on May 31, 2013 (1 of 31 days)	$ 3,500,000.00				
	Adj Closing Balance May 31, 2013	**$ 12,500,000.00**				
	May 2013 Lender Payments					
		May 31, 2013	$ 133,767.12			
	Total		$ 133,767.12	0.00		
June 2013		**Fund Balance**	**Funds for Pyt. calc.**	**Payment Rate**	**Pro-rate for Jun**	**Total Payment**
	June 2013 Opening Balance:	$ 12,500,000.00		17.50%	30 of 30 Days	$ 179,794.52
	Funds Received on May 31, 2013 (1 of 31 days)		$ 3,500,000.00	17.50%	1 of 31 Days	$ 1,678.08
	Closing Balance June 30, 2013	**$ 12,500,000.00**				$ 181,472.60

Cash Store Interest Calculation
The Family Trust

	Funds Received on June 27, 2013 (4 of 30 days)		$ 1,500,000.00				
	Adj Closing Balance May 31, 2013		**$ 14,000,000.00**				
	June 2013 Lender Payments						
		June 28, 2013	$ 181,472.60				
	Total		$ 181,472.60	0.00			
July 2013			**Fund Balance**	**Funds for Pyt. calc.**	**Payment Rate**	**Pro-rate for Jul**	**Total Payment**
	July 2013 Opening Balance:		$ 14,000,000.00		17.50%	31 of 31 Days	$ 208,082.19
	Funds Received on June 27, 2013 (4 of 30 days)			$ 1,500,000.00	17.50%	4 of 30 Days	$ 2,876.71
	Closing Balance June 30, 2013		**$ 14,000,000.00**				$ 210,958.90
	Withdrew by Lender (7/24/2013)		$ (650,000.00)				
	Adj Closing Balance July 31, 2013		**$ 13,350,000.00**				
	July 2013 Lender Payments						
		July 31, 2013	$ 210,958.90				
	Total		$ 210,958.90	0.00			
August 2013			**Fund Balance**	**Funds for Pyt. calc.**	**Payment Rate**	**Pro-rate for Aug**	**Total Payment**
	August 2013 Opening Balance:		$ 13,350,000.00		17.50%	31 of 31 Days	$ 198,421.23
July Portion	Withdrew by Lender (7/24/2013)			$ (650,000.00)	17.50%	8 of 31 Days	$ (2,493.15)
	Closing Balance August 31, 2013		**$ 13,350,000.00**				$ 195,928.08
	August 2013 Lender Payments						
		August 30, 2013	$ 195,928.08				
	Total		$ 195,928.08	0.00			
September 2013			**Fund Balance**	**Funds for Pyt. calc.**	**Payment Rate**	**Pro-rate for Sep**	**Total Payment**
	September 2013 Opening Balance:		$ 13,350,000.00		17.50%	30 of 30 Days	$ 192,020.55
	Closing Balance September 30, 2013		**$ 13,350,000.00**				$ 192,020.55
	September 2013 Lender Payments						

Cash Store Interest Calculation
The Family Trust

		September 30, 2013	$ 192,020.55				
	Total		$ 192,020.55	(0.00)			
October 2013			**Fund Balance**	**Funds for Pyt. calc.**	**Payment Rate**	**Pro-rate for Oct**	**Total Payment**
	October 2013 Opening Balance:		$ 13,350,000.00		17.50%	31 of 31 Days	$ 198,421.23
	Closing Balance October 31, 2013		**$ 13,350,000.00**				$ 198,421.23
	October 2013 Lender Payments						
		October 31, 2013	$ 198,421.23				
	Total		$ 198,421.23	0.00			
November 2013			**Fund Balance**	**Funds for Pyt. calc.**	**Payment Rate**	**Pro-rate for Nov**	**Total Payment**
	November 2013 Opening Balance:		$ 13,350,000.00		17.50%	30 of 30 Days	$ 192,020.55
	Closing Balance November 30, 2013		**$ 13,350,000.00**				$ 192,020.55
	November 2013 Lender Payments						
		November 29, 2013	$ 192,020.55				
	Total		$ 192,020.55	(0.00)			
December 2013			**Fund Balance**	**Funds for Pyt. calc.**	**Payment Rate**	**Pro-rate for Dec**	**Total Payment**
	December 2013 Opening Balance:		$ 13,350,000.00		17.50%	31 of 31 Days	$ 198,421.23
	Closing Balance December 30, 2013		**$ 13,350,000.00**				$ 198,421.23
	December 2013 Lender Payments						
		December 31, 2013	$ 198,421.23				
	Total		$ 198,421.23	0.00			
January 2014			**Fund Balance**	**Funds for Pyt. calc.**	**Payment Rate**	**Pro-rate for Jan**	**Total Payment**
	January 2014 Opening Balance:		$ 13,350,000.00		17.50%	31 of 31 Days	$ 198,421.23
	Closing Balance January 31, 2014		**$ 13,350,000.00**				$ 198,421.23

Cash Store Interest Calculation
The Family Trust

January 2014 Lender Disbursement						
	January 29, 2014	$ 198,421.23				
Total		$ 198,421.23	0.00			

February 2014		Fund Balance	Funds for Pyt. calc.	Payment Rate	Pro-rate for Feb	Total Payment
February 2014 Opening Balance:		$ 13,350,000.00		17.50%	28 of 28 Days	$ 194,687.50
Closing Balance February 28, 2014		**$ 13,350,000.00**				$ 194,687.50
February 2014 Lender Disbursement						
	February 28, 2014	$ 194,687.50				
Total		$ 194,687.50	-			

March 2014		Fund Balance	Funds for Pyt. calc.	Payment Rate	Pro-rate for Mar	Total Payment
Opening Balance March 1, 2014		$ 13,350,000.00		17.50%		$ 194,687.50
Closing Balance March 31, 2014		**$ 13,350,000.00**				$ 194,687.50
Disbursement March 28, 2014						
		$ 194,687.50				

TAB 15

Court File No. CV-14-10518-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE - COMMERCIAL LIST

B E T W E E N :

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 THE CASH STORE FINANCIAL SERVICES INC., THE CASH STORE INC., TCS CASH STORE INC., INSTALOANS INC., 7252331 CANADA INC., 5515433 MANITOBA INC., 1693926 ALBERTA LTD. DOING BUSINESS AS "THE TITLE STORE"

APPLICANTS

REPLY AND RESPONDING FACTUM OF TRIMOR ANNUITY FOCUS LP #5
(returnable June 11, 2014)

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Brookfield Place
181 Bay Street, Suite 4400
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Lawyers for Trimor Annuity Focus Limited Partnership #5

TO: THE SERVICE LIST

PART I - INTRODUCTION

1. There are two issues on this motion and cross-motion.

2. The issue on the motion is ownership of the outstanding loans ("**TPL Loans**") in the name of Trimor Annuity Focus Limited Partnership #5 ("**Trimor**") and the other third party lenders ("**TPLs**") at the time of the Applicants' CCAA filing, and the proceeds of those TPL Loans.

3. The DIP Lenders to the Applicants (the "**DIP Lenders**") argue that they should benefit from the comingling of funds by the Applicants in breach of their Broker Agreements with the TPLs. The DIP Lenders suggest that as a result of the comingling of funds, the Cash Store converted the TPLs' property, the TPL Loans, into its own property. Despite, having had the benefit of full disclosure of the nature of the Cash Store's business model and its legal relationship with the TPLs at all relevant times, the DIP Lenders now argue opportunistically for the enlargement of the Applicants' estate for their benefit.

4. The issue on the cross-motion is whether the Transactions (as defined below) are preferences under the applicable legislation.

PART II - THE FACTS

5. In determining the issue of ownership, it is important to carefully consider the facts.

6. In reviewing the arguments made by the DIP Lenders, it must be remembered that when they decided to become creditors of Cash Store they were aware of the following facts, all of which were highlighted in a Preliminary TSCI Circular dated January 12, 2012 ("**Preliminary TSCI Circular**"):[1]

(a) Cash Store acts "primarily as a broker of short-term advances between our customers and third-party lender, ***the effect of which is that the loan portfolio we service is not financed on our balance sheet...***"[2]

(b) "... our business will remain dependant on third-party lenders who are willing to make funds available for lending to our customers. ***There are no assurances that the existing or new third-party lenders will continue to make funds available to our customers.*** Any reduction or withdrawal of funds could have a significant material adverse impact on this portion of our business..."[3]

(c) "***The advances provided by the third-party lenders are repayable by the customer to the third-party lenders and represent assets of the lenders; accordingly, they are not included on our balance sheet...***"[4]

(d) "We have made the decision to ***voluntarily make retention payments to the third-party lenders as consideration for continuing to advance funds to our customers.*** The retention payments are made pursuant to a resolution approved

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[1] Second Armstrong Affidavit sworn May 8, 2014 ("**Second Armstrong Affidavit**") at para. 5 and Exhibit "A" - Preliminary TCSI Circular at p. 4 (internal); Motion Record of Trimor, Tab 3.
[2] *Ibid.* at p. 4 (internal).
[3] *Ibid.* at p. 16 (internal).
[4] *Ibid.* at p. 38 (internal).

by our board of directors (the "Board") which authorizes management to pay a maximum amount of retention payments per quarter, and the retention payments are recorded in the period in which a commitment is made to a lender pursuant to the resolution..."[5]

(e) "***While the third-party lenders have not been guaranteed a return, the decision has been made to voluntarily make retention payments to the lenders to lessen the impact of loan losses experienced by the third-party lenders...***"[6]

7. From the above it is clear that the DIP Lenders were aware that the TPL Funds and Receipts were not assets of Cash Store and that the TPLs were receiving retention payments referred to above to the extent authorized from time to time by the Board of Cash Store.

8. Despite this disclosure, the DIP Lenders are now claiming that because Cash Store commingled the proceeds of the TPL Loans, without the knowledge of the TPLs and in clear breach of the Broker Agreement, they have now been converted into an asset of Cash Store.

9. They go on to argue that the receipt of the Retention Payments, which were fully disclosed, supports this argument because these voluntary, discretionary payments transformed a brokerage arrangement into a loan.

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[5] *Ibid.*
[6] *Ibid.*

10. Lastly, they claim that the TPLs did not bear any collection risk, which they say leads to the conclusion that the TPLs are creditors. This is patently false. As described in more detail below, according to Cash Store, almost a third of the Trimor loan portfolio has gone bad and there is little chance of collecting those loans. The risk of loss could not be more clear.

A. Comingling of TPL Loans Proceeds

11. It is uncontested that the Broker Agreements (i) provide for the proceeds of the TPL Loans to be segregated, and (ii) make it very clear that they are only to be used for the purpose of brokering loans to third parties. One of the reasons for this was that it was important from a regulatory perspective that the funds being lent, and the TPL Loans themselves, did not belong to the Applicants.

12. To the extent that the Cash Store comingled funds, it breached the terms of the Broker Agreements. Contrary to the assertions made by the DIP Lenders, there was no reason for the TPLs to believe that the Cash Store would breach the Broker Agreements and applicable regulatory requirements.

13. The DIP Lenders, who are also pre-filing secured creditors of the Applicants, are now opportunistically attempting to use these breaches of the Broker Agreements as justification for confiscating the TPLs' property.

14. The DIP Lenders argue that by comingling the proceeds of the TPL Loans with its own funds, Cash Store converted the TPL Loans into an asset of Cash Store. Their argument suggests that the Cash Store ought to be entitled to rely on its breach of the

Broker Agreements, and if the DIP Lenders are to be believed, potentially applicable law, to convert the TPL Funds to a Cash Store asset.[7]

B. Retention Payments and Collection Risk

15. The DIP Lenders correctly note that Cash Store's legal relationship with the TPLs is not exhaustively defined by the Broker Agreements. The conduct of the parties is also relevant. For example, the payment of voluntary retention payments and capital protection was not provided for in the Broker Agreements. As highlighted above, these payments and transfers were disclosed to all of Cash Stores creditors, including the DIP Lenders/bondholders/secured creditors and were approved by Cash Store's Board of Directors pursuant to resolutions passed from time to time, presumably in accordance with the Board's business judgment. [8] Despite an oblique reference to the contrary in the DIP Lenders' factum, there is not a shred of evidence that suggests that the Cash Store did not at all relevant times operate at arm's length from the TPLs.

16. The reason for these payments is clear. This brokering model was very lucrative for Cash Store, which received a risk free 23% brokering fee upfront each and every time a loan was made. That meant that it made a risk free profit on every transaction, and the TPLs assumed the borrower's credit risk.[9] Without the retention payments, the TPLs

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[7] The *ex turpi causa* doctrine prohibits a party from benefitting from its illegal or immoral conduct: *Randhawa v. 420413 B.C. Ltd.*, 2009 BCCA 602 at para. 66 citing *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 45; Book of Authorities of Trimor, Tab 1. This doctrine has been applied in the context of bankruptcy proceedings. In *Re Bluebird Corp.* [1926] 2 D.L.R. 484, the Court confirmed that "no one can have the assistance of the Court in an attempt to place himself in better legal position by breaking the law." Book of Authorities of Trimor, Tab 2.

[8] Affidavit of Steven Carlstrom sworn April 14, 2014 ("**Carlstrom Affidavit**") at para. 85; Motion Record of the Applicants at Tab 1.

[9] Report of PricewaterhouseCoopers dated May 14, 2014 (the "**PwC Report**") at p. 6 (internal); Motion Record of Trimor, Tab 4.

would have demanded the return of the TPL Loans and proceeds and deprived the Cash Store of an important source of revenue that could be used, among other things, to service its secured loans and bonds. [10]

17. To encourage the TPLs to continue to make the TPL Funds available for brokering, the Cash Store decided from time to time to make Retention Payments. As stated by Mr. Carlstrom in his affidavit, "Under the broker model, Cash Store makes voluntary retention payments to the TPLs to encourage them to continue making funds available to Cash Store". [11]

18. The Retention Payments made by the Cash Store were neither "fixed" nor "guaranteed". The Retention Payments were "voluntary" and could be made in any amount the Cash Store Board of Directors determined appropriate, which is evidenced by the fact that they fluctuated over time. [12] They were entirely at the discretion of the Cash Store and could be terminated unilaterally by the Cash Store at any time, as can be seen by the fact that, as the DIP Lenders state in their factum, "Cash Store elected not to make any ***voluntary*** retention payments to the TPLs" after February 2014. [13]

19. While it is true that, as stated in Mr. Carlstrom's affidavit, the Retention Payments were made to "lessen the impact of loan losses", [14] there is no doubt that the TPLs continue to have collection risk and suffered loan losses. In fact, the Applicants

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[10] Carlstrom Affidavit at para. 85; Motion Record of the Applicants at Tab 1.
[11] Carlstrom Affidavit at para. 85; Motion Record of the Applicants at Tab 1.
[12] Trimor Distribution Summary, March 2014, DIP Lender Cross-Motion Record, Tab 2
[13] DIP Lender Factum, para. 47
[14] Carlstrom Affidavit at para 84; Motion Record of the Applicants at Tab 1.

allege that Trimor experienced more than $8 million in loan losses according to Cash Store's records.[15]

20. The DIP Lenders inaccurately state at paragraph 27 of their factum that the reason that 0% of Trimor's loans were greater than 90 days past due is that Cash Store had "acquired all of Trimor's bad debt, insulating it completely from the credit risk of the payday lending products." This is simply wrong. The reason that 0% of Trimor's loans were more than 90 days overdue is that Cash Store wrote off all loans that were more than 90 days past due. The amount of loans that were more than 90 days past due is included in the "balance forward" shown in the Trimor portfolio summary as at March 31, 2014 contained in the PwC Report.[16]

21. This is clearly stated in the PwC Report, "The current loan portfolio balance represents loans less than 90 days overdue" and "The balance forward [of $8,514,000] presented on the lender statement is comprised primarily of loans more than 90 days overdue".[17] PwC goes on to state that "The Company has acknowledged that loans more than 90 days [overdue] are more difficult to collect and have a low likelihood of being collected".[18] As a result, there is a low likelihood that Trimor will recover approximately 30% of the amounts it has lent to Cash Store customers. This is a significant credit risk.

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[15] PwC Report at pp. 13 and 17, Trimor Motion Record, Vol. 3, Tab 4.
[16] PwC Report at p. 13, Trimor Motion Record, Vol. 3, Tab 4.
[17] PwC Report at p. 17; Trimor Motion Record, Vol. 3, Tab 4.
[18] PwC Report at p. 18; Trimor Motion Record, Vol. 3, Tab 4.

PART III - ISSUES AND THE LAW

22. The sole issue on the cross-motion is whether making payments to the TPLs is a preference under the legislation referred to by the DIP Lenders.

A. The Brokering Business was not a Preference

i. The TPLs are not creditors of the Cash Store

23. The TPLs are not creditors of Cash Store with respect to the TPL Loans or proceeds of the TPL Loans. It is clear from both the Broker Agreements and the conduct of the parties that the TPL funds were made available by the TPLs solely for the purpose of brokering TPL Loans to third parties, and were not lent to Cash Store.

24. The cases relied on by DIP Lenders to assert a debtor-creditor relationship are either distinguishable or support the TPLs argument that there is no such relationship.

25. The DIP Lenders argue that the Retention Payments are "interest" and that this establishes a debtor-creditor relationship. The only "interest" that was required to be paid to the TPLs was to be paid by the Applicants' customers. In Trimor's case, the obligation to pay interest was set out in the loan agreements entered into between Trimor (not Cash Store) and the Applicants' customers.[19] The DIP Lenders have not introduced any evidence that any TPL Loans in the name of Trimor were made pursuant to agreements between Cash Store and its customers. There is no legal obligation for any customer of Cash Store that is a borrower under a TPL Loan in the name of Trimor to pay principal or interest to Cash Store. A customer's legal obligation to Cash Store is to pay a broker commission at the time a loan is made.

26. As between Cash Store and Trimor, the risk of a customer failing to repay its loan remained solely with Trimor. The fact that Cash Store might unilaterally and

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[19] PwC Report p. 10, Motion Record of Trimor, Vol. 3, Tab 4.

voluntarily elect to offset all or a portion of the losses arising from that risk from time to time in order to induce Trimor to leave the TPL Loans with Cash Store does not turn a broker relationship into a debtor creditor relationship.

27. At paragraph 53 of their Factum, the DIP Lenders include a quote from *Oosterhoff on Trusts* which actually supports the TPLs position. It states that:

> [T]he debtor always remains liable to the creditor until the debt is paid. The trustee, however, is not personally obligated to compensate the beneficiaries if the trust property is lost other than through the trustee's own fault.

28. That is exactly the case here. According to the Applicants, Trimor currently holds over $8 million in bad, or written off, loans in its loan portfolio. As provided in the Broker Agreement, Cash Store has no obligation to make Trimor whole unless it was negligent in its duties.[20] When the Broker Agreement terminates, all that the TPLs receive is the cash and loans in existence at the time of the termination, which includes all of the bad loans.[21] Nothing in the Broker Agreements or in the Cash Store's conduct requires the Cash Store to make the TPLs whole for bad loans. The TPLs are at risk, not the broker, Cash Store.

29. At paragraph 55 of their Factum, the DIP Lenders rely on *Salo v. Royal Bank of Canada*, where the Court held that "no direction or control was exercised"[22] over the property at issue. The facts of this case obviously differ from *Salo*. Trimor exercised

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[20] Affidavit of Erin Armstrong sworn April 13, 2014 (the "**Armstrong Affidavit**") – Exhibits "A" and "B", s. 7.1; Motion Record of Trimor, Tab 1.
[21] Armstrong Affidavit – Exhibits "A" and "B, s. 6.4; Motion Record of Trimor, Tab 1.
[22] 1998 BCJ No. 999 (BCCA) at p. 2; Book of Authorities of Trimor, Tab 3.

significant control over the TPL Funds, which included, but was not limited to, the fact that:

(a) The Broker Agreements required the TPL Funds to be segregated from Cash Store's funds; [23]

(b) The TPL Funds could only be used for the purpose of brokering loans to third parties;[24]

(c) The TPLs retained the right to reduce the TPLs Funds available for brokering on 120 days' notice;[25]

(d) Trimor had the legal authority to approve loans and specify the amounts of loans that were made to Customers;[26] and

(e) The TPLs had audit rights, which they exercised.[27]

30. In paragraph 54 of its factum, the DIP Lender relies on *Outset Media Corp. v. Stewart House Publishing Inc.* ("*Outset*").[28] That case is also clearly distinguishable from the facts here. In *Outset*, "the parties entered into a contract that obligated the applicant to pay the respondent 75 percent (a fixed rate) of an amount invoiced to purchasers regardless of the ultimate sale price of the product. In contrast, Cash Store had no obligation under the Broker Agreement, or otherwise, to make the voluntary retention payments at a particular rate, or at all.

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[23] Affidavit of Erin Armstrong sworn April 13, 2014 (the "**Armstrong Affidavit**") – Exhibits "A" and "B", s. 1.1(g) and (h).
[24] Transcript of Cross-Examination of Erin Armstrong on her affidavits sworn April 13 and May 8, 2014 held on May 21, 2014 ("**Armstrong Cross-Examination Transcript**"), questions 97, 98, 168 and Exhibits "1", "2", "3" and"9"; Motion Record of Trimor at Tab 6.
[25] Armstrong Affidavit, Exhibits "A" and "B" at ss. 2.2 and 6.4.
[26] Armstrong April 13 Affidavit, at para. 13, Motion Record of Trimor at Tab 1 and Armstrong Affidavit at para. 13, Exhibits "A" and "B" at s. 2.3, Motion Record of Trimor at Tab 6.
[27] Armstrong Affidavit at para. 13, Exhibits "A" and "B" at s. 5.1, Carlstrom Affidavit at para. 134 and Exhibit "U".
[28] [2003] O.J. No. 2558 (C.A.); Book of Authorities of Trimor, Tab 4.

31. The DIP Lenders have fundamentally mischaracterized what they refer to as the "basic foundation" of the relationship between Cash Store and the TPLs. The TPLs had no legal right to a specified rate of return on their capital and the TPLs assumed the credit risk of Cash Store's customers.

32. The DIP Lenders' claim that Trimor made its funds "generally available to Cash Store in the running of its business" is also simply wrong. In fact, Trimor obtained an express statement from Cash Store that it had "never used [proceeds of Trimor Loans] for any other purpose than loans to customers or maintaining a loan float."[29] Trimor also believed that the Trimor Funds were also separated from Cash Store's funds in a segregated account containing only TPL Funds.[30]

ii. If TPLs were Otherwise Creditors of Cash Store, the Proceeds of TPL Loans are impressed with a Trust

33. To the extent that this Court finds that there is a creditor-debtor relationship between the Cash Store and Trimor, the Trimor Loans and Receipts are the subject of a "Quistclose trust". A "Quistclose trust" arises in the following circumstances:

(a) Where the mutual intent of the parties is that the funds advanced be used exclusively for a particular use, the lender obtains an equitable right to see that the funds are applied for the primary designated purpose;[31] and

(b) If the primary purpose cannot be carried out, the question arises if a secondary purpose (*i.e.*, repayment to the lender) has been agreed expressly or by implication. If so, a secondary resulting "Quistclose trust" arises for the benefit of the lender.[32]

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[29] Transcript of Cross-Examination of Erin Armstrong on her affidavits sworn April 13 and May 8, 2014 held on May 21, 2014 ("**Armstrong Cross-Examination Transcript**"), Exhibit "3" and "9"; Motion Record of Trimor at Tab 6.
[30] Second Armstrong Affidavit at para. 10; Motion Record of Trimor, Tab 3.
[31] *Maple Homes Canada* , 2000 BCSC 1443 at para. 47 citing *Barclays Bank Ltd. v. Quistclose Investments Ltd.* (1968), [1970] A.C. 567 (U.K. H.L.).
[32] *Maple Homes Canada* , 2000 BCSC 1443 at para. 47 citing *Barclays Bank Ltd. v. Quistclose Investments Ltd.* (1968), [1970] A.C. 567 (U.K. H.L.).

34. Cash Store advised Trimor that it would not use Trimor Loans and Receipts for any purpose other than advancing loans in accordance with the Broker Agreements, unless Cash Store first obtained Trimor's written permission.[33] No such permission was ever granted. Cash Store also advised Trimor that it had "never used [Trimor Funds] for any other purpose than loans to customers or maintaining a loan float."[34]

35. The CRO has determined, in consultation with the Monitor, that it is necessary and appropriate to implement a cessation of the brokered loan business and cease brokering new loans in all jurisdictions in which the Cash Store operates.[35] Cash Store's intention to cease all brokered loan operations effectively terminates the Broker Agreements.

36. Trimor and Cash Store expressly agreed that on termination of the Broker Agreements, the Trimor Loans and Receipts would, at the sole option of Trimor, be repaid to Trimor.[36] Accordingly, the Trimor Loans and proceeds of Trimor Loans are the subject of a "Quistclose Trust" for the benefit of Trimor.

B. The Transfer of Loan Receivables to TPLs Was Not a Preference

37. The DIP Lenders seek a declaration that two categories of transactions which occurred between the TPLs and the Cash Store constitute preferences:

(a) Cash Store's designation of advances or loans in the TPLs' names; and

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[33] Armstrong Cross-Examination Transcript, questions 97, 98, 168 and Exhibits "1", "2", "3" and"9".
[34] Armstrong Cross-Examination Transcript, Exhibit "3" and "9".
[35] Affidavit of William Aziz sworn May 9, 2014 (the "**Aziz Affidavit**") at para. 29.
[36] Upon termination of the Broker Agreements, Trimor has the option to allow the Applicants to continue to administer the Trimor Loans, transfer the administration of them to a new service provider, or sell the Trimor Loans to a third party. Armstrong Affidavit, Exhibits "A" and "B" at paras. 6.4.

(b) Any assignment by the Cash Store to the TPLs of non-brokered loans made in Cash Store's name (the "**Transactions**").

38. By way of cross-motion, the DIP Lenders ask for the Court's assistance in reversing the Transactions in order, they say, to ensure that the proceeds of loans made or brokered by the Cash Store are available to all creditors in accordance with their respective priorities. This application has nothing whatsoever to do with "all creditors" of the Cash Store nor is it brought in furtherance of the policies and objectives of the CCAA. This is a blatant attempt by the DIP Lenders to summarily opportunistically scoop the TPL Loans and the proceeds of the TPL Loans to secure repayment of their DIP Loans and nothing more. The DIP Lenders lack both the standing and the legal basis to impugn any Transactions. This backend attack on the substance of the Broker Agreements and the regular course business practices between the TPLs and the Cash Store of which the DIP Lenders ("qua" DIP Lenders, pre-filing lien holders and pre-filing bondholders) were always well aware ought not to be countenanced by this Court.

i. The DIP Lenders Lack Standing to Bring Preference Claim

39. Creditors, such as the DIP Lenders, are not entitled as of right to impugn a payment as a preference in a CCAA proceeding.

40. Under sections 95 and 96 of the BIA, a trustee in bankruptcy has the right to impugn a payment or transaction as a preference or transfer at undervalue. Section 36.1 of the CCAA extends this right to a CCAA Monitor. It does not extend it to individual creditors of the CCAA estate unless the creditor complies with Section 38 and takes an

assignment of the claim. The Monitor has not challenged any transaction involving the TPLs as a preference. The DIP Lenders have not purported to take an assignment of the claim, nor would it be appropriate for them to do so in light of their express or implied consent to the ordinary course Transactions that they now complain of.

ii. The Transactions are not void as Preferences

41. Even if the DIP Lenders' motion was properly before the Court, the Transactions are not preferences or otherwise void under any legal theory advanced by the DIP Lenders in their cross-motion and factum or any other legal theory. The DIP Lenders seek to void or set aside the Transactions as:

(a) preferences under section 95 of the BIA; or

(b) void transactions under section 2 of Ontario's Fraudulent Conveyances Act and section 3 of Alberta's Fraudulent Preferences Act (Alberta).[37]

42. The DIP Lenders must, in order to successfully impeach the Transactions under any of these provisions, prove the following essential elements:

(a) that the Cash Store was insolvent at the time of the Transactions; and

(b) that the Transactions were made with the intention to prefer or that the Transactions were made outside the ordinary course of business of the Cash Store and for inadequate consideration.

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[37] BIA, ss 95, 96; *Fraudulent Conveyances Act*, RSO 1990, c F.29 [***FCA***] s. 2; *Fraudulent Preferences Act*, RSA 2000, c F-24 [***FPA***] ss. 2, 3.

43. The DIP Lenders have not proven any of these elements.

C. DIP Lenders have Failed to Establish the Statutory Requirements for a Preference

44. Under section 95 of the BIA, a trustee in bankruptcy (or a monitor in a CCAA) is empowered to attack certain payments, transfers of property or provision of services before the initial bankruptcy event with the intent of preferring one arms' length creditor (or multiple creditors) over others.

45. A pre-CCAA-filing transaction with an arm's length creditor is void under section 95 if three conditions are met:

(a) The transaction was made within the prescribed period;

(b) The debtor was insolvent on the date of the impugned transaction; and

(c) The debtor intended to prefer one creditor over another.[38]

46. For arm's length creditors, the prescribed period is three months before the date of the initial bankruptcy event. For non-arm's length creditors, the prescribed period is one year before the date of the initial bankruptcy event.

47. The BIA provides that test for determining whether non-related parties are dealing at arm's length is whether the "transaction at arm's length could be considered to

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[38] *Keith G Collins Ltd v Canadian Imperial Bank of Commerce*, 2011 MBCA 41 at para 19, 268 Man R (2d) 30; Book of Authorities of Trimor, Tab 9. *Touche Ross Ltd v Weldwood of Canada Sales Ltd*, 48 CBR (NS) 83 at paras 3- 7, 1983 CarswellOnt 214 (SC) [*Touche Ross*]; Book of Authorities of Trimor, Tab 10.

be a transaction between persons between whom there are no bonds of dependence, control or influence, in the sense that neither of the two co-contracting parties has available any moral or psychological leverage sufficient to diminish or possibly influence the free decision-making of the other".[39]Notwithstanding a vague reservation of rights in their Factum, the DIP Lenders have not seriously suggested, nor have they provided any evidence to establish, that any of the TPLs did not operate at arm's length from the Cash Store.

48. There is no evidence that either the Cash Store or Trimor have any moral or psychological leverage over one another that would diminish or possibly influence the free decision-making of the other. The DIP Lenders have not shown that the Cash Store and Trimor do not deal at arm's length. Therefore that three month period applies.

49. Section 2 of the FCA requires the DIP Lenders to prove intent to "defeat, hinder, delay or defraud" creditors. For conveyances made for good consideration, the DIP Lenders must prove the fraudulent intent of both parties to the transaction. For voluntary conveyances, the DIP Lenders need to prove the fraudulent intent of the maker of the conveyance.[40]

50. In Alberta, the FPA sets out rules which are substantially similar to those in Ontario. Under section 3 of the FPA, a transaction is void if, within one year of the impugned transaction, an action is commenced to set it aside, the debtor company was

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[39] BIA, s. 4(4); *Abou-Rached*, Re 2002 BCSC 1022 at para 46; Book of Authorities of Trimor, Tab 11.
[40] *FCA*, s. 2.

in insolvent circumstances or unable to pay debts in full or was on the eve of insolvency, and the transaction had the effect of giving a creditor a preference. Section 3 provides as follows:

> [3 Subject to sections 6 to 9, every gift, conveyance, assignment, transfer, delivery over or payment of goods, chattels or effects or of bills, bonds, notes or securities or of shares, dividends, premiums or bonus in any bank, company or corporation, or of any other property, real or personal, made
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> (a) by a person at a time when the person is in insolvent circumstances or is unable to pay the person's debts in full or knows that the person is on the eve of insolvency, and
>
> (b) to or for a creditor and having the effect of giving that creditor a preference over the other creditors of the debtor or over any one or more of them,
>
> is, in and with respect to any action that within one year after the transaction is brought to impeach or set aside the transaction, void as against the creditor or creditors injured, delayed, prejudiced or postponed.

51. While an intention to prefer need not be shown under section 3 of the FPA if the impugned transaction has preferential effect, bona fides transactions are protected from the ambit of the FPA at s. 6, which provides:

> **6** Nothing in sections 1 to 5 applies to
>
> (a) a bona fide sale or payment made in the ordinary course of trade or calling to innocent purchasers or parties, or
>
> (b) a payment of money to a creditor, or a bona fide conveyance, assignment, transfer or delivery over of any goods, securities or property, of any kind as above mentioned, that is made in consideration of a present actual bona fide sale or delivery of goods or other property or of a present actual bona fide payment in money, or by way of security for a present actual bona fide advance of money,
>
> if the money paid or the goods or other property sold or delivered bear a fair and reasonable relative value to the consideration for it.

52. As described in greater detail below, all of the Transactions were in the ordinary course of business.

ii. No Evidence of Insolvency

53. All of the statutory provisions pursuant to which the DIP Lenders ask the court to set aside the Transactions require the DIP Lender's to prove that the Cash Store was insolvent at the time the Transactions took place.

54. A party seeking to have a transaction set aside on the basis that it constitutes a preference has the burden of proving that the debtor was in fact insolvent at the time of the impugned transaction. The court is not to presume insolvency.[41]

55. Pursuant to s. 2 of the BIA, "insolvent person" means

> a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and
>
> (a) who is for any reason unable to meet his obligations as they generally become due,
>
> (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
>
> (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;

56. In a recent decision of the Ontario Superior Court, it was held that despite the fact that the plaintiff was in default of their mortgage (failed to make payments for 13 months), they were not insolvent under the BIA.

57. An application under section 248 must be made by an insolvent person. The onus of proving insolvency is on the applicant, on a balance of probabilities. The definition of

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[41] *Keith G. Collins Ltd. v. Canadian Imperial Bank of Commerce*, 2011 MBCA 41 at para. 20; Book of Authorities of Trimor, Tab 9.

an "insolvent person" is found in section 2 of the BIA. Having regard to that definition, although I am satisfied the Plaintiff is not bankrupt, carries on business in Canada, and has liabilities in excess of $1,000, there has been no evidence led upon which I could find it is unable to meet its obligations in the ordinary course of business, has ceased paying its current obligations in the ordinary course of business as they generally become due, or that the aggregate of its property is not, at a fair valuation, sufficient, if disposed of at a fairly conducted sale under legal process, to enable payment of all its obligations.[42]

58. The DIP Lenders have not produced any evidence to show that the Cash Store was insolvent as of September 2013 or any time prior to April 14, 2014. They have not shown that the Cash Store was unable to meet its obligations generally as they became due or that the Cash Store had ceased meeting its obligations in the ordinary course of business.

59. The DIP Lenders have also not proven that, as at September 2013, the aggregate of the Cash Store's property if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due. Simply referring to the book value of the assets and liabilities as stated on Cash Store's balance sheet is not enough to meet the burden. In *King Petroleum Ltd.*, Re, 29 C.B.R. (N.S.) 76, the Ontario Superior Court noted as follows:

> 11 To consider the question of insolvency under cl. (c) I must look to the aggregate property of the company and come to a conclusion as to whether or not

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[42] *917488 Ontario Inc. v. Sam Mortgages Ltd*, 2013 ONSC 2212 at para. 38.

it would be sufficient to enable payment of all obligations due and accruing due. There are two tests to be applied: first, its fair value and, secondly, its value if disposed of at a fairly conducted sale under legal process. The balance sheet is the starting point, but the evidence relating to the fair value of the assets and what they might realize if disposed of at a fairly conducted sale under legal process must be reviewed in interpreting it.[43]

iii. The Transactions occurred in the ordinary course of business of the Cash Store

60. All of the statutory provisions relied on by the DIP Lenders, with the exception of section 3 of the FPA require the DIP Lenders to show that the Cash Store intended to prefer the TPLs. However, section 3 of the FPA presumes a preference has occurred if the impugned transaction has the effect of preferring a creditor but transactions made in the ordinary course of the business of the debtors or payments given by the debtor in exchange for a benefit are exempted from the application of section 3 and the other avoidance provisions in the FPA.

61. The debtor's intention and ordinary course of business are related concepts. If a transaction occurred in the ordinary course of the debtor's business or payment or transfer given in exchange for present consideration the presumption of intention that such transaction, payment or transfer constituted a preference is rebutted.[44]

62. The fact is that the Transactions occurred in the ordinary course of business of the Cash Store in accordance with the Broker Agreements entered into by the Cash Store outside the review periods prescribed by the various statutes with the full knowledge of

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[43] *King Petroleum Ltd.*, Re, 29 C.B.R. (N.S.) 76 at para. 11; Trimor Book of Authorities of Trimor, Tab 12.
[44] *St. Anne-Nackawic Pulp Co. (Trustee of) v. Logistec Stevedoring (Atlantic) Inc.*, 2005 NBCA 55 at para 13; Trimor Book of Authorities of Trimor, Tab 17; L.W. Houlden and Geoffrey B. Morawetz, *Houlden and Morawetz Bankruptcy and Insolvency Analysis*, Bankruptcy and Insolvency Act Part IV (ss. 67-101.2), F§210 — Rebutting The Presumption; Trimor Book of Authorities, Tab 18.

the secured creditors and bondholders. Further the transfers of loan receivables were made for valuable consideration to encourage the TPLs to continue to make their funds available to the Cash Store, again with the knowledge of the secured creditors and bondholders.

63. Intention requires an objective assessment of the debtor's intention at the time of the transaction. Justice Bastin furnished the quintessential statement of this test in *Re Holt Motors Ltd.*:[45]

> The test which I consider should be applied is an objective and not a subjective one, that is to say, the intention which should be attributed to the parties will always be that which their conduct bears a reasonably construed and not that which, long after the event, they claim they believe was present in their minds.

64. In the present case, as in the Holt Motors case, the intention which should be attributed to the Cash Store is that which their conduct reasonably bears. The evidentiary record makes clear that the Cash Store did not intend to prefer Trimor through the Transactions. The Transactions were made in accordance with the Broker Agreements and the established practices between the Trimor and the Cash Store, both of which the DIP Lenders (qua DIP Lenders, pre-filing lienholders, and pre-filing bondholders) were well aware of.

65. Payments in the ordinary course of business are usually made so that the debtor company can take advantage of favourable payment terms or to secure a continued supply of goods or services so that the debtor company can continue in business. In such

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[45] *Re Holt Motors Ltd* (1966), 57 DLR (2d) 180 at para 8, 56 WWR 182 (Man QB) [Holt Motors]; Book of Authorities of Trimor, Tab 13. *Thorne Riddell v Fleishman*, 47 CBR (NS) 233 at para 26, 1983 CarswellOnt 201 (Sup Ct); Book of Authorities of Trimor, Tab 14.

circumstances, the debtor company's expectation that the transaction would permit it to remain in business and buy some time to extricate itself from its financial difficulties will strongly militate against finding an intent to prefer.[46]

66. In the present case, the Transactions bear none of the badges of fraud which the courts will often look at in reviewable transaction cases where there is often no direct evidence of intent. The Cash Store's secured creditors had notice of the business arrangements between Cash Store and Trimor, including the fact that Trimor retained ownership of the Trimor Loans and proceeds of the Trimor Loans. The secured creditors did not therefore suffer any prejudice. Rather, they benefitted from the risks of lending into a structure in which these TPL arrangements were in place. The Cash Store received the benefit of the broker fees earned on loans brokered to Customers with TPL monies, which were in turn used to make interest payments to Cash Store's secured creditors. The secured lenders cannot now seek to confiscate the Trimor Loans and the proceeds of the Trimor Loans simply because the inherent risks in their investments materialized into real losses.

67. As set out above, the evidence of the TPLs is that they are, and have always been, the sole legal and beneficial owners of the TPL property. The Cash Store did not transfer their property to the TPLs.

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[46] *Re AR Colquhoun & Son Ltd*, [1937] WWR 222, 18 CBR 124 (SaskKB); Book of Authorities of Trimor, Tab 15. *Re Norris* (1994), 23 Alta LR (3d) 397 at para 7, 28 CBR (3d) 167 (QB), rev'd on other grounds (1996), 45 Alta LR (3d) 1., 193 AR 15 (CA); Book of Authorities of Trimor, Tab 16.

68. In their factum, the DIP Lenders allege that even Transactions entered into after the Initial Order was made constitute preferences under the BIA and/or voidable transactions under the FPA and FCA. In addition to the points made above, those transactions were entered into by the Applicants under the management of the CRO and the supervision of the Monitor and as expressly contemplated in the Initial Order and the Additional TPL Protection Order made in these proceedings. The DIP Lenders had notice of and consented to both of those orders. For the DIP Lenders to now argue that such transactions are improper is telling.

PART IV - ORDER REQUESTED

69. Trimor respectfully requests that the relief sought by the DIP Lender in the cross-motion be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of June, 2014.

Brett Harrison and Adam Maerov
McMillan LLP

Lawyer for Trimor Annuity Focus Limited Partnership #5

SCHEDULE "A"
LIST OF AUTHORITIES

1 *Randhawa v 420413 BC Ltd*, 2009 BCCA 602, 2009 CarswellBC 3512

2 *Bluebird Corp, Re*, 1926 CarswellOnt 29, [1926] 2 DLR 484

3 *Salo v Royal Bank of Canada*, 1988 CarswellBC 3186, 11 ACWS (3d) 148

4 *Outset Media Corp v Stewart House Publishing Inc*, 2003 CarswellOnt 2460, 34 BLR (3d) 241

5 *Maple Homes Canada Ltd, Re*, 2000 BCSC 1443, 2000 CarswellBC 2017

6 *Tucker v Aero Inventory (UK) Ltd*, 2011 ONSC 4223, 2011 CarswellOnt 8476

7 *Verdellen v Monaghan Mushrooms Ltd*, 2011 ONSC 5820, 2011 CarswellOnt 11612

8 *Dilollo, Re*, 2013 ONSC 578, 2013 CarswellOnt 781

9 *Keith G Collins Ltd v Canadian Imperial Bank of Commerce*, 2011 MBCA 41, 2011 CarswellMan 196

10 *Abou-Rached, Re*, 2002 BCSC 1022, 2002 CarswellBC 1642

11 *917488 Ontario Inc v Sam Mortgages Ltd*, 2013 ONSC 2212, 2013 CarswellOnt 4413

12 *King Petroleum Ltd, Re*, 1978 CarswellOnt 197, 29 CBR (NS) 76

13 *Holt Motors Ltd, Re*, 1966 CarswellMan 3, 56 WWR 182

14 *Thorne Riddell v Fleishman*, 1983 CarswellOnt 201, 47 CBR (NS) 233

15 *AR Colquhoun & Son Ltd, Re*, 1936 CarswellSask 15, [1937] 1 WWR 222

16 *Norris, Re*, 1994 CarswellAlta 353, [1994] AWLD 831

17 *St. Anne Nackawic Pulp Company Ltd.*, 2005 NBCA 55

18 L.W. Houlden and Geoffrey B. Morawetz, *Houlden and Morawetz Bankruptcy and Insolvency Analysis*, Bankruptcy and Insolvency Act Part IV (ss. 67-101.2), F§210 — Rebutting The Presumption; Trimor Book of Authorities, Tab 18

SCHEDULE "B"
RELEVANT STATUTES

Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3

S.2: "insolvent person"

a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

(a) who is for any reason unable to meet his obligations as they generally become due,

(b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;

S. 4(4):

Question of fact

(4) It is a question of fact whether persons not related to one another were at a particular time dealing with each other at arm's length.

Preferences

95. (1) A transfer of property made, a provision of services made, a charge on property made, a payment made, an obligation incurred or a judicial proceeding taken or suffered by an insolvent person

(a) in favour of a creditor who is dealing at arm's length with the insolvent person, or a person in trust for that creditor, with a view to giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy; and

(b) in favour of a creditor who is not dealing at arm's length with the insolvent person, or a person in trust for that creditor, that has the effect of giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up

against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is 12 months before the date of the initial bankruptcy event and ending on the date of the bankruptcy.

Transfer at undervalue

96. (1) On application by the trustee, a court may declare that a transfer at undervalue is void as against, or, in Quebec, may not be set up against, the trustee — or order that a party to the transfer or any other person who is privy to the transfer, or all of those persons, pay to the estate the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor — if

a. the party was dealing at arm's length with the debtor and

   i. the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and that ends on the date of the bankruptcy,

   ii. the debtor was insolvent at the time of the transfer or was rendered insolvent by it, and

   iii. the debtor intended to defraud, defeat or delay a creditor; or

b. the party was not dealing at arm's length with the debtor and

   i. the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and ends on the date of the bankruptcy, or

   ii. the transfer occurred during the period that begins on the day that is five years before the date of the initial bankruptcy event and ends on the day before the day on which the period referred to in subparagraph (i) begins and

      (A) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, or

      (B) the debtor intended to defraud, defeat or delay a creditor.

Fraudulent Conveyances Act, R.S.O. 1990, c. F.29

Where conveyances void as against creditors

2. Every conveyance of real property or personal property and every bond, suit, judgment and execution heretofore or hereafter made with intent to defeat, hinder, delay or defraud creditors or others of their just and lawful actions, suits, debts, accounts,

damages, penalties or forfeitures are void as against such persons and their assigns. R.S.O. 1990, c. F.29, s. 2.

Fraudulent Preferences Act, RSA 2000, c F-24

Preferential effect

3 Subject to sections 6 to 9, every gift, conveyance, assignment, transfer, delivery over or payment of goods, chattels or effects or of bills, bonds, notes or securities or of shares, dividends, premiums or bonus in any bank, company or corporation, or of any other property, real or personal, made

> (a)by a person at a time when the person is in insolvent circumstances or is unable to pay the person's debts in full or knows that the person is on the eve of insolvency, and
>
> (b)to or for a creditor and having the effect of giving that creditor a preference over the other creditors of the debtor or over any one or more of them,

is, in and with respect to any action that within one year after the transaction is brought to impeach or set aside the transaction, void as against the creditor or creditors injured, delayed, prejudiced or postponed.

6 Nothing in sections 1 to 5 applies to

> (a) a bona fide sale or payment made in the ordinary course of trade or calling to innocent purchasers or parties, or
>
> (b) a payment of money to a creditor, or a bona fide conveyance, assignment, transfer or delivery over of any goods, securities or property, of any kind as above mentioned, that is made in consideration of a present actual bona fide sale or delivery of goods or other property or of a present actual bona fide payment in money, or by way of security for a present actual bona fide advance of money,

if the money paid or the goods or other property sold or delivered bear a fair and reasonable relative value to the consideration for it.

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 THE CASH STORE FINANCIAL SERVICES INC., THE CASH STORE INC., TCS CASH STORE INC., INSTALOANS INC., 7252331 CANADA INC., 5515433 MANITOBA INC., 1693926 ALBERTA LTD. DOING BUSINESS AS "THE TITLE STORE"

APPLICANTS

Court File No. CV-14-10518-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE - COMMERCIAL LIST

Proceeding commenced at Toronto

REPLY AND RESPONDING FACTUM OF TRIMOR ANNUITY FOCUS LP #5 (RETURNABLE JUNE 11, 2014)

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TAB 16

Court File No. CV-14-10518-00CL

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

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APPLICANTS

FACTUM OF THE MOVING PARTY,
0678786 B.C. LTD. (FORMERLY THE MCCANN FAMILY HOLDING CORPORATION)
(returnable June 11, 2014)

Date: May 30, 2014

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TO: SERVICE LIST

Court File No. CV-14-10518-00CL

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 THE CASH STORE FINANCIAL SERVICES INC., THE CASH STORE INC., TCS CASH STORE INC., INSTALOANS INC., 7252331 CANADA INC., 5515433 MANITOBA INC., 1693926 ALBERTA LTD. DOING BUSINESS AS "THE TITLE STORE"

APPLICANTS

FACTUM OF THE MOVING PARTY,
0678786 B.C. LTD. (FORMERLY THE MCCANN FAMILY HOLDING CORPORATION)
(returnable June 11, 2014)

I. OVERVIEW

1. The moving parties, responding parties by cross-motion, are third-party lenders ("**TPLs**") which entrusted millions of dollars to the Applicants for the sole purpose of brokering loans between the TPLs and borrowers. At all times, the TPLs retained ownership of their funds and all of the loans ultimately brokered with those funds or otherwise purchased by or assigned to the TPLs. They also own any accounts receivable in respect of their loans and any amounts actually received by the Applicants from their customers in repayment of the loans. This arrangement was memorialized in written broker agreements.

2. 0678786 B.C. Ltd., formerly the McCann Family Holding Corporation ("**McCann**"), is a TPL. McCann made approximately $13,350,000 available to the Applicants under a broker agreement that expressly provided that McCann owned its funds, the loans and any receivables. In this motion, McCann requests a declaration that, among other things, McCann is the sole legal and beneficial owner of these funds, loans and receivables, as reflected in its broker agreement, before its property vanishes like the millions of dollars in cash and other assets that the TPLs entrusted to the Applicants.

3. Now, after the Applicants obtained an initial order under the CCAA, the DIP lenders wish to re-write history. In their cross-motion, the DIP lenders ask this Court to declare that McCann's property belongs to the Applicants, effectively locking McCann's property into a business which is taking no steps to collect on outstanding McCann loans, has huge realization costs and cannot reasonably be expected to maximize recoveries.

4. The DIP lenders do not articulate any plausible legal theory in support of their request. Rather, they simply insist in the face of overwhelming evidence to the contrary that the TPLs are mere unsecured creditors. This cross-motion is a transparent effort to appropriate assets to which they have no entitlement to secure repayment of their DIP loans.

5. The DIP lenders also attack ordinary-course transactions between the Applicants and the TPLs. This issue, however, is not properly before this Court. The right to impugn a transaction as a preference or transfer at undervalue belongs to the Monitor, and the Monitor has not challenged any of the transactions in question. Further, the period for reviewing transactions as possible preferences has lapsed. In any event, the evidence makes clear that the impugned transactions do not constitute preferences or transfers at undervalue. Rather, the TPL property is, and has always

been understood and intended to be, the property of the TPLs. These transactions were not intended to prefer, defraud or otherwise hinder the Applicants' other creditors, and the TPLs did not knowingly participate in any fraudulent scheme or preference. They were lending money to borrowers through brokerage arrangements which had been publicly disclosed by the Applicants.

6. The time to determine McCann's entitlement to its property is now, before that property loses any more of its value. Since the initial order in mid-April 2014, the TPLs have watched their loans and cash advanced to the Applicants plummet from a stated value of approximately $42 million to significantly less than half of that value.

7. If the ownership issue is not determined now and McCann is not permitted to mitigate its losses by using other means to collect its outstanding loans, McCann is extremely concerned that what little value its loans still possess will evaporate into a cloud of bad debts and fees. For these and other reasons, McCann respectfully requests that it be allowed to realize on its property. It also respectfully requests that the Applicants be required to pay McCann's legal and other professional fees to create a more even and fair playing field in what has essentially become a priority dispute over the TPL loans.

II. FACTS

A. Relevant Parties

8. McCann is a British Columbia corporation extra-provincially registered in Alberta.

> Affidavit of Sharon Fawcett, sworn April 11, 2014 (the "April 11 Fawcett Affidavit") at para 2, Exhibit 1 to the Affidavit of Sharon Fawcett, sworn April 22, 2014 (the "April 22 Fawcett Affidavit"), Application Record of 0678786 BC Ltd (the "McCann Application Record"), Tab 2, p 11.

9. The applicant The Cash Store Financial Services Inc. ("**Cash Store Financial**") is an Alberta corporation publicly listed on the Toronto Stock Exchange. The applicant The Cash Store Inc. ("**Cash Store**" and, together with Cash Store Financial and the other applicants, the "**Applicants**") is an Alberta corporation and a subsidiary of Cash Store Financial. Both Cash Store Financial and Cash Store were initially established in Edmonton, Alberta. They continue to have their head offices there.

> April 11 Fawcett Affidavit at para 3, Exhibit 1 to the April 22 Fawcett Affidavit, McCann Application Record, Tab 2, p 12.
>
> Transcript of the Cross-Examination of Steven Carlstrom dated April 22, 2014 (the "Carlstrom Cross") at Qs 31-32, Brief of Transcripts of the Respondent 0678786 BC Ltd (the "Brief of Transcripts"), Tab 1, p 10.

10. Cash Store and Cash Store Financial appear to have the same officers, and they present financial statements on a consolidated basis. McCann does not know whether any separation is maintained between these corporations. However, McCann has always dealt with Cash Store Financial and its officers, and all correspondence has been from this entity.

> April 11 Fawcett Affidavit at para 4, Exhibit 1 to the April 22 Fawcett Affidavit, McCann Application Record, Tab 2, p 12.

11. All of the Applicants are direct or indirect subsidiaries of Cash Store Financial.

> Affidavit of Steven Carlstrom sworn April 14, 2014 (the "Carlstrom Affidavit") at para 11, Application Record of the Applicants (the "Application Record"), Tab 2, p 55.

12. The moving parties by cross-motion are the lenders under the Applicants' Amended and Restated Debtor-in-Possession Term Sheet dated May 16, 2014 (collectively, the "**DIP Lenders**").

B. Broker Agreement

13. On or around June 19, 2012, McCann and Cash Store executed a Broker Agreement (the "**Broker Agreement**") under which McCann, as Financier, made $13,350,000 in funds available (the "**McCann Funds**") to Cash Store, as Broker, for the sole purpose of Cash Store brokering loans (the "**McCann Loans**") between McCann and Cash Store's customers (the "**Customers**").

> Broker Agreement, Exhibit H to the Carlstrom Affidavit, Application Record, p 508.

14. Before the McCann Funds could be loaned out, Cash Store was required to ensure that extensive loan criteria were met or to obtain specific approval from McCann. Further, the McCann Funds were to be used for no other purpose. This requirement was set out in article 2.10 of the Broker Agreement:

> 2.10 USAGE OF LOAN ADVANCES
>
> For greater certainty, funds from time to time advanced to Broker from Financier are solely intended to be utilized for the purposes of making advances to Broker Customers on Financier's behalf as contemplated hereunder. Broker agrees that any funds not otherwise being held by the Broker as a "float" in anticipation of Loan approvals shall not, without the consent of Financier, be advanced or utilized for any other purpose.

> April 11 Fawcett Affidavit at para 6, Exhibit 1 to the April 22 Fawcett Affidavit, McCann Application Record, Tab 2, p 12.
>
> Broker Agreement, art 2.10, Exhibit H to the Carlstrom Affidavit, Application Record, p 508.

15. In discussions leading up to the Broker Agreement's execution and while Cash Store Financial was administering the McCann Funds on McCann's behalf, it was expressed to be important to McCann that its funds be kept separate and apart from Cash Store Financial's general operating funds in accordance with the Broker Agreement. Cash Store Financial assured McCann that the McCann Funds were—and would continue to be—segregated at all times.

April 11 Fawcett Affidavit at para 7, Exhibit 1 to the April 22 Fawcett Affidavit, McCann Application Record, Tab 2, p 13.

16. In fact, Cash Store Financial represented to McCann, and it was a term of the Broker Agreement, that all of the McCann Funds would be placed in a "Designated Broker Bank Account", which would be separate and apart from Cash Store Financial's general operating account.

April 22 Fawcett Affidavit at para 3 and Exhibit 2, McCann Application Record, Tab 2, pp 7, 18.

17. At all times, the understanding was that Cash Store would act as a broker by arranging for loans between TPLs such as McCann and the Customers. Over the course of this arrangement and at all material times, it was understood that McCann owned both the McCann Funds and the McCann Loans and that its accounts would be administered on a segregated basis from Cash Store's funds and be pooled safely with other "broker only" monies.

Affidavit of Murray McCann sworn April 22, 2014 (the "McCann Affidavit") at para 4, McCann Application Record, Tab 1, p 1.

Carlstrom Cross at Qs 110-120, 139-143, 222-232, Brief of Transcripts, Tab 1, pp 26-29, 33-35, 51-54.

Email exchange confirming Designated Broker Bank Account, Exhibit 2 to the April 22 Fawcett Affidavit, McCann Application Record, Tab 2, p 18.

18. Cash Store's former CEO, Gordon Reykdal, confirmed in discussions with Murray McCann, McCann's former president, that Cash Store was acting as a trustee of the McCann Funds, the McCann Funds would always be administered as monies held in trust, and Cash Store would not comingle the McCann Funds with monies in Cash Store's general operating account or otherwise. None of this was disclosed in the Carlstrom Affidavit.

McCann Affidavit at para 5, McCann Application Record, Tab 1, p 2.

19. McCann received numerous account statements from Cash Store. The "funding excess / deficiency" on these account statements provided a summary of the McCann Loans. When the McCann Funds exceeded the amount deployed as loans to Customers, Cash Store described the undeployed monies as the "funding excess / deficiency". At all times, McCann understood this amount to be held separate and apart from Cash Store's other accounts in accordance with the Broker Agreement and McCann's instructions. Cash Store Financial's public disclosure always showed the McCann Funds as McCann's property, not the property of Cash Store or Cash Store Financial.

McCann Affidavit at para 7, McCann Application Record, Tab 1, p 2.

20. In February 2014, after learning of the difficulties Cash Store had encountered in its Ontario operations, McCann requested an updated listing of its loan portfolio. It also advised Mr. Carlstrom that, given the suspension of the line of credit product in Ontario, McCann would prefer to reduce its loan portfolio balance as at February 12, 2014. Further, it advised Mr. Carlstrom that McCann's property should be returned as amounts were collected by Cash Store, along with the unexpended capital balance of the McCann Funds.

April 11 Fawcett Affidavit at para 9, Exhibit 1 to the April 22 Fawcett Affidavit, McCann Application Record, Tab 2, p 13.

21. By returning the undeployed McCann Funds to McCann, Cash Store would avoid incurring interest and other costs in connection with holding funds that were neither its property nor generating interest or fees. This repayment arrangement was struck by Mr. McCann and Mr. Reykdal, and it was confirmed in writing on February 26, 2014. However, the McCann Funds were not repaid to McCann as agreed or at all.

April 11 Fawcett Affidavit at para 9, Exhibit 1 to the April 22 Fawcett Affidavit, McCann Application Record, Tab 2, p 13.

22. As recently as mid-March 2014, Carlstrom assured McCann that undeployed portions of the McCann Funds were secure and remained available to McCann and that Cash Store was administering McCann's property in accordance with the Broker Agreement. During this period, Mr. Reykdal continued to assure Mr. McCann that the McCann Funds were segregated and safe. Mr. Reykdal reiterated this representation to Mr. McCann on March 24, 2014. In addition to representing that the McCann Funds were safe and properly segregated, Mr. Reykdal represented that the only reason McCann was not being repaid was instructions from the Special Committee. None of this was disclosed in the Carlstrom Affidavit.

April 11 Fawcett Affidavit at paras 12-13, Exhibit 1 to the April 22 Fawcett Affidavit, McCann Application Record, Tab 2, p 14.

McCann Affidavit at paras 9-10, McCann Application Record, Tab 1, pp 2-3.

23. Based on all of the above, Carlstrom's assertion that McCann only belatedly sought segregation of its funds is simply incorrect. In fact, McCann sought and received assurances that the McCann Funds would be segregated from Cash Store's own funds. And it has always understood and been advised that the McCann Funds and the McCann Loans, as McCann's property, were trust monies provided to Cash Store as broker to be used for the sole purpose of, and in the manner stipulated in, the Broker Agreement.

McCann Affidavit at para 18, McCann Application Record, Tab 1, p 4.

C. The Applicants Induce McCann to Make the McCann Funds Available

24. Under the Broker Agreement, McCann owned loans made in the name of TPLs which were brokered by Cash Store on behalf of the Customers using funds made available by McCann for that purpose. McCann also owned advances originated by Cash Store and subsequently purchased with the McCann Funds and certain loans and advances originated by Cash Store and

subsequently assigned to McCann as capital protection or otherwise. McCann was entitled to receive a stated rate of 59 per cent interest under these loans from the Customers.

Transcript of the Cross-Examination of Sharon Fawcett dated May 21, 2014 (the "Fawcett Cross") at Q 131, Brief of Transcripts, Tab 2, p 34.

Transcript of the Cross-Examination of J. Murray McCann dated May 21, 2014 (the "McCann Cross") at Qs 40-41, Brief of Transcripts, Tab 3, p 11.

25. By their nature, the McCann Loans were risky. Accordingly, Cash Store historically made inducement payments to TPLs—referred to by Cash Store as "retention payments"—to induce TPLs to continue to make their funds available to Cash Store which, in turn, enabled Cash Store to earn broker fees. In other words, these payments were intended to ensure that the TPLs were receiving a return commensurate with the considerable risk they were assuming.

Fawcett Cross at Qs 131-132, Brief of Transcripts, Tab 2, p 34.

26. Cash Store made these inducement payments in the ordinary course on a monthly basis. Absent these payments, McCann would have elected to withdraw the McCann Funds, as was its right under the Broker Agreement.

Fawcett Cross at Q 131, Brief of Transcripts, Tab 2, p 34.

D. The Applicants Misappropriate McCann's Property

27. Until March 2014, McCann received monthly statements indicating the cash that McCann had made available to Cash Store and the amount that was deployed in loans to Customers. The statement from February 2014 shows that $6,449,420 in undeployed cash remained available to McCann as at February 28, 2014. Subsequently, McCann was advised that a further $831,000 had been collected on McCann's third-party loan portfolio between March 1 and March 16, 2014. This increased McCann's undeployed cash balance to $7,280,420. Between March 17, 2014, and

the present, further collection would have occurred increasing McCann's undeployed cash balance accordingly.

April 11 Fawcett Affidavit at para 10, Exhibit 1 to the April 22 Fawcett Affidavit, McCann Application Record, Tab 2, p 14.

28. In the Carlstrom Affidavit, Carlstrom acknowledged that so-called "Restricted Cash" in Cash Store's bank account—that is, cash belonging to the TPLs—totaled $12,961,000 as at February 28, 2014. However, by close-of-business on April 11, 2014, this amount had dwindled to approximately $2.9 million.

Carlstrom Affidavit at paras 48, 156, Application Record, pp 69, 106.

29. Carlstrom did not disclose in his affidavit that, in breach of the Broker Agreement and without the knowledge or consent of McCann and contrary to the multiple representations made to McCann, Cash Store had misappropriated the TPLs' monies and spent them on the Applicants' operating and professional costs leading up to the CCAA filing. This misappropriation was not disclosed to this Court in the evidence filed in support of the Initial Order and in support of the Amended and Restated Initial Order.

30. When the Applicants sought the Initial Order and the Amended and Restated Initial Order, they did not disclose to this Court that Cash Store was in breach of the broker agreements when they sought permission to continue to make advances using funds provided by TPLs.

Carlstrom Affidavit at paras 76-86, Application Record, pp 78-83.

31. On cross-examination, Carlstrom admitted that, as at the end of March 2014 and up to the date of the CCAA filing, Cash Store had used monies advanced by the TPLs for the sole purpose of brokering loans to Customers for purposes not authorized by the TPLs. These purposes included, among other things, the payment of salaries, outside lawyers, consultants, advisors and

rent. Remarkably, Carlstrom estimated that approximately $10 million of the TPLs' monies had been used for these unauthorized purposes. This fact had not been disclosed to this Court when it issued the Initial Order or the Amended and Restated Order in this proceeding.

Carlstrom Cross at Qs 258-273, Brief of Transcripts, Tab 1, pp 61-63.

32. Moreover, and again undisclosed in the Carlstrom Affidavit, the Special Committee must have made the decision to use the McCann Funds knowing that Cash Store and Cash Store Financial were acting in breach of the Broker Agreement and that they had misrepresented that McCann's monies had been properly segregated.

April 22 Fawcett Affidavit at para 5, McCann Application Record, Tab 2, p 8.

33. The Special Committee took steps to ensure that the owners of the TPL funds, including the McCann Funds, were not apprised of the misrepresentations to enable Cash Store and Cash Store Financial to spend most of their funds. On or around March 31, 2014, the Special Committee instructed management not to speak with Sharon Fawcett or Murray McCann. Although a request was made on April 4, 2014, to allow PwC to inspect Cash Store's records on behalf of McCann pursuant to its rights under the Broker Agreement, PwC was not allowed access for inspection until after the Initial Order was obtained.

April 22 Fawcett Affidavit at para 6, McCann Application Record, Tab 2, p 8.

McCann Affidavit at para 11, McCann Application Record, Tab 1, p 3.

34. Digging into the numbers in the Carlstrom Affidavit and the Monitor's Pre-Filing Report exposes the depth of the problem and the extent to which Cash Store Financial and Cash Store have misappropriated the TPLs' funds. It is undisputed that Cash Store received approximately $42 million of TPL monies to broker. Nevertheless, in the Monitor's Pre-Filing Report, the Monitor reported that only $18.66 million of brokered loans were outstanding and that Cash

Store only had $2.94 million cash on hand. $18.66 million and $2.94 million equals $21.6 million. All or part of the remaining $20.4 million was misappropriated.

Carlstrom Affidavit at para 78, Application Record, p 79.

Monitor's Pre-Filing Report at para 28.

35. At paragraph 22 of the Monitor's Pre-Filing Report, the Monitor estimates that Cash Store's so-called "Restricted Cash" totaled approximately $14.7 million as at March 31, 2014. Given that actual cash on hand was only $2.94 million, this means that Cash Store Financial and Cash Store misappropriated at least $11.76 million—more than the $10 million estimated by Carlstrom during his cross-examination—of TPL monies to fund their operations and pay professional and other expenses not authorized by the TPLs, in breach of the broker agreements and their numerous representations that the TPLs' funds were safe, segregated and protected.

Monitor's Pre-Filing Report at para 22.

36. The remaining shortfall in TPL funds is explained at paragraph 22 of the Monitor Pre-Filing Report. At this paragraph, the Monitor states that there are amounts totaling approximately $8.5 million in loans to Customers under the broker agreements that the company considers "bad loans" and that the Monitor indicates have been outstanding since at least 2012. These loans are unlikely to be recovered, although they have not yet been written off. The fact that these losses were booked to the third-party lenders evidences Cash Store's view that the loans are property of the TPLs.

Monitor's Pre-Filing Report at para 22.

37. As referenced in the Carlstrom Affidavit, Cash Store had a consistent pre-filing practice of inducing the TPLs to continue to advance capital by protecting the TPLs' capital through either an expensing or purchasing mechanism that ultimately insulated the TPLs from "any

losses arising from brokered loans that remain unpaid after 90 days". On cross-examination, Carlstrom admitted that these two mechanisms were consistently applied to protect the capital of TPLs and had been applied since he had been at the company. In other words, the receivables and losses belonged to and were booked to the TPLs, subject to safeguards designed to protect the capital of the TPLs.

Carlstrom Affidavit at para 84(2), Application Record, p 32.

Carlstrom Cross at Qs 145-152, Brief of Transcripts, Tab 1, pp 35-37.

38. Given that Cash Store admittedly always made the TPLs whole from losses on bad loans that had remained unpaid after 90 days, they should have made the TPLs whole for the $8.5 million in "bad loans". Accordingly, this money ought to equally be added to the amount of Restricted Cash set out in paragraph 22 of the Monitor's Pre-Filing Report providing a true Restricted Cash Amount of $23.2 million (calculated by adding the $14.7 million reported by the Monitor to the $8.5 million in bad loans that would have been protected by Cash Store according to its own evidence). Given that there is only $2.94 million in cash on hand, Cash Store Financial and Cash Store actually misappropriated at least $20.26 of TPL monies.

39. Had McCann been notified earlier that its monies were being spent on Cash Store Financial's general operations or to fund other unauthorized expenses, it would have immediately attended at Court to protect its monies—as it ultimately did in the application it commenced in Alberta on April 11, 2014, to restrain the use of its funds. In fact, McCann engaged counsel and brought the application in Alberta as required by the Broker Agreement within three days of learning that Cash Store no longer regarded the McCann Funds as trust monies or segregated brokerage funds.

April 22 Fawcett Affidavit at paras 7-8, McCann Application Record, Tab 2, pp 8-9.

McCann Affidavit at para 13, McCann Application Record, Tab 2, p 3.

E. The May 13th Order Puts the TPLs at Further Risk

40. Paragraph 7 of the Order of this Court dated May 13, 2014 (the "**May 13th Order**"), approved the cessation of the Applicants' brokered loan business in all jurisdictions in which they operated that business. Also, the Chief Restructuring Officer (the "**CRO**"), in consultation with the Monitor, was authorized to take steps to conduct an orderly cessation of that business.

41. With recent legislative and policy changes which have negatively affected payday loan businesses and the rates that they can charge (including in Ontario), it is highly doubtful that Cash Store's operations will be as profitable as they once were or that a viable business is even possible, let alone probable. The brokered line of credit product has been discontinued in Ontario and no lending activity is currently occurring in Ontario due to issues regulatory compliance issues. Further, Cash Store is currently not making any active efforts to collect outstanding TPL loans in Ontario until after they mature 12 months after the loan was made, ostensibly to comply with the Ontario regulator's position on this issue.

Affidavit of William E Aziz sworn May 9, 2014 at paras 26, 36, Exhibit B to the Third Affidavit of William E Aziz, sworn May 15, 2014, Motion Record of the Applicants, Tab 2, pp 9, 13.

42. Not only did the TPLs not agree to allow their monies and receivables to be held and used by an insolvent Cash Store, the May 13th Order puts the TPLs in even greater jeopardy as it purports to create charges against the TPLs' property and treat it as if it is the Applicants' property. Paragraph 6 of the May 13th Order provides that the TPL Charge is capped at $2.94 million and ranks third (*parri passu* with the DIP Lenders) after the Administrative Charge and

the Directors' Charge (up to a maximum of $1,250,000). This increases the risk that the costs of these proceedings will be paid out of the TPLs' remaining monies, after many millions of dollars of TPL funds were already misappropriated by Cash Store for payment of costs not authorized by the TPLs leading up to the CCAA filing.

III. ISSUES

43. On this motion and cross-motion, this Court is asked to confirm that McCann owns the McCann Property and to permit McCann or its agents to assume administration of the McCann Loans to maximize realizations in accordance with McCann's contractual rights.

44. This Court is also asked to dismiss the DIP Lenders' cross-motion for a declaration that the Applicants are the beneficial owners of the McCann Funds and the McCann Loans and that transactions (occurring in the ordinary course for legitimate business reasons) between McCann and Cash Store constitute preferences under federal and provincial legislation.

IV. LAW AND ARGUMENT

A. Ownership of the McCann Property

1. McCann Owns the McCann Property

45. The DIP Lenders seek a declaration that the McCann Funds and the McCann Loans (together with accounts receivable in respect of the McCann Loans and the amounts actually received by Cash Store from its Customers in repayment of the McCann Loans, the "**McCann Property**") are beneficially owned by the Applicants. This transparent cash grab attempt by the DIP Lenders must fail.

46. The Broker Agreement expressly recognizes that ownership of the McCann Property remained with McCann at all times. This ownership arrangement is corroborated by the evidentiary record. In fact, Cash Store's own evidence, past statements, public filings and conduct leave little doubt that the McCann Property belongs to McCann. The DIP Lenders do not offer a single compelling legal theory for their claim that the Applicants are the beneficial owners of the McCann Property.

47. McCann advanced the McCann Funds to Cash Store for a single purpose: the brokering of loans to Customers. McCann always understood that the McCann Funds were segregated from Cash Store's operating funds. This understanding was grounded in the Broker Agreement, and it was reinforced by numerous representations by Cash Store and Cash Store Financial that the McCann Funds would be maintained in a designated TPL account separate and apart from Cash Store's operating funds.

> Broker Agreement, art 2.10, Exhibit H to the Carlstrom Affidavit, Application Record, p 508.
>
> April 11 Fawcett Affidavit at para 6, Exhibit 1 to the April 22 Fawcett Affidavit, McCann Application Record, Tab 2, p 12.
>
> Email exchange confirming Designated Broker Bank Account, Exhibit 2 to the April 22 Fawcett Affidavit, McCann Application Record, Tab 2, p 18.

48. Even if the McCann Property has been comingled with Cash Store's operating funds in breach of the Broker Agreement and without McCann's knowledge or consent, the McCann Funds have always been accounted for separately. The McCann Funds were treated as "Restricted Cash". The Applicants' creditors could always discern the amount of the McCann Funds that were deployed as loans to Customers or held as a float for future loans.

> Email exchange confirming Designated Broker Bank Account, Exhibit 2 to the April 22 Fawcett Affidavit, McCann Application Record, Tab 2, p 18.

Carlstrom Affidavit at paras 46, 48, 49, 56, Application Record Tab 2, pp 69, 72.

49. The DIP Lenders have always known the nature of the relationship between the Applicants and the TPLs. They lent funds in CCAA proceedings with full knowledge that the Applicants did not view the TPL loans as their property to which the DIP Lenders' charge could attach. It does not lie in their mouths to now argue that the TPL funds and loans are the Applicants' property and, thus, potentially subject to their security interests. Although this applies to all secured creditors of the Applicants, it applies *a fortiori* to the DIP Lenders which are transparently seeking to appropriate assets to which they have no entitlement to secure repayment of their DIP loans.

50. At all times, Cash Store was to *broker* the McCann Funds. For years, the Applicants' secured creditors, including the DIP Lenders in their respective capacities as holders of debt under the Senior Credit Agreement and Senior Secured Notes, benefitted from the broker fees paid by Customers on the McCann Loans. The DIP Lenders knew that these loans had been made with the McCann Funds. They cannot complain when things go badly, and they should not be permitted to benefit from Cash Store's breaches of the Broker Agreement.

2. Indicia of Ownership

51. By definition, a broker does not own the property in question but, rather, acts as an intermediary or agent between prospective buyers and sellers. A broker is not entitled to appropriate the property for its own use, and it breaches its duties as a broker if it does so. Just as an insolvent securities brokerage firm would not be entitled to use its clients' property to finance its restructuring or pay other creditors, the Applicants should not be permitted to use the McCann Property to finance their restructuring or pay other creditors.

Clarke v Baillie, [1911] 45 SCR 50 at paras 89-90, 1911 CarswellOnt 733.

52. Parliament has specifically addressed this issue in the context of an insolvent securities brokerage firm in Part XII of the *Bankruptcy and Insolvency Act* (the "**BIA**"). This part of the BIA provides that, other than "customer name securities" as defined in the BIA, all securities and cash held by a bankrupt securities firm are to be pooled in a "customer pool fund" and distributed among all customers of the firm on a *pro rata* basis. The customer pool fund is paid out before any creditors of the brokerage firm are paid at all. This part of the BIA is instructive: it reflects Parliament's clear intention to prevent brokerage firms from using their clients' property to satisfy their debts and pay their creditors.

Bankruptcy and Insolvency Act, RSC 1985, c B-3, ss 253 (defn of "customer name securities"), 261-262 [BIA].

53. While Cash Store may not be a securities firm for the purposes of Part XII of the BIA, the treatment of such brokerage businesses and property held by them on behalf of third parties is equally applicable. The property rights attending the broker-lender relationship between McCann and Cash Store can also be understood by way of analogy to a true consignment of goods or a true sale of receivables. In both instances, a secured creditor has no interest in the goods or receivables consigned or sold. Equally, the DIP Lenders and other secured creditors have no interest in the McCann Property in the present case.

54. The leading Canadian case considering when the transfer of financial assets constitutes a true sale or a loan is *Metropolitan Toronto Police Widows and Orphans Fund v. Telus Communications Inc.* ("***BC Tel***"). In this case, Justice Ground of this Court addressed whether an assignment of trade receivables was a true sale or a financing. Although this Court in not asked to do the same here, the indicia of ownership set out in *BC Tel* are instructive.

Metropolitan Toronto Police Widows and Orphans Fund v Telus Communications Inc (2003), 30 BLR (3d) 288, 2003 CarswellOnt 168 (Sup Ct), rev'd on other grounds (2005), 75 OR (3d) 784, 5 BLR (4th) 251 (CA), leave to appeal to SCC ref'd [2005] SCCA No 379, 216 OAC 399 (note) ("*BC Tel*").

55. In this case, Justice Ground concluded that the assignment of receivables had been a true sale rather than a financing. In so concluding, Justice Ground considered six factors:

(a) *Intention of the Parties* – The intention of the parties as evidenced by the language of the agreement and subsequent conduct of the parties;

(b) *Ownership Risk and Recourse* – Whether the risks of ownership are transferred to the purchaser and the extent and nature of recourse to the seller;

(c) *Right to Surplus* – The right of the seller to surplus collections;

(d) *Determination of Price* – Certainty of determination of the purchase price;

(e) *Identification of Assets* – The extent to which the assets are identifiable; and

(f) *Collection of Receivables* – Whether the seller has a right to redeem the receivables on payment of a specified amount.

BC Tel at paras 40, 41, 51, 57, 61, 67.

56. By applying these indicia of ownership to the broker-lender relationship between McCann and Cash Store, it becomes clear that McCann retained ownership of the McCann Property at all times.

57. In *BC Tel*, Justice Ground cautioned that courts must consider the intention of the parties as expressed in the written contract but also as revealed by "the factual matrix or the

circumstances existing at the time the contract was entered into". Courts must consider the substance of the transaction, not merely the form.

BC Tel at paras 38, 40.

58. The Broker Agreement expressly limited the Applicants' permitted use of the McCann Funds to the brokering of loans to Customers. It also anticipated the segregation of these funds from the Applicants' other accounts. On cross-examination, Sharon Fawcett confirmed that McCann always expected and understood that its funds would be segregated, which understanding was reinforced by representations by the Applicants. The factual matrix of the Broker Agreement thus underscores the clear intention of both parties to the Broker Agreement that McCann would retain ownership of the McCann Property at all times. This was a brokering arrangement, not a financing.

Fawcett Cross at Qs 33, 37, 75, 80 Brief of Transcripts, Tab 2, p 10, 11-12, 22-23, 23-24.

59. It is equally clear that McCann took the credit risk on the McCann Loans. It had so-called "bad loans" in its loan portfolio as evidenced by the Applicants' own records and account statements. In *BC Tel*, Justice Ground noted: "In any true sale transaction, there must be a transfer of ownership risk to the purchaser. In the case of the sale of accounts receivable, the risk with regard to the non-payment of the receivable must pass to the purchaser subject to whatever forms of recourse the purchaser may have against the vendor". Here, ownership risk was not contractually transferred to the Applicants.

Carlstrom Affidavit at para 77, Application Record, Tab 2, p 78.

BC Tel at para 41.

60. *BC Tel* also stands for the proposition that the absence of a right to retain the surplus from the collection of accounts receivable is not fatal to a determination that the transaction in question was a true sale. McCann received the principal and interest paid on the McCann Loans.

BC Tel at para 56.

61. Courts should consider all of the indicia of ownership set out in *BC Tel*. However, whether the seller has a right of redemption is the "ultimate test" to determine if a transaction is a true sale or a loan. Here, the Broker Agreement does not allow the Applicants to redeem the McCann Loans. To the contrary, it grants McCann the right to take back its funds at any time on 120 days notice and to take over the administration of the McCann Loans on the termination of the Broker Agreement.

BC Tel at para 67.

62. Justice Ground found in *BC Tel* that the fact that a seller acts as the collection agent is not inconsistent with interpreting a transaction as a true sale. As in *BC Tel*, the arrangement between McCann and Cash Store involving the latter acting as the collection agent was simply "logical and efficient" in the circumstances.

BC Tel at para 66.

63. Turning to the analogy of a true consignment, the supplier of the consigned goods in such a transaction retains legal title until those goods are sold and title passes directly from the consignor to the ultimate purchaser. Similarly, the Broker Agreement between McCann and Cash Store established a commercial and legal relationship pursuant to which McCann entered into a direct debtor-creditor relationship with each Customer.

64. In *Access Cash International Inc. v. Elliot Lake and North Shore Corporation for Business Development* ("***Access Cash***"), this Court identified various indicia that courts should consider in determining whether a transaction constitutes a consignment (which merely creates a security interest) or a true consignment (which involves the supplier of the consigned goods retaining legal title to those goods until sold to the ultimate purchaser). The indicia indicating a true consignment include the following:

- The goods are shown as an asset in the books and records of the supplier and are not shown as an asset in the books and record of the merchant;
- It is apparent in the merchant's dealings with others that the goods belong to the supplier rather than the merchant;
- Title of goods remains with the supplier;
- The supplier has the right to demand the return of the goods at any time;
- The merchant has the right to return unsold goods to the supplier;
- The merchant is required to segregate the supplier's goods from his own;
- The merchant is required to maintain separate books and records in respect of the supplier's goods;
- The merchant is required to hold sale proceeds in trust for the supplier;
- The supplier has the right to stipulate a fixed price or a price floor for the goods; and
- The merchant has the right to inspect the goods and the premises in which they are stored.

> *Access Cash International Inc v Elliot Lake & North Shore Corp for Business Development* (2000), 1 PPSAC (3d) 209 at para 21, 2000 CarswellOnt 2824 (Sup Ct).

65. As with the indicia of ownership from *BC Tel*, the true consignment indicia identified in *Access Cash* strongly militate for interpreting the Broker Agreement as creating a relationship pursuant to which McCann retained ownership of the McCann Property at all material times.

McCann has the contractual right to demand the return of the McCann Funds, and Cash Store was required to hold the McCann Funds in a segregated account and to account for those funds separately. Further, the loan documentation evidences a direct debtor-creditor relationship between McCann and each Customer.

66. For all of these reasons, McCann is the sole legal and beneficial owner of the McCann Property and should be recognized as such by this Court.

3. McCann Should be Permitted to Realize on the McCann Loans

67. Since the Applicants have initiated an "orderly cessation" of their brokering business, they do not have any use—or any legitimate use—for the McCann Funds. Despite this fact, the DIP Lenders insist that the Applicants are entitled to collect the McCann Loans in circumstances in which the Applicants either cannot or will not make new loans available to Customers, in contrast to other potential servicers.

68. The Applicants admit that their inability to make new loans has "significantly impaired" their ability to collect outstanding accounts receivable. This significant impairment will apply to all jurisdictions in which the Applicants operated their brokering business, as confirmed in the Monitor's Third Report.

Carlstrom Affidavit at para 101, Application Record, Tab 2, p 87.

69. The Applicants are similarly unable to take all necessary steps to ensure that collections on the McCann Loans are maximized. The May 13th Order approved the cessation of the Applicants' brokered loan business in all jurisdictions in which it is currently carried out, and the CRO has been authorized to take all steps to conduct an orderly cessation of that business. The

brokered line of credit product has been discontinued in Ontario, and no lending activity is currently occurring in Ontario due to issues regarding compliance with regulatory requirements. The CRO has stated that Cash Store's ability to collect on Ontario brokered loans "has been curtailed" and that he can only take "reasonable steps to effect the receipt of outstanding brokered loan receivables in a manner that preserves, to the extent possible, the value of the [TPL] receivables". Cash Store is currently not making any active efforts to collect outstanding TPL loans in Ontario until after they mature.

> Affidavit of William E Aziz sworn May 9, 2014 at paras 26, 36, 38, Exhibit B to the Third Affidavit of William E Aziz, sworn May 15, 2014, Motion Record of the Applicants, Tab 2, pp 10, 13, 14.

70. The CRO owes duties to numerous stakeholders. He is thus understandably concerned with the costs and management resources necessary to preserve the value of the TPL loans, including the McCann Loans. But his refusal or inability to take all necessary steps to ensure that collections on the McCann Loans are maximized should not prejudice McCann when McCann is willing to take those steps.

71. McCann owns the McCann loans. It is therefore prepared to invest the time and resources necessary to maximize recoveries from those loans, which is in McCann's own interest. This will assist the CRO and the Applicants by eliminating the cost and related inconvenience of collecting the McCann Loans. If granted, the relief sought by McCann would relieve the Applicants, the CRO and the Monitor of this burden, and it would allow them to focus on restructuring those parts of the Applicants' business that the Applicants believe continue to be viable. It will also allow McCann to take the steps that it deems necessary to facilitate the orderly and efficient collection of, and to realize the maximum recovery from, the McCann Loans at McCann's own expense.

72. Under the Broker Agreement, McCann has the right to take over the administration of the McCann Loans. Unbelievably, the Applicants now seek to improperly retain the McCann Loans and to force McCann to allow them to realize on them despite the fact that the Applicants can neither maximize recoveries nor minimize costs.

73. In *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.* ("*Cliffs*"), Justice Tysoe of the British Columbia Court of Appeal lucidly articulated the idea that, notwithstanding the broad scope of the CCAA, there are circumstances in which granting a stay or continuation of a stay will not be justified:

> [T]he ability of the court to grant or continue a stay under s. 11 is not a free standing remedy that the court may grant whenever an insolvent company wishes to undertake a "restructuring", a term with a broad meaning including such things as refinancing, capital injections and asset sales and other downsizing. Rather, s. 11 is ancillary to the fundamental purpose of the CCAA, and a stay of proceedings freezing the rights of creditors should only be granted in furtherance of the CCAA's fundamental purpose.
>
> *Cliffs Over Maple Bay Investments Ltd v Fisgard Capital Corp*, 2008 BCCA 327 at para 26, 296 DLR (4th) 577.

74. In essence, the Applicants seek this Court's assistance to terminate the Broker Agreement and, at the same time, to block McCann from mitigating its damages by assuming administration of the McCann Loans, as is McCann's right pursuant to the Broker Agreement. The CCAA was not intended to accommodate conduct of this kind. The Court ought not to extend the CCAA stay to McCann's prejudice in these circumstances.

75. Recently, *Cliffs* was cited with approval by Justice Brown of the Ontario Superior Court of Justice in *Romspen Investment Corporation v. 6711162 Canada Inc.* In this decision, Justice Brown faced competing applications by, on the one hand, the secured creditors for the

appointment of a receiver and, on the other hand, the debtor company for an initial CCAA order.

Justice Brown noted as follows:

> At a high level, a certain unfairness characterizes the plan of the CCAA Applicants. Under their plan, they would see the development of the Midland Condo Project to its end and use the unit sales proceeds to pay off Romspen in full and, evidently, to pay most of the amounts sought by the lien claimants. They would then develop out the other secured properties to propose a plan to the other unsecured creditors, but according to Soorty most of the unsecured debt consists of shareholders loans from Cocov and himself. Reduced to its essence, the plan seems to be no more than asking the court to impose on Romspen an extension of the term of the Loan beyond its 2-year term and to allow management to continue operating as they have in the past. In other words, the CCAA Applicants do not propose the compromise of debt or the liquidation of part of their businesses – they want to carry on just as they have in the past.
>
> I accept the evidence of Romspen about the unfairness of such an approach. Romspen stated that it had "absolutely no confidence" in the ability of Soorty and Cocov to manage the affairs of the CCAA Applicants during any stay period, pointing to them letting the first general contractor on the Midland Condo Project, Dineen, place liens on it, and allowing subsequent contractors to do so as well.
>
> *Romspen Investment Corporation v 6711162 Canada Inc*, 2014 ONSC 2781 at paras 72-73, 2014 CarswellOnt 5836.

76. Justice Brown concluded that the initial order should not be granted. He cited *Re Dondeb Inc.* in which Justice Campbell also determined that CCAA relief should not be granted to the applicant company. In reaching this conclusion, Justice Campbell made the following statement at the end of his reasons:

> The *CCAA* is a flexible instrument, which with judicial discretion, is capable of permitting restructuring, including in appropriate situations, liquidation.
>
> In my view the use of the *CCAA* for the purpose of liquidation must be used with caution when liquidation is the end goal, particularly when there are alternatives such as an overall less costly receivership that can accomplish the same overall goal.
>
> *Re Dondeb Inc*, 2012 ONSC 6087 at paras 33-34, 2012 CarswellOnt 15528.

77. In his earlier decision in *Romspen Investment Corp. v. Edgeworth Properties*, Justice Campbell granted the applicant declaratory relief over the objections of investors who challenged the validity of the applicant's security with the following effect:

(a) The applicant, who held a mortgage over certain of the debtor company's real property, was effectively carved out of the CCAA proceeding;

(b) The validity and priority of the applicant's mortgage was recognized; and

(c) The applicant was permitted to proceed with judicial sale/foreclosure proceedings in respect of the real property subject to its security.

Romspen Investment Corp v Edgeworth Properties, 2012 ONSC 4693, 222 ACWS (3d) 854.

78. The Applicants do not intend to restructure their brokering business. Rather, they have shut down that business altogether, pursuant to the Order of this Court dated May 13, 2014. There is no benefit to the Applicants in continuing to administer the McCann Loans, whereas there is significant prejudice to McCann and the TPLs if the CCAA stay continues to obstruct the efficient and effective collection of their loans.

79. The prejudice to McCann includes, without limitation:

(a) the fact that Cash Store cannot broker new loans, which will "significantly impair" its ability to collect the McCann Loans;

(b) the fact that Cash Store intends to take no steps to collect in Ontario and only limited steps in other jurisdictions;

(c) the enormous professional fees and other expenses associated with any liquidation conducted under the CCAA; and

(d) the risk that the Applicants' restructuring is unsuccessful and that the task of collecting the McCann Loans will be left for yet another future (and potentially costly) insolvency proceeding.

80. The CCAA's fundamental purpose—namely, to facilitate compromises and arrangements between companies and their creditors—is not advanced by permitting the Applicants to continue administering the McCann Loans because there is no reasonable prospect that the brokering business will be restructured. McCann should therefore be permitted to realize on the McCann Loans at its own expense.

B. Preferences

1. The Preference Issue is not Properly Before this Court

81. The DIP Lenders seek a declaration that two categories of transactions which occurred between the TPLs and the Applicants constitute preferences:

(a) The designation by the Applicants of any advances or loans, including brokered loans, as advances or loans in the names of the TPLs; and

(b) Any assignment, whether as capital protection or otherwise, by the Applicants to the TPLs, or in their names, of non-brokered loans made in the name of the Applicants (together with (a), the **"Transactions"**).

82. The preference issue is not properly before the Court, and so the DIP Lenders are not entitled to the relief requested. The only issue properly before the Court is the question of ownership of the TPLs' property.

83. Under sections 95 and 96 of the BIA, a trustee in bankruptcy has the right to impugn a payment or transaction as a preference or transfer at undervalue. Section 36.1 of the CCAA extends this right to a CCAA Monitor. It does not extend it to individual creditors of the CCAA estate. The Monitor has not challenged any transaction involving the TPLs as a preference, and the DIP Lenders have no right to the relief requested.

84. No Canadian court has allowed a preference challenge by a creditor in the context of a CCAA proceeding. The case law is clear that a trustee in bankruptcy is the only party who can bring a preference challenge in bankruptcy proceedings and, as a result, a monitor is the only party who can bring a preference motion in CCAA proceedings pursuant to section 36.1 of the CCAA. The DIP Lenders simply cannot arrogate to themselves the Monitor's statutory right to challenge transactions as preferences or transfers at undervalue.

> *Tucker v Aero Inventory (UK) Ltd*, 2011 ONSC 4223 at paras 65, 137, 151, 166, 338 DLR (4th) 577 (Sup Ct).
>
> *Verdellen v Monaghan Mushrooms Ltd*, 2011 ONSC 5820 at para 46, 207 ACWS (3d) 553 (Sup Ct).
>
> *Re Dilollo*, 2013 ONSC 578 at para 26, 97 CBR (5th) 182 (Sup Ct), aff'd 2013 ONCA 550, 117 OR (3d) 81.

85. The DIP Lenders clearly lack any status to request this relief under the CCAA. However, the DIP Lenders could not challenge the Transactions even if they had a right to do so. A "preference" is a payment made to one creditor to the prejudice of another creditor. When the

Transactions occurred, the DIP Lenders were not creditors of the Applicants as DIP Lenders. They could not therefore have been prejudiced by the Transactions as DIP Lenders.

86. The DIP Lenders are post-CCAA-filing lenders who lent money to the Applicants based on the Applicants' assets as at and after the CCAA filing date. By impugning the Transactions, which occurred prior to the CCAA filing date, the DIP Lenders are now trying to appropriate assets to which they have no entitlement to secure repayment of their DIP loans, including exorbitant fees and interest rates.

87. Since the CCAA filing date, McCann's property has essentially been frozen and no payment or transfer of any kind has been made to McCann. Therefore, no transaction involving McCann could possibly have worsened the DIP Lenders' position. This Court should not allow the motion for the return of the TPLs' property to be sidetracked by an improper motion by the post-CCAA-filing DIP Lenders.

2. The Transactions are not Void as Preferences or Otherwise

88. Even if the preference issue is properly before the Court, the Transactions are not preferences, transfers at undervalue or otherwise void under any legal theory advanced by the DIP Lenders in their cross-motion.

89. The DIP Lenders seek to void or set aside the Transactions as:

(a) preferences under section 95 of the BIA;

(b) transfers at undervalue under section 96 of the BIA; or

(c) void transactions under section 2 of Ontario's *Fraudulent Conveyances Act*, section 4 of Ontario's *Assignments and Preferences Act* and/or sections 2 and 3 of Alberta's *Fraudulent Preferences Act* (Alberta).

BIA, ss 95, 96.

Fraudulent Conveyances Act, RSO 1990, c F.29, s 2 ("FCA").

Assignments and Preferences Act, RSO 1990, c A.33, s 4 ("APA").

Fraudulent Preferences Act, RSA 2000, c F-24, ss 2, 3 ("FPA").

i. Section 95 of the BIA

90. Under section 95 of the BIA, a trustee in bankruptcy is empowered to attack a payment, transfer of property or provision of services by a debtor before the date of bankruptcy (or, in a CCAA proceeding, before the date on which the CCAA proceedings are commenced) that advantages one creditor (or multiple creditors) over others.

BIA, s 95.

91. A pre-CCAA-filing transaction is void under section 95 if three conditions are met:

(a) *Prescribed Period* – The transaction was made within the prescribed period before the date of bankruptcy;

(b) *Insolvent* – The debtor was insolvent on the date of the impugned payment; and

(c) *Dominant Intention* – The debtor intended to prefer one creditor over another.

Keith G Collins Ltd v Canadian Imperial Bank of Commerce, 2011 MBCA 41 at para 19, 268 Man R (2d) 30.

Touche Ross Ltd v Weldwood of Canada Sales Ltd, 48 CBR (NS) 83 at paras 3-7, 1983 CarswellOnt 214 (SC) [*Touche Ross*].

92. For the first condition, the prescribed period under section 95 depends on whether the creditor in question was arm's length or non-arm's length. For arm's length creditors, the prescribed period is three months before the date of the initial bankruptcy event. For non-arm's length creditors, the prescribed period is one year before the date of the initial bankruptcy event.

93. The third condition is called the "dominant intention" test. It requires an objective assessment of the debtor's intention at the time of the transaction. Justice Bastin furnished the quintessential statement of this test in *Re Holt Motors Ltd.*:

> The test which I consider should be applied is an objective and not a subjective one, that is to say, the intention which should be attributed to the parties will always be that which their conduct bears a reasonably construed and not that which, long after the event, they claim they believe was present in their minds.

Re Holt Motors Ltd (1966), 57 DLR (2d) 180 at para 8, 56 WWR 182 (Man QB).

Thorne Riddell v Fleishman, 47 CBR (NS) 233 at para 26, 1983 CarswellOnt 201 (Sup Ct).

94. Under section 95(2) of the BIA, the debtor's intention to prefer one creditor over another is presumed where the effect of the impugned transaction is to give the creditor a preference over other creditors.

BIA, s 95(2).

95. In the present case, the Transactions were outside of the prescribed period. McCann is arm's length from the Applicants. The prescribed period is thus three months from the CCAA filing date—namely, April 15, 2014. McCann did not receive any payments or other transfers of property from the Applicants between January 15 and April 15, 2014. Even if McCann were a related party (which it is not) and the one-year period applied, most of the Transactions would still fall outside of the prescribed period and, thus, could not be challenged under section 95.

96. In addition, McCann denies that Cash Store was insolvent when the Transactions occurred. TPL monies were crucial to Cash Store's business. Without receipt of the payments to which McCann was entitled, McCann would have withdrawn its money.

97. In any event, the evidentiary record makes clear that the Applicants did not intend to prefer McCann through the Transactions. Further, McCann is and has always been the sole legal and beneficial owner of the McCann Property. Cash Store has confirmed this in numerous public statements and in evidence filed with this court, including the Carlstrom Affidavit and the cross-examination of Mr. Carlstrom on that affidavit. Accordingly, this is not a situation in which property of the debtor company's has been improperly transferred to McCann.

> Carlstrom Affidavit at paras 46, 48, 49, 56, Application Record Tab 2, pp 69, 72.
>
> Carlstrom Cross at Qs 110-120, Brief of Transcripts, Tab 1, pp 26-29.

98. Each and every one of the Transactions between Cash Store and McCann occurred in the ordinary course of business and pursuant to the Broker Agreement. This has been a decisive factor in cases under section 95 of the BIA.

> See e.g. *Touche Ross*.

99. Payments in the ordinary course of business are usually made so that the debtor company can take advantage of favourable payment terms or to secure a continued supply of goods or services so that the debtor company can continue in business. In such circumstances, the debtor company's expectation that the transaction would permit it to remain in business and buy some time to extricate itself from its financial difficulties will strongly militate against finding an intent to prefer.

> *Re AR Colquhoun & Son Ltd*, [1937] WWR 222, 18 CBR 124 (Sask KB).
>
> *Re Norris* (1994), 23 Alta LR (3d) 397 at para 7, 28 CBR (3d) 167 (QB), rev'd on other grounds (1996), 45 Alta LR (3d) 1, 193 AR 15 (CA).

100. Therefore, the DIP Lenders cannot rely on section 95 of the BIA to seek a declaration that the Transactions are void.

ii. Section 96 of the BIA

101. Section 96 of the BIA provides a trustee in bankruptcy with a mechanism for challenging a transaction involving a disposition of property or a provision of services for which either no consideration is received by the debtor company or for which the consideration received by the debtor company is conspicuously below fair market value. These transactions are referred to as "transfers at undervalue".

102. The BIA provides no definition as to the meaning of a conspicuous difference in value. Case law has construed "conspicuous" to mean plainly evident or attracting notice and hence eminent, remarkable or noteworthy. Whether there is a conspicuous difference in value depends on all of the circumstances, and it is not possible to say that any particular percentage difference will necessarily result in a finding of a conspicuous difference in value.

> *Skalbania (Trustee of) v Wedgewood Village Estates Ltd* (1988), 31 BCLR (2d) 184, 70 CBR (NS) 232 (SC), aff'd (1989), 37 BCLR (2d) 88, 60 DLR (4th) 43 (CA), leave to appeal to SCC ref'd (1989), 40 BCLR (2d) xxxiii (note), 62 DLR (4th) viii (note) (SCC).

103. The requirements of section 96 depend on whether the parties to the impugned transaction were dealing at arm's length. As discussed above in the context of section 95, the broker-lender relationship between McCann and Cash Store was arm's length at all times. Under section 96(1)(a) of the BIA, an impugned transaction between arm's length parties is void if three conditions are met:

(a) The transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and that ends on the date of the bankruptcy;

(b) The debtor was insolvent at the time of the transfer or was rendered insolvent by it; and

(c) The debtor intended to defraud, defeat or delay a creditor.

BIA, s 96(1)(a).

104. In *Conte Estate v. Alessandro*, Justice Rouleau outlined the proper approach to determining a debtor company's intent with respect to a transaction under section 95 of the BIA. He made the following comments:

> In this type of case it is unusual to find direct proof of intent to defeat, hinder or delay creditors. It is more common to find evidence of suspicious facts or circumstances from which the court infers a fraudulent intent.
>
> These suspicious facts or circumstances are sometimes referred to as the "badges of fraud." These badges of fraud are evidentiary indicators of fraudulent intent and their presence can form the *prima facie* case needed to raise a presumption of fraud...
>
> The presence of one or more of the badges of fraud raises the presumption of fraud. Once there is a presumption, the burden of explaining the circumstantial evidence of fraudulent intent falls on the parties to the conveyance.
>
> *Conte Estate v Alessandro*, 2002 CarswellOnt 4507 at paras 20-22, [2002] OJ No 5080 (Sup Ct) [*Conte Estate*].

105. Justice Anderson's classic articulation in *Re Fancy* of the role of the "badges of fraud" analysis in determining intent under section 96 is frequently cited:

> Whether the intent exists is a question of fact to be determined from all of the circumstances as they existed at the time of the conveyance. Although the primary burden of proving his case on a reasonable balance of probabilities remains with the plaintiff, the existence of one or more of the traditional "badges of fraud" may give rise to an inference of intent to defraud in the absence of an explanation from the defendant. In such circumstances there is an onus on the defendant to adduce evidence showing an absence of fraudulent intent. Where the impugned transaction was, as here, between close relatives under suspicious circumstances, it is prudent for the court to require that the debtor's evidence on bona fides be corroborated by reliable independent evidence.
>
> *Re Fancy* (1984), 46 OR (2d) 153 at para 19, 8 DLR (4th) 418 (SC).

106. The Canadian case law identifies the following circumstances as badges of fraud for ascertaining the intention of the debtor company:

(a) The transferor has few remaining assets after the transfer;

(b) The transfer was made to a non-arm's length person;

(c) There are actual or potential liabilities facing the transferor, he is insolvent or he is about to enter upon a risky undertaking;

(d) The consideration for the transaction is grossly inadequate;

(e) The transferor remains in possession or occupation of the property for his own use after the transfer;

(f) The deed of transfer contains a self-serving and unusual provision;

(g) The transfer was effected with unusual haste; or

(h) The transaction was made in the face of an outstanding judgment against the debtor company.

Conte Estate at para 43.

Boudreau v Marler, 18 RPR (4th) 165 at para 70, 48 CBR (4th) 188 (CA).

Montor Business Corp (Trustee of) v Goldfinger, 2013 ONSC 6635 at para 262, 237 ACWS (3d) 296.

107. In the present case, the Transactions bear none of the badges of fraud which would tend to indicate the requisite intention to "defraud, defeat or delay a creditor".

108. The Applicants' secured creditors had notice of the business arrangements between Cash Store and McCann, including the fact that McCann retained ownership of the McCann Property. The secured creditors did not therefore suffer any prejudice. Rather, they understood (or reasonably should have understood) the risks of lending into a structure in which these TPL arrangements were in place. Indeed, the Applicants happily took the benefit of the broker fees earned on loans brokered to Customers with TPL monies, which were in turn used to make interest payments to Cash Store's secured creditors. The secured lenders cannot now seek to improperly appropriate the McCann Property simply because the inherent risks in their investments materialized into real losses.

109. As explored in more detail above, the evidence of the TPLs is that they are, and have always been, the sole legal and beneficial owners of the TPL property. The Applicants did not transfer their property to the TPLs. Further, there was a contract in place between the parties according to which the interest actually paid to the TPLs of 17.5 per cent was *below* the interest rate of 59 per cent to which the TPLs were entitled. Thus, in participating in the Transactions, the debtor company's intent was not to prefer McCann. Its intention was to make payments pursuant to a contractual relationship and established business practices in the ordinary course of business and without the intent to defraud, defeat or delay a creditor.

iii. The Provincial Statutes

110. To attack transactions as preferences or transfers at undervalue under the BIA, the transactions must have occurred within the prescribed period. If a transaction falls outside the prescribed period, it cannot be challenged as a preference or transfer at undervalue under sections 95 and 96 of the BIA.

111. Since McCann is at arm's length from the Applicants, the prescribed period in this case is three months before the CCAA filing date for challenges under section 95 and one year before the CCAA filing date for challenges under section 96.

112. The DIP Lenders cannot invoke sections 95 and 96 of the BIA to impeach the Transactions. Within the three-month period preceding the CCAA filing date, McCann did not receive any payments from the Applicants. Instead, the Applicants improperly used segregated funds belonging to McCann to fund exorbitant professional costs leading up to the CCAA filing date, without McCann's knowledge or consent. Within the one-year period preceding the CCAA filing date, any payments made to McCann were made in the ordinary course of business and pursuant to the Broker Agreement. Further, the DIP Lenders were not even creditors of the Applicants *qua* DIP Lenders when the Transactions occurred.

113. Unlike the BIA, Ontario's *Fraudulent Conveyances Act* (the "**FCA**") and *Assignments and Preferences Act* (the "**APA**") do not prescribe periods for challenging transactions. So long as actions are not statute barred under the applicable provincial limitations regime, it may be possible to challenge a transaction under one or both of these statutes.

> *Robinson v Countrywide Factors Ltd* (1977), [1978] 1 SCR 753, 72 DLR (3d) 500.
>
> *Re Garrett*, 30 CBR (NS) 150 at para 2, 1979 CarswellOnt 195 (SC).
>
> *Indcondo Building Corp v Sloan*, 2010 ONCA 890 at para 9, 103 OR (3d) 445.

114. Section 2 of the FCA provides:

> **2.** Every conveyance of real property or personal property and every bond, suit, judgment and execution heretofore or hereafter made with intent to defeat, hinder, delay or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages, penalties or forfeitures are void as against such persons and their assigns.

FCA, s 2.

115. Section 2 of the FCA requires the DIP Lenders to prove intent to "defeat, hinder, delay or defraud" creditors. For conveyances made for good consideration, the DIP Lenders must prove the fraudulent intent of both parties to the transaction. For voluntary conveyances, the DIP Lenders need to prove the fraudulent intent of the maker of the conveyance.

Oliver v McLaughlin, 24 OR 41, [1893] OJ No 11 (CA).

Bank of Montreal v Peninsula Broilers Ltd, 177 ACWS (3d) 405 at para 88, 2009 CarswellOnt 2906 (Sup Ct).

116. Justice Sedgwick expanded on what is required to prove intent to "defeat, hinder, delay or defraud" creditors in *Dapper Apper Holdings Ltd. v. 895453 Ontario Ltd.* as follows:

> If the court is satisfied that a conveyance is made with intent on the part of the grantor to defeat, hinder, delay or defraud creditors and others, the parties to the conveyance (the grantor and the grantees) must show that it was made for good consideration and good faith and to a person (or persons) who was (or were) without notice or knowledge of the grantor's fraudulent intent. *Bank of Montreal v. Jory* (1981), 39 C.B.R. (N.S.) 30 (B.C. S.C.). Otherwise, the conveyance is void against creditors of the grantor.

Dapper Apper Holdings Ltd v 895453 Ontario Ltd (1996), 38 CBR (3d) 284 at para 57, 11 PPSAC (2d) 284 (Gen Div).

117. Section 4(1) of the APA provides:

> **4.** (1) Subject to section 5, every gift, conveyance, assignment or transfer, delivery over or payment of goods, chattels or effects, or of bills, bonds, notes or securities, or of shares, dividends, premiums or bonus in any bank, company or corporation, or of any other property, real or personal, made by a person when insolvent or unable to pay the person's debts in full or when the person knows that he, she or it is on the eve of insolvency, with intent to defeat, hinder, delay or prejudice creditors, or any one or more of them, is void as against the creditor or creditors injured, delayed or prejudiced.

APA, s 4(1).

118. Therefore, to set aside a transaction under this provision, the plaintiff must prove three elements:

(a) There was a conveyance of property;

(b) There was an intent to "defeat, hinder, delay or prejudice" creditors; and

(c) At the time of the transaction, the debtor company was insolvent or unable to pay his, her or its debts in full or knew that he, she or it was on the eve of insolvency.

119. Section 4(2) permits challenges to transactions intended to give a creditor an "unjust preference" over other creditors. There is a presumption of intention under section 4(3) if three elements are satisfied:

(a) The debtor was insolvent at the time of the transaction;

(b) The transaction had the effect of providing the creditor with a preference; and

(c) An action or proceeding was brought within sixty (60) days to impeach or set aside such transaction.

APA, s 4(2), 4(3).

120. In Alberta, the FPA sets out rules which are substantially similar to those in Ontario. Under section 2 of the FPA, the applicant must show that there was a transfer of property by a person who is insolvent (or on the eve of insolvency) to a creditor with the intent of giving that creditor a preference over other creditors. Where direct evidence of the debtor company's intent is insufficient, courts can consider the badges of fraud.

Burton v R & M Insurance Ltd (1977), 5 Alta LR (2d) 14, 9 AR 589 (SC TD).

Alberta (Director of Employment Standards) v Sanche, 134 AR 149, 5 Alta LR (3d) 243 (QB).

Dwyer v Fox, 190 AR 114 at para 26, 43 Alta LR (3d) 63 (QB).

121. Under section 3 of the FPA, a transaction is void if, within one year of the impugned transaction, an action is commenced to set it aside, the debtor company was in insolvent circumstances or unable to pay debts in full or was on the eve of insolvency, and the transaction had the effect of giving a creditor a preference.

> *Taylor & Associates Ltd v Louis Bull Tribe No 439*, 2011 ABQB 213 at paras 12-13, 46 Alta LR (5th) 182.
>
> *Maki Megbiz, KFT v Osprey Energy Ltd*, 2006 ABQB 630, 405 AR 165 (Master).

122. Again, the factual circumstances prove that there was no intention on the part of the Applicants to defeat, hinder, delay, defraud, prefer or prejudice their creditors. Further, to the extent that such a finding is necessary, the evidentiary record is clear that McCann had no such intent to defeat, hinder, delay, defraud, prefer or prejudice their creditors in participating in the Transactions.

123. Even if the requisite intent can be established as against the Applicants, the Transactions occurred upon good consideration, in good faith and without notice or knowledge of the Applicants' intent within the meaning of section 3 of the FCA.

124. The TPLs did not knowingly participate in any fraudulent scheme or preference. They were lending money to individual borrowers through contractual brokerage arrangements of which all of the secured creditors had notice.

C. McCann's Legal Fees

125. Historically, an administration charge was granted pursuant to the Court's inherent jurisdiction. Section 11.52 of the CCAA now provides statutory jurisdiction to grant an administration charge. It provides as follows:

11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

CCAA, s 11.52(1).

Re Canwest Publishing Inc/Publications Canwest Inc, 2010 ONSC 222 at para 53, 184 ACWS (3d) 684.

126. Pursuant to subsection (c) of this provision, the Initial Order should be varied or amended to require payments by the Applicants of McCann's legal and other professional fees incurred in or in connection with this CCAA proceeding. Further, it should be varied or amended to include McCann and its legal counsel as beneficiaries of the Administration Charge, as that term is defined in the Initial Order, ranking *pari passu* in priority with all other parties entitled to the benefit of the Administration Charge.

127. These orders are warranted and necessary to safeguard fairness in this CCAA proceeding. McCann is both a TPL and a holder of the first lien debt. There is no rational basis upon which other creditors, such as the bondholders, who rank behind McCann in respect of the first lien debt and in respect of the McCann Property, should have their professional fees paid while McCann does not. This creates an uneven and unfair playing field that allows the bondholders an advantage in what has essentially become a priority dispute over the TPL loans.

128. McCann has been forced to expend considerable time and money in seeking to protect its position by participating in this CCAA proceeding, often in connection with other parties to this proceeding seeking adjournments of the comeback hearing originally scheduled for April 25, 2014. The issues that McCann raised in connection with this initial hearing date have still not been heard, and they are now to be heard on June 11, 2014.

129. For these reasons, the Applicants should be required to pay McCann's legal and other professional fees incurred in or in connection with this CCAA proceeding to ensure an even and fair playing field moving forward.

V. ORDER REQUESTED

130. For all of the above reasons, McCann respectfully submits that it should be granted:

(a) an order granting a declaration that the McCann Property, including without limitation the McCann Property as defined in McCann's notice of motion dated May 15, 2014 (the "**Notice of Motion**"), is owned by McCann free of any interests or claims of any creditor of the Applicants including, without limiting the generality of the foregoing, any encumbrances or charges created by the Order of the Honourable Regional Senior Justice Morawetz dated April 14, 2014;

(b) an order that the Applicants shall forthwith execute and deliver such documentation as is necessary or desirable to evidence the fact that McCann is the sole legal and beneficial owner of the McCann Property;

(c) an order that the Applicants shall forthwith transfer the McCann Funds and the McCann Receipts, as defined in the Notice of Motion, to McCann;

(d) an order that the Applicants shall forthwith, at McCann's expense, provide such assistance to McCann as is necessary or desirable to facilitate the transfer of the administration of the McCann Loans and the McCann Accounts Receivable to another service provider;

(e) an order that McCann's legal and other professional fees incurred in or in connection with this CCAA proceeding shall be paid by the Applicants and shall be covered by the Administration Charge granted in the Initial Order;

(f) an order that the Applicants shall pay McCann's costs of this motion; and

(g) an order that McCann reserves all rights to assert any arguments and claims in this proceeding or otherwise in relation to claims (whether they be trust, proprietary or otherwise) it has against the Applicants and any other persons resulting from or relating to monies it advanced to make third party loans.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 30th day of May, 2014.

M. Beaulne

BENNETT JONES LLP
Lawyers for 0678786 B.C. Ltd.

Tab A

SCHEDULE "A"
AUTHORITIES CITED

1. *Clarke v Baillie,* [1911] 45 SCR 50, 1911 CarswellOnt 733 (SCC).

2. *Metropolitan Toronto Police Widows and Orphans Fund v Telus Communications Inc* (2003), 30 BLR (3d) 288, 2003 CarswellOnt 168 (Sup Ct), rev'd on other grounds (2005), 75 OR (3d) 784, 5 BLR (4th) 251 (CA), leave to appeal to SCC ref'd [2005] SCCA No 379, 216 OAC 399 (note).

3. *Access Cash International Inc v Elliot Lake & North Shore Corp for Business Development* (2000), 1 PPSAC (3d) 209, 2000 CarswellOnt 2824 (Sup Ct).

4. *Cliffs Over Maple Bay Investments Ltd v Fisgard Capital Corp*, 2008 BCCA 327, 296 DLR (4th) 577.

5. *Romspen Investment Corporation v 6711162 Canada Inc*, 2014 ONSC 2781, 2014 CarswellOnt 5836.

6. *Re Dondeb Inc*, 2012 ONSC 6087, 2012 CarswellOnt 15528.

7. *Romspen Investment Corp v Edgeworth Properties*, 2012 ONSC 4693, 222 ACWS (3d) 854.

8. *Tucker v Aero Inventory (UK) Ltd*, 2011 ONSC 4223, 338 DLR (4th) 577 (Sup Ct).

9. *Verdellen v Monaghan Mushrooms Ltd*, 2011 ONSC 5820, 207 ACWS (3d) 553 (Sup Ct).

10. *Re Dilollo*, 2013 ONSC 578, 97 CBR (5th) 182 (Sup Ct), aff'd 2013 ONCA 550, 117 OR (3d) 81.

11. *Keith G Collins Ltd v Canadian Imperial Bank of Commerce*, 2011 MBCA 41, 268 Man R (2d) 30.

12. *Touche Ross Ltd v Weldwood of Canada Sales Ltd*, 48 CBR (NS) 83, 1983 CarswellOnt 214 (SC).

13. *Re Holt Motors Ltd* (1966), 57 DLR (2d) 180, 56 WWR 182 (Man QB).

14. *Thorne Riddell v Fleishman,* 47 CBR (NS) 233, 1983 CarswellOnt 201 (Sup Ct).

15. *Re AR Colquhoun & Son Ltd*, [1937] WWR 222, 18 CBR 124 (Sask KB).

16. *Re Norris* (1994), 23 Alta LR (3d) 397, 28 CBR (3d) 167 (QB), rev'd on other grounds (1996), 45 Alta LR (3d) 1, 193 AR 15 (CA).

17. *Skalbania (Trustee of) v Wedgewood Village Estates Ltd* (1988), 31 BCLR (2d) 184, 70 CBR (NS) 232 (SC), aff'd (1989), 37 BCLR (2d) 88, 60 DLR (4th) 43 (CA), leave to appeal to SCC ref'd (1989), 40 BCLR (2d) xxxiii (note), 62 DLR (4th) viii (note) (SCC).

18. *Conte Estate v Alessandro*, 2002 CarswellOnt 4507, [2002] OJ No 5080 (Sup Ct).

19. *Re Fancy* (1984), 46 OR (2d) 153, 8 DLR (4th) 418 (SC).

20. *Boudreau v Marler*, 18 RPR (4th) 165, 48 CBR (4th) 188 (CA).

21. *Montor Business Corp (Trustee of) v Goldfinger*, 2013 ONSC, 237 ACWS (3d) 296.

22. *Robinson v Countrywide Factors Ltd* (1977), [1978] 1 SCR 753, 72 DLR (3d) 500.

23. *Re Garrett*, 30 CBR (NS) 150, 1979 CarswellOnt 195 (SC).

24. *Indcondo Building Corp v Sloan*, 2010 ONCA 890, 103 OR (3d) 445.

25. *Oliver v McLaughlin*, 24 OR 41, [1893] OJ No 11 (CA).

26. *Bank of Montreal v Peninsula Broilers Ltd*, 177 ACWS (3d) 405, 2009 CarswellOnt 2906 (Sup Ct).

27. *Dapper Apper Holdings Ltd v 895453 Ontario Ltd* (1996), 38 CBR (3d) 284, 11 PPSAC (2d) 284 (Gen Div).

28. *Burton v R & M Insurance Ltd* (1977), 5 Alta LR (2d) 14, 9 AR 589 (SC TD).

29. *Alberta (Director of Employment Standards) v Sanche*, 134 AR 149, 5 Alta LR (3d) 243 (QB).

30. *Dwyer v Fox*, 190 AR 114, 43 Alta LR (3d) 63 (QB).

31. *Taylor & Associates Ltd v Louis Bull Tribe No 439*, 2011 ABQB 213, 46 Alta LR (5th) 182.

32. *Maki Megbiz, KFT v Osprey Energy Ltd*, 2006 ABQB 630, 405 AR 165 (Master).

33. *Re Canwest Publishing Inc/Publications Canwest Inc*, 2010 ONSC 222, 184 ACWS (3d) 684.

Tab B

SCHEDULE "B"
STATUTORY REFERENCES

ASSIGNMENTS AND PREFERENCES ACT, RSO 1990, C A.33

Nullity of gifts, transfers, etc., made with intent to defeat or prejudice creditors

4. (1) Subject to section 5, every gift, conveyance, assignment or transfer, delivery over or payment of goods, chattels or effects, or of bills, bonds, notes or securities, or of shares, dividends, premiums or bonus in any bank, company or corporation, or of any other property, real or personal, made by a person when insolvent or unable to pay the person's debts in full or when the person knows that he, she or it is on the eve of insolvency, with intent to defeat, hinder, delay or prejudice creditors, or any one or more of them, is void as against the creditor or creditors injured, delayed or prejudiced.

Unjust preferences

(2) Subject to section 5, every such gift, conveyance, assignment or transfer, delivery over or payment made by a person being at the time in insolvent circumstances, or unable to pay his, her or its debts in full, or knowing himself, herself or itself to be on the eve of insolvency, to or for a creditor with the intent to give such creditor an unjust preference over other creditors or over any one or more of them is void as against the creditor or creditors injured, delayed, prejudiced or postponed.

When there is presumption of intention if transaction has effect of unjust preference

(3) Subject to section 5, if such a transaction with or for a creditor has the effect of giving that creditor a preference over the other creditors of the debtor or over any one or more of them, it shall, in and with respect to any action or proceeding that, within sixty days thereafter, is brought, had or taken to impeach or set aside such transaction, be presumed, in the absence of evidence to the contrary, to have been made with the intent mentioned in subsection (2), and to be an unjust preference within the meaning of this Act whether it be made voluntarily or under pressure.

BANKRUPTCY AND INSOLVENCY ACT, RSC 1985, C B-3

Preferences

95. (1) A transfer of property made, a provision of services made, a charge on property made, a payment made, an obligation incurred or a judicial proceeding taken or suffered by an insolvent person

> (a) in favour of a creditor who is dealing at arm's length with the insolvent person, or a person in trust for that creditor, with a view to giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period

beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy; and

(b) in favour of a creditor who is not dealing at arm's length with the insolvent person, or a person in trust for that creditor, that has the effect of giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is 12 months before the date of the initial bankruptcy event and ending on the date of the bankruptcy.

Preference presumed

(2) If the transfer, charge, payment, obligation or judicial proceeding referred to in paragraph (1)(a) has the effect of giving the creditor a preference, it is, in the absence of evidence to the contrary, presumed to have been made, incurred, taken or suffered with a view to giving the creditor the preference — even if it was made, incurred, taken or suffered, as the case may be, under pressure — and evidence of pressure is not admissible to support the transaction.

Exception

(2.1) Subsection (2) does not apply, and the parties are deemed to be dealing with each other at arm's length, in respect of the following:

(a) a margin deposit made by a clearing member with a clearing house; or

(b) a transfer, charge or payment made in connection with financial collateral and in accordance with the provisions of an eligible financial contract.

Definitions

(3) In this section,

"clearing house"
« chambre de compensation »
"clearing house" means a body that acts as an intermediary for its clearing members in effecting securities transactions;

"clearing member"
« membre »
"clearing member" means a person engaged in the business of effecting securities transactions who uses a clearing house as intermediary;

"creditor"
« créancier »
"creditor" includes a surety or guarantor for the debt due to the creditor;

"margin deposit"

« dépôt de couverture »
"margin deposit" means a payment, deposit or transfer to a clearing house under the rules of the clearing house to assure the performance of the obligations of a clearing member in connection with security transactions, including, without limiting the generality of the foregoing, transactions respecting futures, options or other derivatives or to fulfil any of those obligations.

Transfer at undervalue

96. (1) On application by the trustee, a court may declare that a transfer at undervalue is void as against, or, in Quebec, may not be set up against, the trustee — or order that a party to the transfer or any other person who is privy to the transfer, or all of those persons, pay to the estate the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor — if

(a) the party was dealing at arm's length with the debtor and

(i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and that ends on the date of the bankruptcy,

(ii) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, and

(iii) the debtor intended to defraud, defeat or delay a creditor; or

(b) the party was not dealing at arm's length with the debtor and

(i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and ends on the date of the bankruptcy, or

(ii) the transfer occurred during the period that begins on the day that is five years before the date of the initial bankruptcy event and ends on the day before the day on which the period referred to in subparagraph (i) begins and

(A) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, or

(B) the debtor intended to defraud, defeat or delay a creditor.

Establishing values

(2) In making the application referred to in this section, the trustee shall state what, in the trustee's opinion, was the fair market value of the property or services and what, in the trustee's opinion, was the value of the actual consideration given or received by the debtor, and the values

on which the court makes any finding under this section are, in the absence of evidence to the contrary, the values stated by the trustee.

Meaning of "person who is privy"

(3) In this section, a "person who is privy" means a person who is not dealing at arm's length with a party to a transfer and, by reason of the transfer, directly or indirectly, receives a benefit or causes a benefit to be received by another person.

[...]

Definitions

253. In this Part,

[...]

"customer name securities" means securities that on the date of bankruptcy of a securities firm are held by or on behalf of the securities firm for the account of a customer and are registered or recorded in the appropriate manner in the name of the customer or are in the process of being so registered or recorded, but does not include securities registered or recorded in the appropriate manner in the name of the customer that, by endorsement or otherwise, are negotiable by the securities firm;

[...]

Vesting of securities, etc., in trustee

261. (1) If a securities firm becomes bankrupt, the following securities and cash vest in the trustee:

(a) securities owned by the securities firm;

(b) securities and cash held by any person for the account of the securities firm; and

(c) securities and cash held by the securities firm for the account of a customer, other than customer name securities.

Establishment of a customer pool fund and a general fund

(2) Where a securities firm becomes bankrupt and property vests in a trustee under subsection (1) or under other provisions of this Act, the trustee shall establish

(a) a fund, in this Part called the "customer pool fund", including therein

(i) securities, including those obtained after the date of the bankruptcy, but excluding customer name securities and excluding eligible financial contracts to which the firm is a party, that are held by or for the account of the firm

(A) for a securities account of a customer,

(B) for an account of a person who has entered into an eligible financial contract with the firm and has deposited the securities with the firm to assure the performance of the person's obligations under the contract, or

(C) for the firm's own account,

(ii) cash, including cash obtained after the date of the bankruptcy, and including

(A) dividends, interest and other income in respect of securities referred to in subparagraph (i),

(B) proceeds of disposal of securities referred to in subparagraph (i), and

(C) proceeds of policies of insurance covering claims of customers to securities referred to in subparagraph (i),

that is held by or for the account of the firm

(D) for a securities account of a customer,

(E) for an account of a person who has entered into an eligible financial contract with the firm and has deposited the cash with the firm to assure the performance of the person's obligations under the contract, or

(F) for the firm's own securities account, and

(iii) any investments of the securities firm in its subsidiaries that are not referred to in subparagraph (i) or (ii); and

(b) a fund, in this Part called the "general fund", including therein all of the remaining vested property.

Allocation and distribution of cash and securities in customer pool fund

262. (1) Cash and securities in the customer pool fund shall be allocated in the following priority:

(a) for costs of administration referred to in paragraph 136(1)(b), to the extent that sufficient funds are not available in the general fund to pay such costs;

(b) to customers, other than deferred customers, in proportion to their net equity; and

(c) to the general fund.

Where property deposited with securities firm under an EFC

(1.1) Where

(a) a person has, under the terms of an eligible financial contract with the securities firm, deposited property with the firm to assure the performance of the person's obligations under the contract, and

(b) that property is included in the customer pool fund pursuant to paragraph 261(2)(a),

that person shall share in the distribution of the customer pool fund as if the person were a customer of the firm with a claim for net equity equal to the net value of the property deposited that would have been returnable to the person after deducting any amount owing by the person under the contract.

Distribution

(2) To the extent that securities of a particular type are available in the customer pool fund, the trustee shall distribute them to customers with claims to the securities, in proportion to their claims to the securities, up to the appropriate portion of their net equity, unless the trustee determines that, in the circumstances, it would be more appropriate to sell the securities and distribute the proceeds to the customers with claims to the securities in proportion to their claims to the securities.

Compensation in kind

(2.1) Subject to subsection (2), the trustee may satisfy all or part of a customer's claim to securities of a particular type by delivering to the customer securities of that type to which the customer was entitled at the date of bankruptcy. For greater certainty, the trustee may, for that purpose, exercise the trustee's power to purchase securities in accordance with section 259.

Allocation of property in the general fund

(3) Property in the general fund shall be allocated in the following priority:

(a) to preferred creditors in the order set out in subsection 136(1);

(b) rateably

(i) to customers, other than deferred customers, having claims for net equity remaining after distribution of property from the customer pool fund and property

provided by a customer compensation body, where applicable, in proportion to claims for net equity remaining,

(ii) where applicable, to a customer compensation body to the extent that it paid or compensated customers in respect of their net equity, and

(iii) to creditors in proportion to the values of their claims;

(c) rateably to creditors referred to in section 137; and

(d) to deferred customers, in proportion to their claims for net equity.

***COMPANIES' CREDITORS ARRANGEMENT ACT*, RSC 1985, C. C-36**

Security or charge relating to director's indemnification

11.51 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Restriction — indemnification insurance

(3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

Negligence, misconduct or fault

(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

[...]

Application of sections 38 and 95 to 101 of the Bankruptcy and Insolvency Act

36.1 (1) Sections 38 and 95 to 101 of the Bankruptcy and Insolvency Act apply, with any modifications that the circumstances require, in respect of a compromise or arrangement unless the compromise or arrangement provides otherwise.

Interpretation

(2) For the purposes of subsection (1), a reference in sections 38 and 95 to 101 of the Bankruptcy and Insolvency Act

(a) to "date of the bankruptcy" is to be read as a reference to "day on which proceedings commence under this Act";

(b) to "trustee" is to be read as a reference to "monitor"; and

(c) to "bankrupt", "insolvent person" or "debtor" is to be read as a reference to "debtor company".

***FRAUDULENT CONVEYANCES ACT*, RSO 1990, C. F.29**

Where conveyances void as against creditors

2. Every conveyance of real property or personal property and every bond, suit, judgment and execution heretofore or hereafter made with intent to defeat, hinder, delay or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages, penalties or forfeitures are void as against such persons and their assigns.

Where s. 2 does not apply

3. Section 2 does not apply to an estate or interest in real property or personal property conveyed upon good consideration and in good faith to a person not having at the time of the conveyance to the person notice or knowledge of the intent set forth in that section.

***FRAUDULENT PREFERENCES ACT*, RSA 2000, C. F-24**

Intent to prefer

2. Subject to sections 6 to 9, every gift, conveyance, assignment, transfer, delivery over or payment of goods, chattels or effects or of bills, bonds, notes or securities or of shares, dividends, premiums or bonus in any bank, company or corporation, or of any other property, real or personal, made

(a) by a person at a time when the person is in insolvent circumstances or is unable to pay the person's debts in full or knows that the person is on the eve of insolvency, and

(b) to or for a creditor with intent to give that creditor preference over the other creditors of the debtor or over any one or more of them,

is void as against the creditor or creditors injured, delayed, prejudiced or postponed.

Preferential effect

3. Subject to sections 6 to 9, every gift, conveyance, assignment, transfer, delivery over or payment of goods, chattels or effects or of bills, bonds, notes or securities or of shares, dividends, premiums or bonus in any bank, company or corporation, or of any other property, real or personal, made

(a) by a person at a time when the person is in insolvent circumstances or is unable to pay the person's debts in full or knows that the person is on the eve of insolvency, and

(b) to or for a creditor and having the effect of giving that creditor a preference over the other creditors of the debtor or over any one or more of them,

is, in and with respect to any action that within one year after the transaction is brought to impeach or set aside the transaction, void as against the creditor or creditors injured, delayed, prejudiced or postponed.

[...]

Bona fide transactions

6. Nothing in sections 1 to 5 applies to

(a) a bona fide sale or payment made in the ordinary course of trade or calling to innocent purchasers or parties, or

(b) a payment of money to a creditor, or a bona fide conveyance, assignment, transfer or delivery over of any goods, securities or property, of any kind as above mentioned, that is made in consideration of a present actual bona fide sale or delivery of goods or other property or of a present actual bona fide payment in money, or by way of security for a present actual bona fide advance of money,

if the money paid or the goods or other property sold or delivered bear a fair and reasonable relative value to the consideration for it.

Payment to creditor

7. When there is a valid sale of goods, securities or property and the consideration or part of it is paid or transferred by the purchaser to the creditor of the vendor under circumstances that would render the payment or transfer void if it were made by the debtor personally and directly, the payment or transfer, even though valid as respects the purchaser, is void as respects the creditor to whom it is made.

Restoration of security to creditor

8. When a payment that is void under this Act has been made and a valuable security has been given up in consideration of the payment, the creditor is entitled to have the security restored or its value made good to the creditor before or as a condition of the return of the payment.

Saving of payment to creditor

9. Nothing in this Act

(a) affects a payment of money to a creditor when the creditor by reason or on account of the payment has lost or been deprived of or has in good faith given up a valid security that the creditor held for the payment of the debt so paid, unless the value of the security is restored to the creditor,

(b) affects the substitution in good faith of one security for another security for the same debt so far as the debtor's estate is not lessened in value to the other creditors because of the substitution, or

(c) invalidates a security given to a creditor for the pre-existing debt when, by reason or on account of the giving of the security, an advance is made in money to the debtor by the creditor in the bona fide belief that the advance will enable the debtor to continue the debtor's trade or business and pay the debtor's debts in full.

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 THE CASH STORE FINANCIAL SERVICES INC., THE CASH STORE INC., TCS CASH STORE INC., INSTALOANS INC., 7252331 CANADA INC., 5515433 MANITOBA INC., 1693926 ALBERTA LTD DOING BUSINESS AS "THE TITLE STORE"

Court File No. CV-14-10518-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE - COMMERCIAL LIST

Proceeding commenced at Toronto

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TAB 17

Court File No. CV-14-10518-00CL

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 THE CASH STORE FINANCIAL SERVICES INC., THE CASH STORE INC., TCS CASH STORE INC., INSTALOANS INC., 7252331 CANADA INC., 5515433 MANITOBA INC., 1693926 ALBERTA LTD. DOING BUSINESS AS "THE TITLE STORE"

APPLICANTS

FACTUM OF TRIMOR ANNUITY FOCUS LIMITED PARTNERSHIP #5

(Motion returnable June 11, 2014)

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TO: SERVICE LIST

TABLE OF CONTENTS

PART I - OVERVIEW

1. Trimor Annuity Focus Limited Partnership #5 ("**Trimor**") seeks to assume administration of the Trimor Loans[1] and the Trimor Receipts[2] (collectively, the "**Trimor Loans and Receipts**") to ensure that they do not vanish like the millions of dollars in Trimor's cash that has already disappeared.

2. It is clear that Trimor owns the Trimor Loans and Receipts and other stakeholders should not be allowed to use nebulous preference claims as an excuse to lock the Trimor Loans and Receipts in a business with no future, which has huge realization costs and which, according to the Applicants' own evidence, cannot reasonably be expected to maximize recoveries. Trimor should be allowed to realize on its property in the most efficient and effective manner possible.

3. The Applicants say they have already initiated an "orderly cessation" of their brokering business. Accordingly, they have no use for the third party lenders' funds. They are nonetheless insisting that the Applicants be entitled to collect the Trimor Loans despite the fact that, unlike other potential servicers, they are unable or unwilling to make new loans available to their former customers.

4. The Applicants' own evidence is that their inability to make new loans in Ontario has resulted in their "ability to collect outstanding customer accounts receivable [being] ***significantly***

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[1] "Trimor Loans" means any loan in existence immediately prior to the effective time of the Initial Order (in accordance with paragraph 34 of the Amended and Restated Initial Order): i) for which Trimor is listed as the lender; ii) which are attributable to Trimor according to the Applicants' records; or (iii) which have been assigned to Trimor. (See paragraphs 3 and 4 of the April 30, 2014 Additional TPL Protection Order).

[2] "Trimor Receipts" means any amounts received by Cash Store from Customers in repayment of the Trimor Loans.

impaired".[3] In fact, collections on the Trimor Loans decreased by 75 percent in Ontario from January to March, 2014, and the proportion of Trimor Loans that are more than 30 days overdue increased from 0 percent as at January 31, 2014 to 39 percent as at April 13, 2014.[4] As highlighted in the Monitor's Third Report,[5] the difficulties in collecting on accounts in Ontario will now apply to all jurisdictions in which the Applicants previously operated the brokering business.

5. In addition to this significant impairment arising from the fact that the Applicants can no longer make new loans, the Applicants are also unable, or unwilling, to take all steps necessary to ensure collections on the Trimor Loans are maximized. The Chief Restructuring Officer (the "**CRO**") has indicated that Cash Store's "ability to collect on Ontario brokered loans ***has been curtailed***"[6] and that outside Ontario he can only take "reasonable steps to effect the receipt of outstanding brokered loan receivables in a manner that preserves, to the extent possible, the value of the [third party lender] receivables".[7] The CRO has duties to a number of stakeholders, and is understandably concerned with the costs and management resources necessary to preserve the value of the Trimor Loans. However, his reluctance to take the necessary steps to maximize realizations should not prejudice Trimor.

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[3] Affidavit of Steven Carlstrom sworn April 14, 2014 (**"Carlstrom Affidavit"**) at para. 101; Motion Record of the Applicants at Tab 1.

[4] Report of PricewaterhouseCoopers dated May 14, 2014 (the **"PwC Report"**) at p. 6 (internal); Motion Record of Trimor, Tab 4.

[5] Monitor's Third Report at para. 39(c)(i).

[6] Affidavit of William Aziz sworn May 9, 2014 (the **"Aziz Affidavit"**) at para. 26; Motion Record of the Applicants at Tab 2. We understand that the CRO relies on the Applicants' interpretation of section 30.1 of the *Payday Loan Act, 2008* regulations for this position.

[7] Aziz Affidavit at para. 38.

6. Because Trimor owns the Trimor Loans, it is prepared to invest the time and resources necessary to maximize recoveries. Doing so will assist the CRO and the Applicants by eliminating the cost and management resources needed to collect the Trimor Loans. The relief sought by Trimor would relieve the Applicants, the CRO, and the Monitor of this burden and allow them to focus on restructuring the parts of the business that the Applicants believe continue to be viable. It will also allow Trimor to realize the maximum recovery from the Trimor Loans at its own expense.

7. In the past two months, the third party lenders have seen the stated value of their loans and restricted cash reduced from approximately $42 million to less than half of that amount. Trimor is extremely concerned that if the issue of ownership is not determined on a timely basis and administration of the loans is not assumed by an independent party with the capacity to make new loans in regulated jurisdictions, then what little value is left will simply evaporate in a cloud of bad debts and fees.

8. In light of the foregoing, Trimor respectfully requests that this Court grant a declaration that Trimor owns the Trimor Loans and Receipts, and order that Cash Store immediately transfer the Loans, and pay the Receipts, to Trimor or its designated administrator.

PART II - THE FACTS

9. Cash Store is a broker and lender of short-term loans. It also offers a range of other products and services to help its customers ("**Customers**") meet their day to day financial service needs.[8]

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[8] Carlstrom Affidavit at para 4.

10. Cash Store brokers loans on behalf of the Customers under broker agreements with third party lenders ("**TPLs**"), including Trimor. TPLs directly lend to Customers or purchase loans that Cash Store has made to Customers.[9]

11. Trimor transferred funds totalling $27,002,000 to Cash Store under the Broker Agreements (as defined below) and for the sole purpose of brokering the loans to Customers (the "**Trimor Funds**").[10] Other TPLs transferred funds to Cash Store for the purpose of brokering loans to Customers (the "**TPL Funds**").

The Broker Agreements

12. Trimor is a party to the following broker agreements with Cash Store (the "**Broker Agreements**"):[11]

(a) broker agreement between Trimor and The Cash Store Inc. ("**TCSI**") dated February 1, 2012 and made as of June 5, 2012; and

(b) broker agreement between Trimor and 1693926 Alberta Ltd. dated September 24, 2012 and made as of June 5, 2012.

The Broker Agreements are similar (if not identical) to the broker agreements that Cash Store has entered into with other TPLs, including 0678786 B.C. Ltd. ("**067**").

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[9] Carlstrom Affidavit at para. 76.

[10] Affidavit of Erin Armstrong sworn April 13, 2014 (the "**Armstrong Affidavit**") at para. 9; Motion Record of Trimor, Tab. 2.

[11] Armstrong Affidavit, Exhibits "A" and "B".

Cash Store Expressly Stated that Trimor Owns the Trimor Loans and Receipts

13. In or about January 2012, TCSI offered $132.5 million in senior secured notes due in 2017 through a private placement (the "**Secured Note Offering**"). Cash Store's Confidential Preliminary Canadian Offering Circular dated January 12, 2012 ("**Circular**") for the Secured Note Offering advises potential investors that Cash Store "currently act[s] primarily as a broker of short-term advances between our customers and third-party lenders, ***the effect of which is that the loan portfolio we service is not financed on our balance sheet.***"[12] Cash Store further states that "***the advances provided by the third-party lenders are repayable by the customer to the third-party lenders and represent assets of the lenders;*** accordingly, they are not included on our balance sheet."[13]

14. Cash Store repeated this express statement in its recent financial statements: When the Company acts as a broker on behalf of income earning consumers seeking short-term advances, the funding of short-term advances is provided by independent third party lenders. "***The advances provided by the third party lenders are repayable by the customer to the third party lenders and represent assets of the lenders***; accordingly, they are not included on the

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[12] Second Armstrong Affidavit sworn May 8, 2014 ("**Second Armstrong Affidavit**"), Exhibit "A" - Preliminary TCSI Circular at p. 4 (internal); Motion Record of Trimor, Tab 3.

[13] Second Armstrong Affidavit, Exhibit "A" at p. 38 (internal).

Company's balance sheet."[14] At no time has Cash Store included the Trimor Loans as assets on its balance sheet.[15]

15. The Report of PricewaterhouseCoopers Inc. ("**PwC**") states that senior management of Cash Store expressly advised PwC that Cash Store has always considered the TPL Funds, such as the Trimor Funds, to be third party funds.[16]

Cash Store is Merely a Broker – Trimor is the Owner of the Trimor Loans and Receipts

16. When Trimor Funds are deployed as loans to Customers the creditor or lender is Trimor and Cash Store takes a brokerage fee. The supporting agreements and disclosure statements signed by Customers name Trimor as the credit grantor and the Customer as the borrower for the Trimor Loans.[17]

17. In its own financial statements and affidavit evidence filed in this and another proceeding, Cash Store describes its relationship with the TPLs and Customers as follows:

(a) Cash Store "acts as either a broker between the customer and the third-party lenders or as the direct lender to the customer;"[18]

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[14] Second Armstrong Affidavit, Exhibit "A" – Notes to the Consolidated Financial Statements for the twelve and fifteen months ended September 30, 2011 and September 30, 2010 at p. F-11; Exhibit "B" – Financial Statements of TCSI for the fifteen months ended September 30, 2010 and for the year ended June 30, 2009 at p. 8; Exhibit "C" – Management's Discussion and Analysis of TCSI for the three and twelve months ended September 30, 2011 at p. 26.

[15] PwC Report at p. 6 (internal). Affidavit of Murray McCann sworn April 22, 2014 (the "**McCann Affidavit**") at para. 4; Motion Record of Trimor, Tab 8.

[16] PwC Report at p. 6 (internal).

[17] PwC Report at p. 6 (internal).

[18] Second Armstrong Affidavit, Exhibit "A" - Preliminary TCSI Circular at p. 1 (internal).

(b) Cash Store "serves as an alternative to traditional banks, acting either as a broker between the customer and the third-party lenders or as the direct lender to the customer;"[19]

(c) Under the broker agreements, "the TPLs make loans to Cash Store's customers and Cash Store provides services to the TPLs related to the collection of documents and information from Cash Store's customers, as well as loan repayment services. Cash Store collects fees for brokering these transactions;"[20]

(d) "When an advance becomes due and payable, the [Broker Customer] must make repayment of the principal and interest owing to the lender through [Cash Store], which remits such amounts to the third party lender;"[21] and

(e) "[Cash Store] generates revenue by charging loan fees or broker fees and interest…The third party lenders earn revenue through the interest charged and collected on the short term advances to [Customers]."[22]

18. In the Circular, Cash Store describes the relationship as follows:

(a) "The TPL Funds are deployed by Cash Store to broker customers, subsequently received by Cash Store as repayment for such broker loans (subject to loan losses), and then redeployed, repeating the process;"[23]

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[19] Second Armstrong Affidavit, Exhibit "A" - Preliminary TCSI Circular at p. 1 (internal).

[20] Carlstrom Affidavit at para. 76.

[21] Second Armstrong Affidavit, Exhibit "I" – Affidavit of C. Warnock sworn September 30, 2013 at para. 25.

[22] Second Armstrong Affidavit, Exhibit "I" – Affidavit of C. Warnock sworn September 30, 2013 at para. 26.

(b) "Similar to what is described above for brokered payday loans, TPLs provide the funds for the line of credit, Cash Store arranges the line of credit, and Cash Store earns fees on these transactions;"[24] and

(c) In a chart setting out the relationship of certain stakeholders to Cash Store, the TPLs' amount is listed as $42.0 million with the following note: "Consisting of the TPL Funds originally advanced, including funds deployed in brokered loans, Restricted Cash, and cumulative losses."[25]

Trimor Could Refuse to Allow the Brokering of the Trimor Funds in its Sole Discretion

19. At any time during the term of the Broker Agreements, Trimor had the right to reduce the funds it was willing to make available to Customers on 120 days notice. In other words, Trimor could reduce the funds it made available for brokering to $0 and effectively terminate the Broker Agreements on 120 days notice to Cash Store.[26]

20. The Broker Agreements further provide that Trimor may give notice to Cash Store that Trimor Funds that have not yet been advanced as loans to Customers should not be advanced. In addition, Trimor is not obligated to approve any particular loan or amount of loans.[27] Lastly, as stated in more detail below, the Broker Agreements also provide Trimor with the right to transfer the Trimor Loans to another service provider.

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[23] Carlstrom Affidavit at para. 78.

[24] Carlstrom Affidavit at para. 34.

[25] Carlstrom Affidavit at para. 58.

[26] Armstrong Affidavit, Exhibits "A" and "B" at ss. 2.2.

[27] Armstrong Affidavit at para. 13, Exhibits "A" and "B" at ss. 2.3.

21. In its Circular, Cash Store advised potential investors Trimor could reduce or withdraw the Trimor Funds. The Circular states that "... our business will remain dependant on third-party lenders who are willing to make funds available for lending to our customers. ***There are no assurances that the existing or new third-party lenders will continue to make funds available to our customers.***"[28]

22. The TPLs, including Trimor, only made the TPL Funds available as a result of representations that the funds were segregated, held in trust, and used for only a specific purpose.[29] The TPLs relied on these representations by the Company, and, to the extent that these representations were false, it should not be able to rely on those misrepresentations to Trimor and the other TPLs' detriment.

Trimor Assumed the Credit Risk of the Trimor Loans

23. Cash Store's own evidence filed in this application is that, under the Broker Agreements, "the TPLs are responsible for losses suffered due to uncollectible advances."[30] Section 7.1 of each of the Broker Agreements states that the TPLs assumed the credit risk of the loans (*i.e.* that Customers would not repay), unless a loan was not repaid as a result of Cash Store's improper performance under the Broker Agreements.[31]

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[28] Second Armstrong Affidavit, Exhibit "A" at p. 16 (internal).

[29] Second Armstrong Affidavit at para. 6, Exhibit "G" and Armstrong Cross-Examination Transcript, questions 58 – 64.

[30] Carlstrom Affidavit at para. 77.

[31] Armstrong Affidavit, Exhibits "A" and "B" at para. 7.1 and Exhibit "I", Affidavit of C. Warnock at para. 25.

24. If the interest received by the TPLs was less than 17.5 percent of the TPL funds, Cash Store would make a payment to bring cash received up to 17.5 percent (a "**Retention Payment**"). Cash Store made the Retention Payments as an inducement to ensure that TPLs were receiving a return that was commensurate with the risk of lending.[32]

25. In its Circular, Cash Store advised potential purchasers of its bonds that "we have made the decision to voluntarily make retention payments to the third-party lenders as consideration for continuing to advance funds to our customers."[33] Although the third-party lenders have not been guaranteed a return, "*the decision has been made to voluntarily make retention payments to the lenders to lessen the impact of loan losses experienced by the third-party lenders.*"[34]

26. Cash Store's practice of paying a retention payment to the TPLs implies that it recognized the need to compensate the TPLs for the use of their funds and to encourage the TPLs to continue to lend their funds to the Customers through Cash Store's brokerage.[35]

27. The DIP Lenders/Bond Holders were well aware of this practice and took no issue with it.

Cash Store Represented that it Would Not Fund Operating Expenses with Trimor Funds

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[32] Transcript of Cross-Examination of Erin Armstrong on her affidavits sworn April 13 and May 8, 2014 held on May 21, 2014 ("**Armstrong Cross-Examination Transcript**"), questions 53 – 55; Motion Record of Trimor at Tab 6. Transcript of Cross-Examination of Sharon Fawcett on her affidavits sworn April 11 and 22, 2014 held on May 21, 2014 ("**Fawcett Cross-Examination Transcript**"), question 131; Motion Record of Trimor at Tab 7.

[33] Second Armstrong Affidavit, Exhibit "A" at p. 17 (internal).

[34] Second Armstrong Affidavit, Exhibit "A" at p. 38 (internal).

[35] PwC Report at p. 11 (internal).

28. Cash Store advised Trimor that it would not use Trimor Funds for any purpose other than advancing loans in accordance with the Broker Agreements, unless Cash Store first obtained Trimor's written permission.[36] Trimor always understood that Cash Store could not use Trimor Funds for the payment of Cash Store's general operating expenses.[37] Cash Store also advised Trimor that it had "never used [Trimor Funds] for any other purpose than loans to customers or maintaining a loan float."[38]

29. In a 2011 report to its auditors, the issue of using the Trimor Funds for operating expenses was raised by and Trimor made it clear that Trimor Funds "are only to be used for loans to broker customers."[39]

30. Further, Cash Store's sworn evidence in a proceeding relating to one TPL is that the TPL Funds would be accounted for as restricted cash and that "no operating expenses are funded from any cash in the restricted cash account."[40] Cash Store definitively stated that its "finance team monitors and reconciles the restricted and unrestricted cash accounts to ensure no operating expenses are funded by any cash in the restricted cash account."[41]

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[36] Armstrong Cross-Examination Transcript, questions 97, 98, 168 and Exhibits "1", "2", "3" and"9".

[37] Armstrong Cross-Examination Transcript, question 75.

[38] Armstrong Cross-Examination Transcript, Exhibit "3" and "9".

[39] Armstrong Cross-Examination Transcript, Exhibit "2".

[40] Second Armstrong Affidavit, Exhibit "I" – Affidavit of C. Warnock sworn September 30, 2013 at para. 36.

[41] Second Armstrong Affidavit, Exhibit "I" – Affidavit of C. Warnock sworn September 30, 2013 at para. 36.

Trimor Funds Were Held in a Segregated Account

31. Any Trimor Funds or other TPL Funds that were not deployed as loans to Customers were to be held separate and apart from Cash Store's general operating account. The Broker Agreements provide that all funds advanced by Trimor are to be held in a Designated Broker Bank Account, which is a Cash Store bank account that is "designated by [Cash Store] for the purposes of temporarily receiving funds from [Trimor]... before they are advanced to a [Customer]."[42]

32. Similarly, all payments made by Customers on account of any Trimor Loans are to be deposited into a Designated Financier Bank Account, which is "the bank branch and account designated by [Trimor] from time to time where (and into which) deposits of cash and cheques received from [Customers], in respect of such [Trimor] funded loans, are to be cleared (deposited) from time to time."[43]

33. Cash Store advised another TPL, 067, that its funds would be held in an account that was separate and apart from Cash Store's own accounts and only contained TPL Funds.[44]

34. Until January 2014 a separate bank account was used for deposit of TPL Funds, including the Trimor Receipts, and the payment of Retention Payments.[45] Cash Store's own evidence filed in another proceeding provides that TPL Funds were "pooled with all funds received from third

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[42] Armstrong Affidavit, Exhibits A and B, s. 1.1(g) "Designated Broker Bank Account".

[43] Armstrong Affidavit, Exhibits A and B, s. 1.1(h) "Designated Broker Bank Account".

[44] Armstrong Affidavit at para. 17. Armstrong Cross-Examination Transcript, questions 39 – 41. Fawcett Cross-Examination Transcript, questions 33 – 38 and 48.

[45] PwC Report at p. 27 (internal).

party lenders" and were "segregated and accounted for in the general ledger restricted cash account."[46] Funds loaned directly to Customers by TPLs were drawn from the pool of available TPL Funds in the account and transferred to the Customers. Cash Store collected interest and loan repayments from the Customer on behalf of a TPL and deposited the funds into the pool."[47] Trimor understood that the Trimor Funds and Trimor Receipts were segregated and pooled in this manner.[48]

35. In addition, PwC has confirmed that when Trimor Receipts were collected, and not yet redeployed, they were segregated as restricted cash (the "**Restricted Cash**") on Cash Store's balance sheet.[49]

Cash Store Assured Trimor that it Held the Trimor Funds in Trust

36. Cash Store also assured Trimor that it would treat the Trimor Funds as being held in trust for Trimor's benefit. In an email from Michael Zvonkovic (former Vice-President, Financial Reporting at TCSI) dated November 9, 2011, Mr. Zvonkovic stated that Cash Store "have not use [*sic*] the [TPL Funds] for general operating expenses and is under the trust conditions as outlined in the [Broker Agreements]."[50] Trimor always understood that Cash Store agreed to

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[46] Second Armstrong Affidavit, Exhibit "I" – Affidavit of C. Warnock sworn September 30, 2013 at paras. 35 and 36.

[47] Second Armstrong Affidavit, Exhibit "I" – Affidavit of C. Warnock sworn September 30, 2013 at paras. 37 and 43.

[48] Second Armstrong Affidavit at para. 10.

[49] PwC Report at p. 6 (internal); Affidavit of Murray McCann sworn April 22, 2014 (the "**McCann Affidavit**") at para. 4; Motion Record of Trimor, Tab 8.

[50] Second Armstrong Affidavit at para. 6, Exhibit "G" – Email from Michael Zvonkovic dated November 9, 2011.

hold the Trimor Funds and Receipts in trust for its benefit.[51] Cash Store also represented to 067, another TPL, that it would hold 067's funds in trust and not co-mingle them with other funds.[52]

Broker Agreements are Terminated and Trimor is Entitled to Transfer Administration

37. The CRO has determined, in consultation with the Monitor, that it is necessary and appropriate to implement a cessation of the brokered loan business and cease brokering new loans in all jurisdictions in which the Cash Store operates.[53] Cash Store's intention to cease all brokered loan operations effectively terminates the Broker Agreements.

38. Upon termination of the Broker Agreements, Trimor has the option to allow the Applicants to continue to administer the Trimor Loans, transfer the administration of them to a new service provider, or sell the Trimor Loans to a third party. Paragraph 6.4 of the Broker Agreements provides that:

> Upon the ending of the Term:
>
> a. Unless [Trimor] determines to appoint a new broker (as contemplated by Subsection 6.4(b)), [Cash Store] shall continue to provide the Broker Services with respect to all Loans still outstanding as at the end of the Term;
>
> b. If [Trimor] notifies [Cash Store] that [Trimor] is designating a new broker to handle the Loan portfolio (or [Trimor] is going to administer the Loan portfolio directly or sell the Loan portfolio) and demands that [Cash Store] deliver the Records related to the Loan portfolio, ***[Cash Store] shall***, unless and to the extent that the [Cash Store] elects to otherwise transfer the same under Section 2.10, ***immediately deliver to [Trimor] (or the new broker or owner designated by [Trimor]) all original Records related to all Loans and copies of all electronic files containing information relating to the Loans. [Trimor] (or any new broker***

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[51] Armstrong Cross-Examination Transcript, questions 64 and 95.

[52] McCann Affidavit at paras. 4 and 5.

[53] Aziz Affidavit at para. 29.

> ***or owner) shall be entitled to contact and carry out such realization actions against the borrowers of the Loans which [Trimor] (or any new broker or owner) determines in its complete discretion.*** The exercise by [Trimor] of this right shall not diminish [Trimor's] right to recover from [Cash Store] as a result of breaches of this Agreement by [Cash Store] and to recover from [Cash Store] under the indemnities set out in Article 7 (if applicable). [Emphasis added][54]

39. Trimor is accordingly entitled to treat the Broker Agreements as terminated and transfer the administration of the Trimor Loans immediately.

Significant Prejudice to Trimor if the Trimor Loans are not Transferred

40. Cash Store's inability to broker new loans has already had a devastating impact on its ability to collect payments due on the Trimor Loans. If Cash Store no longer brokers loans, there is little incentive for Customers to repay.[55] The CRO has already stated that the Applicants' "ability to collect on Ontario brokered loans has been curtailed."[56] Cash Store admits that "the TPLs will likely encounter some difficulty collecting outstanding loans, as the Ontario Cash Store branches are currently unable to broker new loans for customers"[57] and "its ability to collect outstanding customer accounts receivable has...been significantly impaired."[58]

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[54] Armstrong Affidavit, Exhibits "A" and "B" at paras. 6.4.

[55] Second Armstrong Affidavit at para. 12.

[56] Aziz Affidavit at para. 26.

[57] Carlstrom Affidavit at para. 175; Transcript of Cross-Examination of Steven Carlstrom held April 22, 2014, questions 286-292, 307 and 314; Motion Record of Trimor at Tab 6.

[58] Carlstrom Affidavit at para. 101.

41. In fact, both Trimor and 067 collections have been declining significantly since January 2014.[59] Trimor's collections in Ontario decreased by 75 percent from January to March, 2014, while its outstanding loan balance has only declined by 15 percent during this same period.

42. Trimor's loan position has also been declining rapidly since January 2014. The proportion of Ontario Trimor Loans that are more than 30 days overdue (the "**Overdue Loans**") increased from 0 percent as at January 31, 2014 to 39 percent as at April 13, 2014.[60] This decline was caused by Cash Store's inability to relend in Ontario and the same will occur in other jurisdictions now that the brokering business is being shut down.

No Evidence of Prejudice to the Applicants if Trimor Loans Transferred

43. There is no direct evidence of prejudice to the Applicants if Trimor takes the Trimor Loans, and the related customer information, and commences collection activities to preserve their value. In fact, the only evidence is that this is what the Applicants agreed to when they entered into the Broker Agreements.

44. As stated above, the Applicants have agreed that upon termination they would "immediately deliver to [Trimor] (or the new broker or owner designated by [Trimor]) ***all original Records related to all Loans and copies of all electronic files containing information relating to the Loans***. [Trimor] (or any new broker or owner) shall be ***entitled to contact and carry out such realization actions against the borrowers of the Loans*** which [Trimor] (or any

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[59] PwC Report at p. 19 (internal).

[60] PwC Report at pp. 6 and 15 (internal).

new broker or owner) determines in its complete discretion." Trimor is simply seeking to take the steps that the Applicants have agreed to. This is in no way prejudicial to the Applicants.

PART III - ISSUES AND LAW

45. On this motion, the Court is asked to confirm Trimor's ownership of the Trimor Loans and Receipts and to allow Trimor or its agent to assume administration of the Trimor Loans to maximize realizations in accordance with Trimor's contractual rights.

A. Trimor Owns the Trimor Loans

46. The evidence clearly demonstrates that Trimor owns the Trimor Loans and Receivables. The Trimor Funds were made available and lent directly to the Customers pursuant to the Broker Agreements. Cash Store merely facilitated and brokered the Trimor Loans on behalf of the Customers. Cash Store did not acquire an interest in the Trimor Loans.[61]

47. Although proceeds from the Trimor Loans and Receipts may have been co-mingled with other TPL Funds and Cash Store's general operating funds in breach of the terms of the Broker Agreements, the Trimor Funds have always been accounted for separately. The Trimor Funds were segregated with all funds received from third party lenders and accounted for as restricted cash. As a result, the Applicant's creditors and other stakeholders could always discern from

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[61] PwC Report at p. 6 (internal). Second Armstrong Affidavit, Exhibit "A" - Preliminary TCSI Circular at p. 1 (internal). Second Armstrong Affidavit, Exhibit "I" – Affidavit of C. Warnock sworn September 30, 2013 at paras. 25 and 26. Carlstrom Affidavit at para. 76.

public sources the amount of Trimor Funds that were deployed as loans to Customers or held as a float for future loans.[62]

48. The Bondholders, the DIP Lender, and the other secured lenders (collectively the "**Secured Creditors**") have always known the nature of the relationship between Cash Store and the TPLs. It is absurd for these parties to now claim that the Trimor Loans are property of Cash Store and thereby potentially subject the Secured Creditors' security interests.

49. The Secured Creditors have benefitted from the broker fees paid on TPL loans for years. They had knowledge that the TPL loans were being made with TPL Funds. They cannot complain about the state of affairs when things go badly for Cash Store. Further, the Secured Creditors should not be permitted to benefit from Cash Store's breaches of its Broker Agreements.

50. While the nature of the relationship between Trimor and Cash Store is not typical, the position of Trimor is analogous to that of a consignor of goods under a true consignment or a purchaser of a true sale of receivables. A secured creditor of a consignee of goods under a true consignment or of a purchaser of receivables under a true sale has no interest in the goods or receivables consigned or sold. Similarly, the Secured Creditors have no interest in the TPL Loans or their proceeds.

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[62] Second Armstrong Affidavit, Exhibit "I" – Affidavit of C. Warnock sworn September 30, 2013 at paras. 35 to 37, 43.

i) True sale of receivables

51. The leading decision on the factors that a court should consider when determining whether a transfer of financial assets is a sale or loan is *Metropolitan Toronto Police Widows and Orphans Fund v. Telus Communications Inc.* (***"Metropolitan"***).[63] In *Metropolitan*, the Court considered whether the assignment of certain trade receivables was a true sale or a financing. While the issue in the present motion is not the nature of an assignment, the indicia of ownership set out in *Metropolitan* provides guidance on the factors to be considered when determining ownership of the Trimor Loans.

52. The Court in *Metropolitan* set out the following factors as indicia of ownership:

(a) The intention of the parties as evidenced by the language of the agreement and subsequent conduct of the parties (para. 40);

(b) Whether the risks of ownership are transferred to the purchaser and the extent and nature of recourse to the seller (para. 41);

(c) The right of the seller to surplus collections (para. 51);

(d) Certainty of determination of the purchase price (para. 57);

(e) The extent to which the assets are identifiable (para. 61); and

(f) Whether the seller has a right to redeem the receivables on payment of a specified amount (para. 67).

53. With respect to those factors, the Court noted the following:

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[63] (2003), 30 B.L.R. (3d) 288, 2003 CarswellOnt 168 (Sup. Ct.) rev'd on other grounds (2005) 75 OR (3d) 784; 5 B.L.R. (4th) 251 (ONCA) leave to appeal to SCC refused.

(a) When interpreting a contract, one must look not only to the intention of the parties as expressed by the language of the contract itself but also to "the substance of the transaction and not merely to the form" (paras. 38 and 40).

The Broker Agreements and evidence of all parties involved in the implementation of those agreements demonstrate that it was a brokering arrangement, not a financing agreement. [64]

(b) "In any true sale transaction, there must be a transfer of ownership risk to the purchaser. In the case of the sale of accounts receivable, the risk with regard to the non-payment of the receivable must pass to the purchaser subject to whatever forms of recourse the purchaser may have against the vendor" (para. 41).

Trimor took the credit risk on the Trimor Loans and has over $8 million in bad loans in its loan portfolio according to Cash Store's records.[65] The Secured Creditors take the position that any limited capital protection that Trimor was to receive from Cash Store was voluntary and, if they are to be believed, illusory.

(c) The absence of a right of the purchaser to retain the surplus from collection of accounts receivable is not fatal to the transaction being categorized as a true sale (para. 56).

Trimor received the principal and interest paid on the Trimor Loans.[66]

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[64] PwC Report at p. 6 (internal). Second Armstrong Affidavit, Exhibit "A" - Preliminary TCSI Circular at p. 1 (internal). Second Armstrong Affidavit, Exhibit "I" – Affidavit of C. Warnock sworn September 30, 2013 at paras. 25 and 26. Carlstrom Affidavit at para. 76.

[65] Carlstrom Affidavit at para. 77. Armstrong Affidavit, Exhibits "A" and "B" at para. 7.1 and Exhibit "I", Affidavit of C. Warnock at para. 25.

[66] Transcript of Cross-Examination of Erin Armstrong on her affidavits sworn April 13 and May 8, 2014 held on May 21, 2014 ("**Armstrong Cross-Examination Transcript**"), questions 53 – 55; Motion Record of Trimor at Tab 6. Transcript

(d) While all the factors must be considered, whether the seller has a right of redemption is "the ultimate test to be applied to determine whether a particular transaction should be interpreted as a secured loan or as a true sale" (para 67).

> There is no provision in the Broker Agreements that allows the Applicants to redeem the Trimor Loans. Instead, under the Broker Agreements Trimor has the right both to take back its funds at any time on 120 days notice and to take over the administration of the Trimor Loans upon the termination of Broker Agreement.[67]

54. The Court also made it clear that the fact that the seller acts as the collection agent is not inconsistent with a finding that the transaction was a true sale (para. 66).

ii) Consignment of goods under a non-security "true" consignment

55. The relationship of a credit broker and credit grantor outlined in the Broker Agreements is analogous to that of a non-security consignment, otherwise known as a "true" consignment. In a true consignment the supplier of the consigned goods retains legal title until goods are sold and title passes directly from the consignor to the ultimate purchaser. Similarly, the Broker Agreements establish a commercial and legal relationship whereby the funds available for lending to the Customers are supplied by the TPLs, like Trimor, who enter directly into a debtor/creditor relationship with each of the Customers. In differentiating between a consignment, which is in substance a security interest, and a true consignment which is not, courts have set out several key indicia.

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of Cross-Examination of Sharon Fawcett on her affidavits sworn April 11 and 22, 2014 held on May 21, 2014 ("**Fawcett Cross-Examination Transcript**"), question 131; Motion Record of Trimor at Tab 7.

[67] Armstrong Affidavit, Exhibits "A" and "B" at ss. 2.2 and 6.4.

56. In *Access Cash International Inc. v Elliot Lake and North Shore Corporation for Business Development*, the Court set out the following key indicia that differentiate a true consignment from a security consignment:[68]

a) The goods are shown as an asset in the books/records of the supplier and are not shown as an asset in the books/records of the merchant.

b) It is apparent in the merchant's dealings with others that the goods belong to the supplier rather than the merchant.

c) Title of goods remains with the supplier.

d) The supplier has the right to demand the return of the goods at any time.

e) The merchant has right to return unsold goods to the supplier.

f) The merchant is required to segregate the supplier's goods from his own.

g) The merchant is required to maintain separate books and records in respect of the supplier's goods.

h) The merchant is required to hold sale proceeds in trust for the supplier.

i) The supplier has the right to stipulate a fixed price or a price floor for the goods.

j) The merchant has the right to inspect the goods and the premises in which they are stored.

57. A number of the above indicia exist in respect of the relationship between Trimor and Cash Store, including the fact that Trimor has the right to demand the return of the Trimor Funds[69] and the fact that Cash Store is required to segregate the Trimor Funds and were only allowed to use them for brokering.[70] Further, the loan documentation in respect of the Trimor

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[68] (2000), 1 P.P.S.A.C. (3d) 209, 2000 CarswellOnt 2824 at para. 21 (Sup. Ct.) [*Access Cash*].

[69] Armstrong Affidavit, Exhibits "A" and "B" at ss. 2.2.

[70] Armstrong Affidavit, Exhibits "A" and "B" at ss. 1.1(g) and (h).

Loan is directly between the Customers and Trimor.[71] Paragraph 4 of the April 30, 2014 order makes it clear that any non-Ontario loans that were advanced after that Order was made belong to Trimor.

B. Trimor Should be Allowed to Realize on the Trimor Loans

58. The Broker Agreements make it clear that upon termination Trimor has the option to take over the administration of the Trimor Loans.[72] Despite this fact, the Applicants are seeking to trap the Trimor Loans with Cash Store and allow them to realize on the Trimor Loans in a situation where it is clear that Cash Store cannot maximize recoveries or minimize costs.

59. Although the CCAA is broad in scope, its scope it not limitless and there are circumstances, such as here in respect of the Trimor Loans, in which the granting of a stay or continuation of a stay is not justified.

60. As Justice Tysoe said on behalf of the British Columbia Court of Appeal in *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.* (***"Cliffs"***),[73]

> [...] the ability of the court to grant or continue a stay under s. 11 is not a free standing remedy that the court may grant whenever an insolvent company wishes to undertake a "restructuring", a term with a broad meaning including such things as refinancings, capital injections and asset sales and other downsizing. Rather, s. 11 is ancillary to the fundamental purpose of the CCAA, and a stay of proceedings freezing the rights of creditors should only be granted in furtherance of the CCAA's

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[71] PwC Report at p. 6 (internal). Second Armstrong Affidavit, Exhibit "A" - Preliminary TCSI Circular at p. 1 (internal). Second Armstrong Affidavit, Exhibit "I" – Affidavit of C. Warnock sworn September 30, 2013 at paras. 25 and 26. Carlstrom Affidavit at para. 76.

[72] Armstrong Affidavit, Exhibits "A" and "B" at ss. 6.4.

[73] 2008 BCCA 323, 2008 CarswellBC 1756 at para. 26.

fundamental purpose.

61. The Applicants are seeking the Court's assistance to allow them to effectively terminate the Broker Agreements, but at the same time refusing to allow Trimor to mitigate its damages by assuming administration of the Trimor Loans in accordance with the terms of the Broker Agreement. This is not conduct that the CCAA stay was intended to accommodate and the Court ought not to extend the ambit of the CCAA stay in this manner to the prejudice of Trimor.

62. *Cliffs* was cited with approval in a recent decision of the Ontario Superior Court in *Romspen Investment Corporation v. 6711162 Canada Inc.*,[74] where the Court was faced with competing applications by the secured creditor for the appointment of a receiver and the debtor company for an initial CCAA order. In coming to the conclusion that an initial order ought not to be granted, Justice Brown made the following observations:[75]

> At a high level, a certain unfairness characterizes the plan of the CCAA Applicants. Under their plan, they would see the development of the Midland Condo Project to its end and use the unit sales proceeds to pay off Romspen in full and, evidently, to pay most of the amounts sought by the lien claimants. They would then develop out the other secured properties to propose a plan to the other unsecured creditors, but according to Soorty most of the unsecured debt consists of shareholders loans from Cocov and himself. Reduced to its essence, the plan seems to be no more than asking the court to impose on Romspen an extension of the term of the Loan beyond its 2-year term and to allow management to continue operating as they have in the past. In other words, the CCAA Applicants do not propose the compromise of debt or the liquidation of part of their businesses – they want to carry on just as they have in the past.
>
> I accept the evidence of Romspen about the unfairness of such an approach. Romspen stated that it had "absolutely no confidence" in the ability of Soorty and Cocov to manage the affairs of the CCAA Applicants during any stay period, pointing to them

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[74] 2014 ONSC 2781, 2014 CarswellOnt 5836 [*Romspen*].

[75] *Romspen* at paras. 72 and 73.

> letting the first general contractor on the Midland Condo Project, Dineen, place liens on it, and allowing subsequent contractors to do so as well [...].

63. In concluding that CCAA relief was not appropriate in the circumstances, the Court also cited the decision in *Dondeb Inc. (Re)* ("***Dondeb***"),[76] where the Court also determined that CCAA relief should not be granted to the applicant company. At the conclusion of his reasons in *Dondeb*, Justice Campbell stated as follows:[77]

> The *CCAA* is a flexible instrument, which with judicial discretion, is capable of permitting restructuring, including in appropriate situations, liquidation.
>
> In my view the use of the *CCAA* for the purpose of liquidation must be used with caution when liquidation is the end goal, particularly when there are alternatives such as an overall less costly receivership that can accomplish the same overall goal.

64. In his earlier decision in *Romspen Investment Corporation v. Edgeworth Properties et al.*,[78] Justice Campbell determined that a better alternative in that case was to carve the applicant, who held a mortgage over certain of the debtor companies' real property, out of the CCAA proceeding, to make a declaration as to the validity and priority of the applicant's mortgage, and to permit the applicant to proceed with judicial sale/foreclosure proceedings in respect of the real property subject to its security. Justice Campbell made this order over the objections of certain investors in the debtor companies who challenged the validity of the applicant's security.

65. Cash Store does not intend to carry out a restructuring of the brokering business. It intends to close that business down. In fact, it states in its materials that it has already

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[76] 2012 ONSC 6087, 2012 CarswellOnt 15528 [*Dondeb*].

[77] *Dondeb* at paras. 33 and 34.

[78] 2012 ONSC 4693, 2012 CarswellOnt 10902.

commenced that process without prior consultation with the TPLs. There is no benefit to Cash Store continuing to administer the TPL Loans. There is, however, significant prejudice to Trimor and the other TPLs if the CCAA stay continues to stand in the way of the efficient and effective collection of the TPL Loans. This prejudice arises from, among other things:

(a) the fact that the Cash Store cannot broker new loans, which will "significantly impair" its ability to collect the Trimor Loans;[79]

(b) the fact that the Cash Store intends to take no steps to collect in Ontario and only limited steps in other jurisdictions;[80]

(c) the potential for huge professional fees and other expenses associated with any liquidation conducted under the CCAA, and the projected fees for these proceedings in particular; and

(d) the risk that Cash Store's restructuring may not succeed and that the task of collecting the Trimor Loans will be left for yet another future (and potentially costly) insolvency proceeding.

66. The fundamental purpose of the CCAA is not advanced by permitting Cash Store to continue to administer the TPL loans as there is to be no restructuring of that business.

67. Trimor should be allowed to take over the administration of its loans at its cost.

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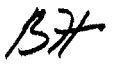
[79] Carlstrom Affidavit at para. 101.

[80] Aziz Affidavit at para. 38.

ORDER REQUESTED

68. For the reasons set out above, Trimor respectfully requests that this Court grant a declaration that Trimor owns the Trimor Loans and Receipts, and order that Cash Store immediately transfer the Loans, and pay the Receipts, to Trimor or its designated administrator.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 30th day of May, 2014.



Brett Harrison and Adam Maerov
McMillan LLP

Lawyers for Trimor Annuity Focus Limited Partnership #5

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Access Cash International Inc. v. Elliot Lake and North Shore Corporation for Business Development* (2000), 1 P.P.S.A.C. (3d) 209, 2000 CarswellOnt 2824.

2. *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 323, 2008 CarswellBC 1756.

3. *Dondeb Inc. (Re)*, 2012 ONSC 6087, 2012 CarswellOnt 15528.

4. *Metropolitan Toronto Police Widows and Orphans Fund v. Telus Communications Inc.* (2003), 30 B.L.R. (3d) 288, 2003 CarswellOnt 168.

5. *Romspen Investment Corp. v. 6711162 Canada Inc.*, 2014 ONSC 2781, 2014 CarswellOnt 5836.

6. *Romspen Investment Corp. v. Edgeworth Properties*, 2012 ONSC 4693, 2012 CarswellOnt 10902.

SCHEDULE "B"
RELEVANT STATUTES

Payday Loans Act, 2008 regulations

30.1 (1) A licensee shall not request or require the borrower under a payday loan agreement to do any of the following or suggest to the borrower that the borrower do any of the following:

1. Repay or pay the advance or any part of it to the lender or anyone else until the end of the term of the agreement.

2. Pay the cost of borrowing or any part of it to anyone until the end of the term of the agreement.

(2) A licensee shall not, directly or indirectly on behalf of any other person, request or require the borrower under a payday loan agreement to do any of the actions described in paragraph 1 or 2 of subsection (1) or suggest to the borrower that the borrower do any of those actions.

(3) If a licensee contravenes subsection (1) or (2), the borrower is only required to repay the advance to the lender and is not liable to pay the cost of borrowing.

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 THE CASH STORE FINANCIAL SERVICES INC., THE CASH STORE INC., TCS CASH STORE INC., INSTALOANS INC., 7252331 CANADA INC., 5515433 MANITOBA INC., 1693926 ALBERTA LTD DOING BUSINESS AS "THE TITLE STORE"

APPLICANTS

Court File No. CV-14-10518-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE - COMMERCIAL LIST

Proceeding commenced at Toronto

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(Motion returnable June 11, 2014)

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IN THE MATTER OF The Cash Store Financial Services Inc., *et al.*

Applicants

Court of Appeal File No: M44123
M44124

COURT OF APPEAL FOR ONTARIO
Proceeding commenced at Toronto

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