

**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 CHIEF RESTRUCTURING OFFICER
OF THE APPLICANTS**

May 11, 2014

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APPLICANTS

**FACTUM OF THE CHIEF RESTRUCTURING OFFICER ("CRO") OF THE
APPLICANTS (MAY 13 MOTIONS)**

PART I – NATURE OF THIS MOTION

1. The Cash Store Financial Services Inc. and the other applicants listed above (the "Applicants") obtained relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA") by an Amended and Restated Initial Order dated April 15, 2014 (the "Initial Order"). The relief requested by the Applicants was supported by the Affidavit of Steven Carlstrom, sworn April 14, 2014 (the "Carlstrom Affidavit"). The Initial Order granted a stay of proceedings (the "Stay") until May 14, 2014.

2. This factum is being filed in support of a motion to extend the Stay until June 17, 2014 (the "Stay Extension Period") and to obtain certain other relief, including (a) approval of the cessation of the brokered lending business in the brokered lending provinces and of proposed measures for realizing upon and segregating outstanding brokered loan receivables; and (b)

approval of a key employee retention plan (“KERP”) and the granting of a related charge (the “KERP Charge”).

3. The Applicants are seeking an extension of the Stay and the approval of the KERP in order to continue their efforts to restructure their businesses (as described in the affidavit of William E. Aziz sworn on May 9, 2014 (the “Second Aziz Affidavit”)) with a view to emerging as a going concern for the purpose of continuing to provide services to their customers and to maintain employment for as many as possible of their approximately 1,840 employees in Canada and the UK.¹

4. The Applicants have, to date, engaged in efforts to find a going-concern solution that will maximize value for all stakeholders and have been proceeding in good faith and with due diligence. An extension of the Stay until June 17, 2014 is warranted, among other things, in order to allow the Applicants to continue with efforts to achieve regulatory compliance for the business in Manitoba, Ontario and other provinces, and to implement a sales process with a view to determining whether a completed sale transaction can be achieved for some or all of Cash Store’s business.

5. The Applicants are seeking the Court’s approval of the cessation of the brokered lending business in the brokered lending provinces based on the economic and regulatory challenges currently being experienced in relation to those jurisdictions, as well as the material risk that this brokered lending model is not legally defensible under criminal interest rate provisions. Given the many competing entitlements – including proprietary entitlements – that may be asserted in relation to outstanding brokered loan receivables and the money received in payment of those receivables, it is proposed that Cash Store be permitted to realize upon all

¹ Carlstrom Affidavit, para. 5.

outstanding brokered loan receivables in an orderly manner, under supervision of both the Monitor and the CRO, and to maintain such receipts in one or more segregated accounts until all potential competing claims to these funds can be fully and fairly determined by this Court. The Applicants submit that this proposed approach provides the best means of ensuring that value is preserved for the benefit of all stakeholders.

6. Without an opportunity for all such stakeholders to determine their competing claims on the basis of a full evidentiary record, it would be premature and potentially prejudicial to the Applicants' stakeholders to transfer any brokered loan or other receivables to the Applicants' third party lenders ("TPLs") or to administer these receivables outside the CCAA process. Moreover, given that Cash Store's goodwill depends on its relationship with its customers, a transfer at this stage of such receivables to the TPLs or their third party administrator (together with applicable customer information) could significantly undermine the Applicants' ability to achieve a going-concern restructuring. The realization and segregation of brokered loan receivables by Cash Store under supervision of the CRO and the Monitor mitigates any prejudice to the TPLs, at the same time as it addresses the potentially substantial prejudice to all stakeholders that would result from any measure that allows value to escape from the Applicants' estate prior to a full determination of all competing entitlements.

7. References to "Cash Store" in this factum refer to all of the Applicants in this proceeding.

PART II – FACTS

8. The facts with respect to this motion are more fully set out in the Second Aziz Affidavit. Capitalized terms in this Factum not otherwise defined have the same meanings as in the Second Aziz Affidavit.

Steps Taken to Date

9. Since the date of the Initial Order, the Applicants, under the supervision of the CRO and the Monitor, have carried out a number of steps in furtherance of the restructuring of the Applicants' business. These include:

- (a) The Special Committee of Cash Store's Board of Directors resigned and the responsibility for Cash Store's restructuring was transitioned to the CRO.²
- (b) The CRO has consulted with both Rothschild Inc. ("Rothschild") and the Monitor in order to familiarize himself fully with the current state of Cash Store's business and to plan the immediate steps required to stabilize Cash Store's liquidity position.³
- (c) The CRO has engaged with the Monitor and Rothschild to develop a process to solicit bids for a new debtor-in-possession (DIP) facility, which culminated in an agreement in principle with the *Ad Hoc* Committee of Noteholders (the "Ad Hoc Committee") and the Initial DIP Lenders (Coliseum Capital Partners LP, Coliseum Capital Partners II, LP and Blackwell Partners, LLC (collectively, "Coliseum") and Alta Fundamental Advisers, LLC). Due to a late-breaking

² Affidavit of William E. Aziz, sworn April 27, 2014 [First Aziz Affidavit], para. 4. The First Aziz Affidavit is attached to the Second Aziz Affidavit as Exhibit A.

unsolicited bid for an alternate new DIP facility, submitted on May 8, 2014 by DirectCash Payments Inc. (“DCPI”), the final form of the new DIP facility is still under negotiation and will be the subject of a request for court approval in the near term.⁴

- (d) The CRO has attended management meetings in Edmonton and participated in comprehensive discussions regarding Cash Store’s business and its cash flows with members of senior management and its financial advisers.⁵
- (e) The CRO has familiarized himself with Cash Store’s relationship with the TPLs and has engaged in discussions in respect of the TPLs.⁶
- (f) The CRO has worked with Rothschild to develop a sales process for the business.⁷
- (g) The CRO has met with the Manitoba Regulator to discuss Cash Store’s business in Manitoba and has instructed Cash Store’s Chief Compliance and Regulatory Affairs Officer to contact regulators in Ontario, Nova Scotia, British Columbia, Saskatchewan and Alberta as soon as possible.⁸
- (h) The CRO has engaged in in-depth discussions regarding the legal and economic viability of Cash Store’s brokered lending business in unregulated jurisdictions

³ Second Aziz Affidavit, para. 5. See also First Aziz Affidavit, para. 6.

⁴ Second Aziz Affidavit, paras. 5 and 6.

⁵ First Aziz Affidavit, para. 18. See also Second Aziz Affidavit, paras. 17(b) and (c).

⁶ First Aziz Affidavit, para. 14.

⁷ Second Aziz Affidavit, para. 17(d).

⁸ Second Aziz Affidavit, paras. 17(e) and (f).

with the Chief Compliance and Regulatory Officer, the Monitor, its counsel and the CRO's counsel.⁹

- (i) The CRO has consulted with the Monitor regarding the future path of Cash Store's business.¹⁰
- (j) In the meantime, the Monitor has begun procedures for notifying stakeholders, including identifying known creditors¹¹ and is taking ongoing steps to supervise the Applicants' systems and to monitor receipts and disbursements of the Applicants.¹² The Monitor has also been actively involved in consulting and negotiation with numerous stakeholders, including the TPLs and regulators.¹³

10. In addition, on April 29, 2014, Rothschild sent a letter to interested parties requesting non-binding offers for the sale of Cash Store to be submitted by May 23, 2014.¹⁴

Nature of the Brokered Loan Business

11. Cash Store carries on its brokered lending business in a number of provinces which have not enacted payday loan legislation (the "Unregulated Provinces"). These are: New Brunswick, Newfoundland, Northwest Territories, Prince Edward Island and the Yukon Territory. In these provinces, Cash Store acts as a broker or intermediary, with the TPLs acting

⁹ Second Aziz Affidavit, para. 17(g).

¹⁰ Second Aziz Affidavit, para. 17(h).

¹¹ Third Report to the Court Submitted by FTI Consulting Canada Inc., in its Capacity as Monitor, dated May 9, 2014 [Monitor's Third Report], paras. 13 to 16.

¹² Monitor's Third Report, paras. 17 to 19.

¹³ Monitor's Third Report, para. 20.

¹⁴ Second Aziz Affidavit, para. 18 and Exhibit B.

as lenders of record. If the customer's eligibility for a loan is established, the customer completes the TPL loan documentation and Cash Store makes the advance.¹⁵

12. The brokered lending model has also been used in Manitoba and Ontario, where Cash Store has offered brokered line-of-credit products instead of traditional payday loans. Both Manitoba and Ontario have enacted payday loan legislation.¹⁶

13. Cash Store earns fees on all brokered loan transactions.¹⁷

14. The TPLs transferred funds to Cash Store for use in its brokered loan business pursuant to a number of broker agreements (the "Broker Agreements").¹⁸ Although not required by the terms of the Broker Agreements (which require the TPLs to bear the risk of loss on brokered loans except in limited circumstances), Cash Store has historically taken certain capital protection measures to insulate the TPLs from such losses, as set out in greater detail in the Carlstrom Affidavit.¹⁹ These measures have included: (a) the transfer of direct loan receivables to free up Restricted Cash;²⁰ (b) a Monthly Lender Distribution in an amount calculated to provide an effective return of 17.5% to the TPLs on their investment;²¹ and (c) certain capital protection mechanisms, including, in the case of Manitoba and Ontario, the purchase of past due

¹⁵ Second Aziz Affidavit, para. 23.

¹⁶ Second Aziz Affidavit, para. 24.

¹⁷ Second Aziz Affidavit, paras. 23 and 24.

¹⁸ Carlstrom Affidavit, para. 76 and Exhibits G, H, I, J, and K.

¹⁹ Carlstrom Affidavit, para. 77.

²⁰ Carlstrom Affidavit, para. 80.

²¹ Carlstrom Affidavit, para. 84.

brokered loans, which also permitted Cash Store to take active steps to collect those loans without requiring licensing under collection agency legislation.²²

15. The Ontario brokered loan business has historically represented a significant percentage of Cash Store's business.²³ Cash Store previously took the position that the line of credit products offered in both Manitoba and Ontario were not subject to provincial payday loan legislation.²⁴ However, a decision of the Ontario Superior Court of Justice determined that this position cannot be sustained.²⁵ As of February 12, 2014, therefore, the brokered line of credit product was discontinued in Ontario and no lending activity is currently occurring in Ontario due to outstanding issues regarding compliance with regulatory requirements. Moreover, the Ontario Regulator has indicated that Cash Store may not take active steps to collect any outstanding amounts owing in relation to brokered line of credit products until the maturity date of the lines of credit.²⁶

16. New legislation in Manitoba that will likely take effect in late 2014 or early 2015 will prevent Cash Store from operating the current form of its brokered loan business in Manitoba.²⁷

²² Carlstrom Affidavit, para. 84.

²³ 33% of Cash Store's revenues and 35% of its branches are associated with the Ontario business. See Second Aziz Affidavit, para. 28.

²⁴ Second Aziz Affidavit, para. 24

²⁵ Second Aziz Affidavit, para. 25. After consultation with the Chief Regulatory and Compliance Officer and Cash Store's litigation counsel, it has been determined that an appeal from this decision should be abandoned.

²⁶ Second Aziz Affidavit, para. 26.

²⁷ Second Aziz Affidavit, para. 27. Manitoba business accounts for 6% of Cash Store's total revenues and 5% of its total branches. See Second Aziz Affidavit, para. 28.

Cessation of the Brokered Loan Business

17. Since the date of the Initial Order, the CRO, the Chief Regulatory and Compliance Officer, Cash Store's senior management, the Monitor and legal and financial advisers have engaged in in-depth discussions regarding the viability of the brokered lending business and whether it should be continued. The conclusion after this process is that it is necessary and appropriate to implement an immediate orderly cessation of the brokered lending business, including ceasing the brokering of any new loans.²⁸ This orderly cessation was initiated on May 8, 2014, after consultation with the Ad Hoc Committee and Coliseum.²⁹

18. The reasons for this decision are set out in detail below and are based on both the legal and regulatory implications of continuing to operate this business, and its relative economic contribution to Cash Store's bottom line.

19. Given the numerous parties that may assert legal entitlements, including proprietary entitlements, to outstanding brokered loans and amounts received in relation to these brokered loans, it is proposed that the orderly wind-down of this business be carried out under the supervision of Cash Store's two court officers (the CRO and the Monitor). Under this protection, it is proposed that Cash Store be authorized to take all necessary steps, in accordance with applicable legal requirements, to receive payment for and to collect all outstanding brokered loan receivables. Cash Store will place all proceeds into one or more segregated accounts and will have no right or ability to use these proceeds for any purpose, pending determination by this Court of the entitlement to these proceeds.³⁰

²⁸ Second Aziz Affidavit, paras. 29 and 30.

²⁹ Second Aziz Affidavit, paras. 31 and 32.

³⁰ Second Aziz Affidavit, paras. 34 to 38.

KERP and KERP Charge

20. In consultation with the Monitor, Cash Store is developing a key employee retention program (“KERP”) which will provide for incentive payments to certain of Cash Store’s key employees. The purpose of the KERP is to encourage these key employees to continue their employment with Cash Store throughout the restructuring on the basis that their experience, expertise and/or ongoing involvement in Cash Store’s restructuring efforts are crucial to the success of the restructuring.³¹

21. The terms and details of the KERP are still being finalized. The current intention is that the participants in the KERP (the “KERP Participants”) will be Cash Store’s key employees in Finance, Human Resources, Marketing and other aspects of Cash Store’s business that require unique skill sets. The KERP Participants will be selected based on their specialized expertise and/or on the basis that their continued employment is critical for a successful restructuring of Cash Store’s business.³²

22. The maximum amount of the KERP will not exceed \$400,000. The KERP payments are proposed to be secured by a charge over Cash Store’s Property (the “KERP Charge”), with priority over all other security interests, charges or liens, except as provided in the proposed Stay Extension Order.³³

PART III – ISSUES AND THE LAW

23. The issues on this motion are as follows:

³¹ Second Aziz Affidavit, paras. 11 and 12.

³² Second Aziz Affidavit, para. 12.

³³ Second Aziz Affidavit, para. 14.

- (a) should the Stay be extended until June 17, 2014?;
- (b) should Cash Store be authorized to cease the brokered loan business and effect the orderly realization and segregation of the outstanding brokered loan receivables?;
and
- (c) should this Honourable Court approve the proposed KERP and KERP Charge?

A. THE APPLICANTS MEET THE TEST FOR EXTENSION OF THE STAY

24. In determining whether to grant an extension of an initial order beyond the first 30 day period, the CCAA requires the debtor company to demonstrate that it has acted and is acting in good faith, and with due diligence.³⁴ This additional requirement is flexibly drafted and does not set out any prescribed list of rules that must be satisfied in order to demonstrate these criteria.

25. As the Supreme Court held in *Ted LeRoy Trucking*, the CCAA court's discretion to make orders facilitating the debtor's restructuring subsists as long as it is not clear that the debtor's restructuring efforts are "doomed to failure":

It is well-established that efforts to reorganize under the CCAA can be terminated and the stay of proceedings against the debtor lifted if the reorganization is "doomed to failure" [citations omitted]. However, when an order is sought that does realistically advance the CCAA's purposes, the ability to make it is within the discretion of a CCAA court.³⁵

26. Cash Store has been subject to the Stay for only a relatively short time period since the Initial Order was granted on April 15, 2014. During that time, a number of initiatives have been taken in furtherance of the restructuring of Cash Store's business. In particular, the initial steps towards implementing a sales process with a view to achieving a going concern

³⁴ CCAA, s. 11.02(3)(b).

³⁵ *Re Ted LeRoy Trucking [Century Services] Ltd.*, 2010 SCC 60, 2010 CarswellBC 3419 (S.C.C.) at para. 71.

solution to the Applicants' current financial difficulties have been taken. Moreover, initiatives are underway with a view to resolving some of the significant regulatory issues facing Cash Store in Manitoba, Ontario and Nova Scotia, among other provinces.³⁶

27. The extension of the Stay for the proposed Stay Extension Period will be in keeping with the purposes of the CCAA including: (a) allowing the Applicants a reasonable breathing space to achieve a successful reorganization where there is a realistic chance that they will be able to do so; and (b) preventing manoeuvring by creditors during that period.³⁷ The Stay Extension Period is a reasonable period of time to allow the Applicants to determine whether there is a realistic possibility that a sale transaction can be achieved and to determine whether there are other viable restructuring alternatives to preserve going concern value for all stakeholders.

28. In fact, due to the competing claims and the attempts by certain stakeholders to jockey for priority positions since the date of the Initial Order, the Applicants have not yet had a reasonable opportunity to benefit from the breathing space that the CCAA is intended to provide. It is submitted that the extension of the Stay, together with the requested orders regarding the cessation of the brokered lending business and its orderly wind-down, will assist Cash Store in achieving some stability for a reasonable period in order to focus on its restructuring. Such stability will be of benefit to Cash Store's stakeholders, as a whole.

29. Should one of the potential DIP Facilities be agreed to by the Applicants and ultimately approved by the Court, it is forecast that the Applicants will have sufficient liquidity

³⁶ Second Aziz Affidavit, para. 17(e) and (f).

³⁷ *Re Sharp-Rite Technologies Ltd.* (2000), 19 C.B.R. (4th) 130, 2000 CarswellBC 1365 (B.C. S.C.) at para. 22; leave to appeal refused 2000 BCCA 402, 2000 CarswellBC 1356 (B.C. C.A.) and *Re Rio Nevada Energy Inc.*, 2000 CarswellAlta 1584, [2000] A.J. No. 1596 (A.B. Q.B.) at para. 32.

to continue operations during the proposed Stay Extension Period. To the extent that one of the DIP facilities has not been finalized prior to the return date of this motion, the Applicants anticipate seeking a shorter extension of the Stay.³⁸

B. CESSATION AND WIND-DOWN OF THE BROKERED LOAN BUSINESS

i. Reasons for Ceasing the Brokered Loan Business

30. For the reasons set out below, the Applicants seek the approval of the Court of their decision to cease their brokered lending business. The Initial Order provides that:

THIS COURT ORDERS that ... 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.³⁹

31. In addition, the Initial Order permits the Applicants to "permanently or temporarily cease, downsize or shut down any of their business or operations..."⁴⁰ Given the terms of the Initial Order and the fact that the cessation of the brokered loan business is an important step in Cash Store's restructuring, the Applicants consider it prudent to seek the approval of the Court of the implementation of the cessation, as of May 8, 2014, of this aspect of their business.

32. The decision to cease the brokered lending business is the product of considerable discussion and consultation among the CRO, the Monitor, the Chief Regulatory and Compliance Officer, Cash Store management and their advisers. The Ad Hoc Committee and Coliseum were

³⁸ Second Aziz Affidavit, para. 19.

³⁹ Initial Order, para. 4.

⁴⁰ Initial Order, para. 11(a).

also consulted.⁴¹ It has been concluded that the economic and other costs of continuing to operate this business, as well as the increased litigation and other risks that may result from such continued operation, far outweigh any contributions of this business to Cash Store's overall revenues. In particular:

- (a) The brokered lending business cannot be operated in Ontario at all as a result of regulatory constraints, and for similar reasons, the current form of the brokered lending business will likely have to be shut down in Manitoba by the end of 2014 as well.⁴² As such, the brokered model cannot function in Cash Store's largest market area (Ontario) and if Cash Store is to operate in Ontario, the business in that province must be transitioned to a payday lending model. A similar transition will likely have to occur by year end at the latest in Manitoba. The remaining brokered lending business in the Unregulated Provinces makes a relatively insignificant contribution to Cash Store's revenues.⁴³

- (b) There is a material risk that the brokered lending model is not legally defensible under the criminal interest rate provisions of the *Criminal Code* (Canada).⁴⁴ As such, the immediate cessation of the brokered lending business caps the related exposure to litigation and regulatory risk that exists as long as this aspect of the business continues in operation. Among other considerations, such ongoing risk can only erode the going concern value of the business and potentially jeopardize the ability of the Applicants to restructure their business.

⁴¹ Second Aziz Affidavit, paras. 29 and 31.

⁴² Second Aziz Affidavit, para. 30(a).

⁴³ Second Aziz Affidavit, paras. 28 and 30(a).

- (c) Certain of Cash Store's secured lenders do not support the continued voluntary retention payments that are being made to the TPLs.⁴⁵
- (d) The brokered lending business requires the funding support of the TPLs. The two largest TPLs (Trimor and McCann) have taken active steps to seek the return of their investment and have sought various forms of relief in these proceedings to preclude any future application of TPL Funds to new brokered lending.⁴⁶ Given the relatively low future value of the brokered lending business, disproportionate management and advisor time and resources have been expended and would be required in the future to address issues regarding the continued use of TPL Funds.⁴⁷

33. For all of the reasons above, it is in the interests of all significant stakeholders for Cash Store to immediately cease brokering new loans and to carry out an orderly wind-down of the brokered lending business, under the supervision of two court officers, including the orderly realization and segregation of outstanding brokered loan receivables.

ii. Orderly Wind-Down Must Be Supervised Under CCAA

34. The Applicants submit that the most reasonable basis on which to conduct the orderly wind-down of the brokered loan business and to ensure the protection of the proceeds of any brokered loan receivables is to provide for the realization of these receivables within the

⁴⁴ Second Aziz Affidavit, para. 30(c).

⁴⁵ Second Aziz Affidavit, para. 30(b).

⁴⁶ Second Aziz Affidavit, para. 30(d). See also First Aziz Affidavit, para. 19 and Carlstrom Affidavit, paras. 131 to 142.

⁴⁷ Second Aziz Affidavit, para. 30(e).

court-supervised CCAA process. It is proposed that this Court authorize Cash Store, under the supervision of the Monitor and the CRO, to take responsibility for receiving payments on account of outstanding brokered loans, and for taking all necessary steps to collect past due brokered loans, taking into consideration the Ontario Regulator's position regarding the appropriate timing for and limitations on collecting outstanding brokered loans in that province. All proceeds received will be placed in one or more segregated accounts that cannot be used for any purpose by either the Applicants or the TPLs.⁴⁸

35. It is well-established that discretionary relief under the CCAA, such as the relief requested with respect to the brokered loan business, requires the balancing of prejudices in order to ensure that there is equitable treatment of stakeholders (including equal sharing of pain associated with the debtor's financial difficulties)⁴⁹ and that no single creditor obtains an unfair advantage over others.⁵⁰ The Applicants submit that the balance of prejudices in this proceeding favours the proposed approach to the cessation of the brokered loan business, on the basis that many parties may assert legal entitlements, including proprietary entitlements, to outstanding brokered loans and the proceeds of those loans.⁵¹

36. For example, on one hand, two of the TPLs, Trimor and McCann, have submitted notices of motion seeking similar relief at this hearing, including the following:

⁴⁸ Second Aziz Affidavit, paras. 36 and 37.

⁴⁹ *Re Timminco Ltd.*, 2012 ONSC 2515, 2012 CarswellOnt 5390 (Ont. S.C.J. [Commercial List]) at paras. 15 to 17; *Re Air Canada (2004)*, 47 C.B.R. (4th) 169, 2004 CarswellOnt 469 (Ont. S.C.J. [Commercial List]) at para 9.

⁵⁰ *Re Comstock Canada Ltd.*, 2013 ONSC 6043, 2013 CarswellOnt 13598 (Ont. S.C.J. [Commercial List]) at para. 17, citing *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 141, 1988 CarswellBC 553 (B.C. S.C.).

⁵¹ Second Aziz Affidavit, para. 34.

- (a) the execution and delivery of documentation evidencing that the TPLs are the “sole legal and beneficial owners” of the brokered loans made in the name of the TPLs, the TPL Funds, any loans assigned to the TPLs as capital protection, any TPL accounts receivable, and any amounts received by Cash Store in repayment of the foregoing loans/advances;
- (b) an immediate transfer of the TPL Funds to the TPLs;
- (c) assistance from Cash Store in transferring administration of TPL-owned loans and advances to a third party administrator.⁵²

37. Both TPLs assert that they will be materially prejudiced if they do not obtain the relief sought above. However, the issues regarding the alleged ownership of the TPL Funds, the outstanding brokered loan receivables and the proceeds of such receivables are complex.

38. The complexities of these issues arise, among other things, from the fact the relationship that is formally documented in the Broker Agreements is not necessarily reflected in the conduct of the parties under those Agreements – a fact which was recognized by the Monitor in its Second Report.⁵³ Moreover, the TPLs have both indicated at various times that they view the TPL Funds and related receivables and their proceeds as subject to some form of proprietary claim,⁵⁴ although the basis for this relief has yet to be fully argued on the facts.

39. It is clear that a full and fair hearing involving all stakeholders, with the benefit of all of the evidence (including an opportunity to cross-examine any witnesses), is necessary in

⁵² See Notice of Motion of 0678786 B.C. Ltd., dated May 7, 2014 [McCann Notice of Motion] and of Trimor Annuity Focus LP #5, dated May 5, 2014 [Trimor Notice of Motion]. See also Second Aziz Affidavit, para. 34.

⁵³ Monitor’s Second Report, paras. 32 to 33.

⁵⁴ Carlstrom Affidavit, paras. 131 to 139. See also McCann Notice of Motion and Trimor Notice of Motion, *supra*.

order to determine the substance of the parties' relationships, the legal consequences of these relationships and the relevance and priority of any competing claims. If the Applicants' relief with respect to the cessation of the brokered loan business is not granted, there is a significant risk that these issues will be effectively predetermined.

40. On the other hand, Coliseum, which is one of the initial DIP Lenders and one of the Applicants' major stakeholders in its capacity as holder of a portion of the Senior Secured Notes, secured by a first lien charge, has submitted a Memorandum of Fact and Law opposing the relief sought by the TPLs. Coliseum asserts that its first lien charge may cover receipts from outstanding brokered loans and that Coliseum intends to assert priority over these receipts at the appropriate time. As such, Coliseum opposes any attempt by the TPLs to lift the Stay to provide the relief sought and asserts that its rights and the rights of other stakeholders would be significantly prejudiced by such a step.⁵⁵

41. Moreover, the Applicants are subject to a number of class actions, which may also give rise to competing claims in relation to assets held by the Applicants, and which have not yet been the subject of any judicial determination.⁵⁶

42. Finally, the evidence is that the Applicants' customer list is a valuable asset of Cash Store. Allowing a TPL to transfer the administration of a loan portfolio to a third party, including the related customer information, would erode the value of Cash Store's saleable assets and materially impair the potential value of a going concern transaction to Cash Store.⁵⁷

⁵⁵ Memorandum of Fact and Law of the DIP Lender, dated May 9, 2014.

⁵⁶ Monitor's Third Report, para. 30(e).

⁵⁷ Second Aziz Affidavit, para. 35.

43. The suggested approach whereby the CRO and the Monitor oversee the realization and segregation of brokered loan proceeds is designed to ensure that value is preserved in the Applicants' estate until the rights of all parties can be fully and properly determined. By contrast, allowing such realization to occur in the absence of the supervision provided by this Court and the Applicants' two court officers (the CRO and the Monitor) presents material risks to stakeholders who may have competing claims to the proceeds. The Monitor has identified some significant unknown elements associated with the TPLs' request to have their loan receivables administered by a third party, including the fact that it is unclear that there is any proposal by the TPLs to segregate any receivables or their proceeds pending determination of future entitlements.⁵⁸ Such a measure appears, at first blush, to be logically inconsistent with the other relief requested by the TPLs, but further evidence may be necessary on this point.

44. Historically, Cash Store took steps in Manitoba and Ontario to buy back past due loans (by means of a non-cash transaction) in order to provide additional capital protection to the TPLs, and to permit Cash Store to take active steps to collect those loans, in light of the fact that Cash Store is not a registered collection agency.⁵⁹ Given that past due brokered loans will be collected under the supervision of two court officers as part of the orderly wind-down of Cash Store's brokered lending business, this issue no longer arises.⁶⁰

⁵⁸ Monitor's Third Report, para. 39(b).

⁵⁹ Second Aziz Affidavit, para. 38; Carlstrom Affidavit, para. 84(2)(b).

⁶⁰ To the extent that provincial licensing requirements apply at all in the context of actions authorized in the course of a federally regulated insolvency proceeding (which does not have to be resolved at this time), collection agency licensing is generally required only where a person "carries on the business" of a collection agent. See for example, *Collection Agencies Act*, R.S.O. 1990, c. C.14, as amended ("Ontario Act"), s. 4(1). In any event, collection agency licensing requirements do not apply in the context of collections by "an assignee, custodian, liquidator, receiver, trustee or other person licensed under [statutory references omitted] or a person acting under the order of any court" (emphasis added): Ontario Act, s. 2(c). A similar exception applies under the Manitoba *Consumer Protection Act*, CCSM, c. C200, which states that the definition of "collection agent"

45. The proposed orderly wind-down of the brokered lending business within the CCAA process and the segregation of funds in one or more accounts mitigates any prejudice to the TPLs that may arise, at the same time that it addresses the substantial prejudice to the Applicants' general body of stakeholders that would result if the administration of the brokered loan portfolio (or any portion thereof) is assigned to an unnamed third party who is not currently subject to court supervision. The balance of prejudices in this regard therefore favours the relief proposed by the Applicants and the CRO. This approach is designed to preserve value for the benefit of all of the Applicants' stakeholders and to ensure that any such stakeholder with a claim to priority over the outstanding brokered loan receivables and their proceeds has a full and fair opportunity to establish such priority in the fullness of time. In the meantime, the position of all stakeholders is protected as much as possible.

E. APPROVAL OF KERP

46. The approval of a KERP and related KERP Charge is in the discretion of the CCAA court. KERPs have been approved in numerous CCAA proceedings⁶¹, including recently in *Re Nortel Networks Corp.* and *Re Grant Forest Products Inc.* In *Re Nortel Networks Corp.*, Morawetz J. approved the proposed KERP on the basis that the commitment and retention of key employees was "essential to the execution of a restructuring of Nortel and the completion of a plan of arrangement".⁶²

does not include a duly appointed officer of a court (s. 1(1), "collection agent"). See also *Collections Act*, R.S.N.L. 1990, c. C-22, s. 3(1)(c); *Consumers Protection Act* (Yukon), RSY 2002, c. 40, s. 1, "collection agent".

⁶¹ See, for example: *Re Nortel Networks Corp.* (2009), 176 A.C.W.S. (3d) 19, 2009 CarswellOnt 1519 (Ont. S.C.J. [Commercial List]) [*Re Nortel Networks Corp. – March 20, 2009*]; *Re Grant Forest Products Inc.* (2009), 57 C.B.R. (5th) 128, 2009 CarswellOnt 4699 (Ont. S.C.J. [Commercial List]) [*Re Grant Forest Products*]; *Re Biltrite Rubber (1984) Inc.* 2009 CarswellOnt 1519 (Ont. S.C.J. [Commercial List]) at paras. 16 to 17 and *Re Nortel Networks Corp.* (2009), 175 A.C.W.S. (3d), 2009 CarswellOnt 1330 (Ont. S.C.J. [Commercial List]) [*Re Nortel Networks Corp. – March 12, 2009*].

⁶² *Re Nortel Networks Corp. – March 12, 2006, supra*, at para 4.

47. In *Re Grant Forest Products Inc.*, Justice Newbould upheld the provisions of an Initial Order granting a KERP and related KERP Charge, taking into account the following factors:

- (a) whether the monitor supports the KERP agreement and the KERP charge;
- (b) whether the beneficiaries of the KERP are likely to consider other employment opportunities if the KERP charge is not approved⁶³;
- (c) whether the beneficiaries of the KERP are crucial to the successful restructuring of the debtor company;
- (d) whether a replacement could be found in a timely manner should the beneficiary elect to terminate his or her employment with the debtor company; and
- (e) the business judgement of the board of directors of the debtor company.⁶⁴

48. In the present case, the Applicants have developed the KERP to facilitate and encourage the continued participation of certain of the Applicants' key employees who have unique skill sets, specialized expertise or who are otherwise critical to the Applicants' efforts to achieve a successful restructuring and preserve enterprise value. Although the exact terms of the KERP continue to be negotiated in conjunction with the Monitor, the value of the KERP will not exceed \$400,000. Without the KERP, there is a material risk that some or all of these employees

⁶³ In *Re Nortel Networks Corp. – March 20, 2009, supra*, Morawetz J. approved a key executive incentive plan arrangement in circumstances in which there was a “potential” loss of management at the time who were sought after by competitors.

⁶⁴ *Re Grant Forest Products, supra*.

will seek other opportunities and will be difficult to replace, to the detriment of the restructuring process.⁶⁵

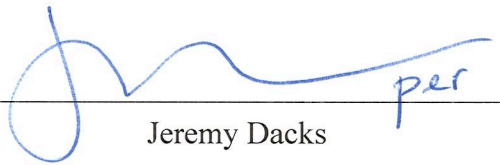
49. Given the above, it is submitted that this Honourable Court ought to exercise its discretion to approve the KERP and grant the KERP Charge.

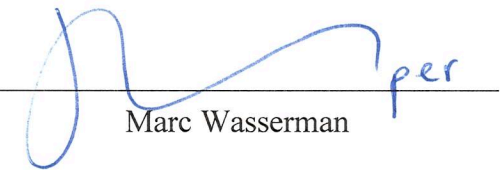
⁶⁵ Second Aziz Affidavit, paras. 11 to 15.

PART IV – NATURE OF THE ORDER SOUGHT

50. The Applicants therefore request an Order substantially in the form of the draft Order attached as Tab 3 to the Motion Record.

51. ALL OF WHICH IS RESPECTFULLY SUBMITTED:


_____ per
Jeremy Dacks


_____ per
Marc Wasserman

Schedule “A”

LIST OF AUTHORITIES

Case Law

1. *Re Air Canada* (2004), 47 C.B.R. (4th) 169, 2004 CarswellOnt 469 (Ont. S.C.J. [Commercial List])
2. *Re Bilrite Rubber (1984) Inc.* (2009), 176 A.C.W.S. (3d) 24, 2009 CarswellOnt 1541 (Ont. S.C.J. [Commercial List])
3. *Re Comstock Canada Ltd.*, 2013 ONSC 6043, 2013 CarswellOnt 13598 (Ont. S.C.J. [Commercial List])
4. *Re Grant Forest Products Inc.* (2009), 57 C.B.R. (5th) 128, 2009 CarswellOnt 4699 (Ont. S.C.J. [Commercial List])
5. *Re Nortel Networks Corp.* (2009), 175 A.C.W.S. (3d), 2009 CarswellOnt 1330 (Ont. S.C.J. [Commercial List])
6. *Re Nortel Networks Corp.*, (2009), 176 A.C.W.S. (3d) 19, 2009 CarswellOnt 1519 (Ont. S.C.J. [Commercial List])
7. *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 141, 1988 CarswellBC 553 (B.C. S.C.)
8. *Re Rio Nevada Energy Inc.*, 2000 CarswellAlta 1584, [2000] A.J. No. 1596 (A.B. Q.B.)
9. *Re Sharp-Rite Technologies Ltd.* (2000), 19 C.B.R. (4th) 130, 2000 CarswellBC 1365 (B.C. S.C.)
10. *Re Ted Leroy Trucking [Century Services] Ltd.*, 2010 SCC 60, 2010 CarswellBC 3419 (S.C.C.)
11. *Re Timminco Ltd.*, 2012 ONSC 2515, 2012 CarswellOnt 5390 (Ont. S.C.J. [Commercial List])

Schedule "B"

COMPANIES' CREDITORS ARRANGEMENT ACT

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

Burden of proof on application

11.02 (3) The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

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

COLLECTION AGENCIES ACT

R.S.O. 1990, c. C.14

Application of Act

2. This Act does not apply,

(a) to a barrister or solicitor in the regular practice of his or her profession or to his or her employees;

(b) to an insurer or agent licensed under the Insurance Act or broker registered under the Registered Insurance Brokers Act, to the extent of the business authorized by such licence or registration, or to the employees of the insurer, agent or broker;

(c) to an assignee, custodian, liquidator, receiver, trustee or other person licensed or acting under the Bankruptcy Act (Canada), the Corporations Act, the Business Corporations Act, the Courts of Justice Act or the Winding-up Act (Canada) or a person acting under the order of any court;

(d) to a broker or salesperson registered under the Real Estate and Business Brokers Act, 2002, or an official or other employee of such a broker to the extent of the business authorized by the registration;

(e) to a bank listed in Schedule I or II to the Bank Act (Canada), a loan corporation or trust corporation registered under the Loan and Trust Corporations Act, or an employee thereof in the regular course of his or her employment;

(f) to an isolated collection made by a person whose usual business is not collecting debts for other persons; or

(g) to a credit union incorporated under the Credit Unions and Caisses Populaires Act or any employee thereof acting in the regular course of his or her employment.

[...]

Registration

4. (1) No person shall carry on the business of a collection agency or act as a collector unless the person is registered by the Registrar under this Act.

Name and place of business

(2) A registered collection agency shall not carry on business in a name other than the name in which it is registered or invite the public to deal at a place other than that authorized by the registration.

CONSUMER PROTECTION ACT

CCSM, c. C200

Definitions

1. (1) In this Act

[...]

"collection agent" means any person who

(a) collects or attempts to collect money owing to others, or

(b) is used by others to levy distress or seize goods, or

(c) collects money under any name which differs from that of the creditor to whom the money is owed, or

(d) offers or undertakes to act for a debtor in arrangements or negotiations with creditors or receives money from a debtor for distribution to creditors, or

(e) solicits accounts for collection or offers or undertakes to collect debts for others either immediately or at a future date, or

(f) writes letters, or makes telephone or personal calls on behalf of others for the purpose of inducing a debtor to pay a debt,

but does not include

(g) a person who accepts payment of accounts on behalf of creditors but who does not otherwise negotiate with or in anyway attempt to obtain payment from debtors in respect of the amount owing, or

(h) a bank, or

(i) a credit union, or

- (j) a trustee licensed under the Bankruptcy and Insolvency Act (Canada) acting in that capacity, or
- (k) a duly appointed officer of a court, or
- (l) a barrister or solicitor entitled to practice in Manitoba and acting in that capacity, or
- (m) a trust company, or
- (n) a person registered under The Real Estate Brokers Act as a real estate broker acting in that capacity, or a person registered under The Real Estate Brokers Act as a salesperson acting in that capacity, or
- (o) a person licensed under The Insurance Act as an insurance agent acting in that capacity, or
- (p) a person registered under The Mortgage Brokers Act who is acting in the capacity of a registrant under that Act, or
- (q) a person appointed under The Corporations Act as a liquidator acting in that capacity;

COLLECTION ACT

R.S.N.L. 1990, c. C-22

Exemption

3. (1) This Act does not apply to

- (a) an insurer or agent or employee of an insurer or agent in respect of the collection of insurance premiums;
- (b) a real estate broker or his or her employee, in respect of the collection of money incidental to the broker's business as a real estate broker;
- (c) a person acting as an officer of or under the process or authority of a court;
- (d) a person appointed under an Act, in respect of the collection of debts in the performance of his or her duty;
- (e) a bank to which the Bank Act (Canada) applies, or employees of the bank in the regular course of their employment;
- (f) a loan company, trust company or finance company licensed under the Loan Companies and Finance Companies Licensing Act, or which meets the requirements of section 3 of the Trust and Loan Corporations Act or employees of the company in the regular course of their employment;
- (g) an isolated collection made by a person whose usual business is not collecting debts for other persons; or
- (h) a person exempted from the application of this Act by the regulations.

CONSUMERS PROTECTION ACT

R.S.Y. 2002, c. 40

Interpretation

1. In this Act,

[...]

"collection agent" means any person who

(a) collects or attempts to collect money owing to others,

(b) is used by others to levy distress or seize goods,

(c) collects money under any name which differs from that of the creditor to whom the money is owed,

(d) offers or undertakes to act for a debtor in arrangements or negotiations with creditors or receives money from a debtor for distribution to creditors,

(e) solicits accounts for collection or offers or undertakes to collect debts for others either immediately or at a future date, or

(f) writes letters, or makes telephone or personal calls on behalf of others for the purpose of inducing a debtor to pay a debt,

but does not include

(g) a person who accepts payment of accounts on behalf of creditors but who does not otherwise negotiate with or in anyway attempt to obtain payment from debtors in respect of the amount owing,

(h) a chartered bank,

(i) a trustee licensed under the *Bankruptcy and Insolvency Act* (Canada) acting in that capacity,

(j) a duly appointed officer of a court,

(k) a lawyer acting in that capacity,

(l) a trust company,

(m) a real estate broker acting in that capacity, or a real estate salesperson acting in that capacity,

(n) an insurance agent acting in that capacity,

(o) a mortgage broker acting in that capacity,

(p) a person appointed under *Business Corporations Act* as a liquidator acting in that capacity; or

(q) a person acting for a friend who receives no reward for services rendered;

IN THE MATTER OF the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended

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

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., Instalogs Inc., 7252331 Canada Inc., 5515433 Manitoba Inc., and 1693926 Alberta Ltd Doing Business as "The Title Store"

Ontario

**SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at Toronto

**FACTUM OF THE CHIEF RESTRUCTURING
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