

**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 SEARS CANADA INC., CORBEIL
ÉLECTRIQUE INC., S.L.H. TRANSPORT INC., THE CUT INC.,
SEARS CONTACT SERVICES INC., INITIUM LOGISTICS
SERVICES INC., INITIUM COMMERCE LABS INC., INITIUM
TRADING AND SOURCING CORP., SEARS FLOOR
COVERING CENTRES INC., 173470 CANADA INC., 2497089
ONTARIO INC., 6988741 CANADA INC., 10011711 CANADA
INC., 1592580 ONTARIO LIMITED, 955041 ALBERTA LTD.,
4201531 CANADA INC., 168886 CANADA INC., AND 3339611
CANADA INC.

APPLICANTS

**FACTUM OF THE APPLICANTS
(Approval of Lease and Real Property Transaction Agreements)
(Motions Returnable October 4, 2017)**

October 2, 2017

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TO: SERVICE LIST

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PART I – NATURE OF THE MOTIONS

1. Sears Canada Inc. (“**Sears Canada**”) and the other applicants listed above (the “**Applicants**”)¹ obtained relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “**CCAA**”) by an Initial Order dated June 22, 2017, as amended and restated on July 13, 2017 (the “**Initial Order**”). FTI Consulting Canada Inc. was appointed in the Initial Order to act as the Court-appointed Monitor (the “**Monitor**”) in this CCAA proceeding.

¹ The Partnerships listed on Schedule “A” to the Initial Order were also granted protection under the Initial Order.

2. On July 13, 2017, this Honourable Court approved a sale and investment solicitation process (the “**SISP**”) to seek bids or proposals for the Applicants’ business, property, assets and/or leases, to be conducted by the Applicants, under the supervision of the Special Committee (the “**Special Committee**”) of Sears Canada’s Board of Directors (the “**Board**”) in consultation with their financial advisor, BMO Nesbitt Burns Inc. (“**BMO**” or the “**Sale Advisor**”), with the supervision and oversight of the Monitor.

3. This factum is filed in support of motions brought by the Applicants to approve certain proposed lease transfer or surrender agreements and agreements of purchase and sale (together, the “**Transactions**”) that are the culmination of the SISP and pursuant to which Sears Canada, as vendor or assignor, has agreed to sell or transfer its interest in certain of its business lines, leases or other assets to certain third party purchasers/assignees (together, the “**Purchasers**”) or landlords (the “**Landlords**”). The proposed Transactions for which the Applicants seek approval in these motions fall into the following four categories:

- (a) *Sales of Business Lines* (the “**Business Line Transactions**”): these three Transactions consist of a proposed transfer of the assets of SLH Holdings Inc. (“**SLH**”); Corbeil Electrique Inc. (“**Corbeil**”) and the Sears Home Improvements business (the “**Home Improvements Business**”), respectively, to third party Purchasers.
- (b) *Sale of Intellectual Property/Brand* (the “**Viking Transaction**”): this Transaction consists of the proposed assignment of certain Viking trademarks and brands owned by Sears Canada to a third party Purchaser.
- (c) *Sale of Owned Real Property* (the “**Garden City Transaction**”): this Transaction consists of the sale of the property owned by Sears Canada, located at Garden City

Shopping Centre in Winnipeg, Manitoba, to an affiliate of the Landlord of the neighbouring property.

- (d) *Lease Transfer/Surrender Agreements* (the “**Lease Transactions**”): these ten Transactions involve the proposed transfer or surrender of one or more of the Applicants’ leases to third party Purchasers or to the respective Landlords.

4. The Applicants submit that the proposed Transactions are the culmination of a robust SISP and should be approved on the basis that the criteria set out in s. 36(3) of the CCAA are clearly satisfied.

5. The SISP, which was designed as an inherently flexible process and involved a broad canvass of the market by the Sale Advisor, was approved by this Court on July 13, 2017 on the basis that it was fair and reasonable. The SISP was designed and implemented in accordance with its terms with the objective of securing the highest value for the Applicants’ assets, leases or business lines. It was conducted by the Sale Advisor on behalf of the Applicants, under the close supervision of the Monitor and the Special Committee.

6. The purchase price offered by each of the Purchasers or Landlords and the terms of the bids received were evaluated by the Sale Advisor and the Applicants, in consultation with the Monitor. Additionally, Confidential Bid Information was shared with Restricted Process Observers (as defined in the SISP). Where applicable, bids received were evaluated in light of other expressions of interest received for the same properties and against factors such as conditionality and closing risk, as well as any non-cash benefits offered by the bidder. Each proposed Transaction was determined by the Board, on the recommendation of the Sale Advisor and the Special Committee and in its informed business judgment, to be fair and reasonable and to

provide the highest available value to the Applicants and their stakeholders. In addition, each Transaction has the support of the Monitor.

7. The proposed Business Line Transactions seek to capitalize on the stand-alone profitability of these lines. These transactions propose the transfer of assets to third party Purchasers on a going-concern basis and/or on terms that preserve, to the extent possible, the employment of a significant number of employees on terms substantially similar to their current employment terms. In addition, it is anticipated that existing customer and supplier relationships will experience minimal disruption.

8. At this time, the Applicants seek an assignment order (the “**Assignment Order**”) conveying to the Purchaser the rights and obligations under assumed contracts in only one Business Line Transaction, namely the Home Improvements Business Transaction. The Applicants submit that the Assignment Order is fair and reasonable, consistent with the objectives of the CCAA and in compliance with the requirements of section 11.3 of the CCAA. It is contemplated under the SLH Transaction and the Corbeil Transaction that SLH and Corbeil will make all reasonable efforts to obtain necessary consents to assign assumed contracts prior to closing and will only seek an equivalent assignment order if such consent cannot be obtained.

9. The proposed Lease Transaction under which the Applicants’ lease for the Calgary DC (defined below) will be assigned to Indigo (defined below), has taken into account the interests of the applicable Landlord and the terms of the applicable lease, and is conditional upon obtaining Landlord consent. As a result, Sears Canada is not seeking at this stage to compel the assignment of any of real property lease under section 11.3 of the CCAA.

10. In relation to the proposed Transactions involving a surrender of Sears Canada’s leasehold interest to an existing Landlord, the Landlords will benefit from the early release from

their obligations under those leases, allowing those Landlords to seek and install a tenant of their choosing. These transactions will also eliminate certain potential claims into the Applicants' estate, including pre-filing claims from the Landlords relating to the applicable Leases and any claims that might otherwise be asserted by such Landlords upon disclaimer of the applicable Leases.

11. In brief, the Applicants submit that the proposed Transactions maximize value for the applicable assets or business lines, for the benefit of the Applicants and their stakeholders. They are the product of a fair and thorough SISP. The Successful Bidders were selected in the informed business judgment of the Board upon the recommendation of the Special Committee, with expert advice from the Sale Advisor and in consultation with the Monitor, in light of the available alternatives. If approved and consummated, the proposed Transactions will generate significant cash proceeds for the estate. The Applicants' and the Monitor's judgment that the Transactions are in the best interests of the Applicants and their stakeholders is entitled to considerable deference.

12. Based on these considerations, and the submissions below, the Applicants submit that the proposed Approval and Vesting Orders and the Assignment Order, in the forms set out in the Applicants' Motion Records, should be approved.

PART II – FACTS

13. The facts with respect to this motion are more fully set out in the Affidavit of Mark Caiger² and the Affidavits of Billy Wong in support of the individual Transactions (the "**Transaction Affidavits**").³ Further details regarding these proceedings are contained in the prior

² Affidavit of Mark Caiger, sworn September 28, 2017 [Process Affidavit].

³ These affidavits are referenced below.

Affidavits of Billy Wong (the “**Prior Wong Affidavits**”)⁴. Capitalized terms in this Factum not otherwise defined have the same meanings as in the Process Affidavit, the Transaction Affidavits and the Prior Wong Affidavits, as applicable.

The SISP

14. The SISP was approved by this Court on July 13, 2017. Pursuant to this process, the Sale Advisor, on behalf of the Applicants and under the supervision of both the Special Committee and the Monitor, would seek bids and proposals for a broad range of transaction alternatives with respect to the Business, Property, Assets and/or Leases of the Applicants (each as defined in the SISP).⁵

15. The SISP was designed to be flexible in order to maximize the realization of the value of the Applicants’ assets for the benefit of their stakeholders. The Applicants and the Sale Advisor, in conjunction with the Monitor, contemplated that the process may result in multiple transactions in a variety of forms, including potentially selling the Sears Canada business as a going concern, selling other ancillary businesses owned by Sears Canada, sales of owned real estate and other assets, assignments of leases to third party Purchasers, and surrender of leases to Landlords. It also provided for the possibility that certain Leases and/or Assets may be withdrawn from the SISP in certain circumstances.⁶

16. The design of the SISP was informed, in part, by discussions with Sears Canada’s management regarding previous expressions of interest received from third parties in respect of all

⁴ Affidavit of Billy Wong, sworn on June 22, 2017 [Initial Order Affidavit]; Affidavit of Billy Wong sworn July 5, 2017 and the Affidavit of Billy Wong, sworn July 12, 2017 [Third Wong Affidavit]

⁵ Process Affidavit, para. 4. See Exhibit A for a copy of the SISP Approval Order.

⁶ Process Affidavit, para. 5.

or part of the Applicants' business and assets. In addition, the Sale Advisor spent a significant amount of time familiarizing itself with the real property, leases and other assets of the Company.⁷

SISP Implementation

17. Following approval of the SISP, the Sale Advisor began soliciting interest from a wide array of prospective parties. More specifically, the Sale Advisor contacted or was contacted by approximately 145 unique parties, such as other major North American retailers, landlords, institutional real estate investors, direct competitors and strategic parties identified as being potentially interested in specific business lines or assets (such as SLH or Corbeil), financial sponsors and brokers. The Sale Advisor provided interested parties with a form of non-disclosure agreement (“**NDA**”) in accordance with the SISP.⁸

18. The Sale Advisor identified potentially interested parties based, in part, on the Sale Advisor's experience in the market as well as prior expressions of interest received by Sears Canada. During the time leading up to the Applicants' CCAA filing, Sears Canada received certain unsolicited offers with respect to various business lines and assets. These expressions of interest were ultimately subsumed under the SISP.⁹

19. Sears Canada entered into NDAs with 92 different parties, who then received access to due diligence materials in an electronic data room (the “**Diligence Data Room**”) based on their

⁷ Process Affidavit, para 6.

⁸ Process Affidavit, para. 8.

⁹ Process Affidavit, para. 8.

expressed interest in select assets. 74 of these parties entered the Diligence Data Room in order to conduct due diligence.¹⁰

20. Potential bidders were provided with several draft standard form agreements prepared by counsel for the Applicants (in a form acceptable to the Monitor and after consultation with the DIP Lenders) (the “**Template Transaction Agreements**”). Different forms of Template Transaction Agreements were created for different types of transactions – such as a full-line retail going-concern sale, a purchase of a stand-alone business line (such as SLH, Corbeil or the Home Improvements Business), a purchase of owned stores/properties, and different possible lease transactions (surrender, transfer or amendment). These forms of Template Transaction Agreements were available to bidders from August 3 and 4th 2017 onwards.¹¹

21. Designated contact persons for 51 landlords or owners (or property managers) of adjacent properties to Sears Canada’s owned properties were sent a “Landlord Process Letter” on July 18, 2017 to advise them of the upcoming deadline of August 31 under the SISP for interested parties to submit binding proposals (the “**Binding Bid Deadline**”) for any of the following:

- (a) the purchase of one or more Assets of the Applicants (a “**Binding Bid**”);
- (b) the surrender of one or more Leases of the Applicants (a “**Binding Lease Surrender Proposal**”) or
- (c) the modification of one or more existing Leases of the Company (conditional on an acquiror of the Company’s Business continuing operations on the leased

¹⁰ Process Affidavit, para. 9. A chart showing the breakdown of access in relation to the different types of assets/business lines is shown at para. 9 of the Process Affidavit.

¹¹ Process Affidavit, para. 10.

premises in accordance with the modified lease terms) (a “**Binding Lease Modification Proposal**”).¹²

22. On or about the same date, a separate Process Letter was sent by the Sale Advisor to other interested parties who had signed an NDA advising these parties of the Binding Bid Deadline. A total of 81 Process Letters were sent to unique, potentially interested parties. Of the potentially interested parties who received a Process Letter, 5 had expressed interest in a potential going-concern bid, 18 had expressed interest in Corbeil, 17 had expressed interest in SLH, 28 had expressed interest in owned real estate, 18 were third parties (i.e., non-landlords) who had expressed interest in the Applicants’ leases, and 20 had expressed interest in other business lines or assets.¹³

23. Throughout the SISP, the Sale Advisor has had numerous discussions with potential purchasers, conducting many follow-up calls to answer questions related to diligence and the sale process.¹⁴

24. At the inception of the SISP, the Sears Canada management team developed a potential operating plan for the Sears Canada full-line business on a going concern basis, and materials reflecting the operating plan were prepared and provided to credible parties interested in a potential going-concern bid. These parties were also offered the opportunity to have an in-person discussion with the Sale Advisor and/or certain members of Sears Canada management to review

¹² Process Affidavit, para. 11. See also Exhibit B for a copy of the Landlord Process Letter, which was reviewed and approved by both the Monitor and the DIP Lenders.

¹³ Process, Affidavit, para. 12. See also Exhibits C and D for a copy of the Process Letter, which was reviewed and approved by the Monitor and the DIP Lenders, and an addendum to the Process Letter related to SLH.

¹⁴ Process Affidavit, para. 13.

the materials.¹⁵ Sears Canada and the Sale Advisor also created unique management presentations for the Corbeil and SLH business lines, and in-person presentations were made to parties interested in these business units who executed NDAs, at their request.¹⁶

ROFRs

25. Certain of Sears Canada's lease agreements and operating agreements (together, the "**Property Agreements**") provide the counterparty to the Property Agreement with a right of first refusal, option to purchase or similar right ("**ROFR**"). Protections were accorded to the potential beneficiaries of such ROFRs in the SISP Approval Order and in the SISP itself, including requirements that certain communications be made (i) to prospective bidders interested in bidding on Property Agreements that may be subject to a ROFR and (ii) to potential ROFR beneficiaries in the event that the Applicants take the position the ROFR is not in force, or is not triggered by a Binding Bid received under the SISP. In particular:

- (a) As required under para. 6(e) of the SISP, a copy of the SISP was placed in the Diligence Data Room for each of the ROFR properties to alert bidders that the beneficiaries of the ROFR reserve all rights with respect to the ROFR;
- (b) As required under para. 6(a) of the SISP Approval Order, on August 4, 2017, the Applicants advised all ROFR holders who had submitted a request for a response that the Applicants did not intend to take the position that the ROFR is not in force with respect to the applicable property;

¹⁵ Process Affidavit, para. 14.

¹⁶ Process Affidavit, para. 15.

- (c) Under para. 6(b) of the SISP Approval Order, the Applicants are required to notify ROFR holders if the Applicants intend to take the position that their ROFR is not triggered in connection with a Binding Bid. Such notice is required to be provided by Sept. 8, 2017, for ROFR holders who are not bidders in the SISP, and by Sept. 25, 2017 for ROFR holders who are also bidders. The Applicants have not provided any notice to any ROFR holders pursuant to this provision.¹⁷

Communications Protocol

26. In light of the potential for members of Sears Canada's management team to submit a bid or proposal in the SISP, the SISP provided that such individuals were not to be provided with Confidential Information or Bid Information (both as defined in the SISP), including information about any Binding Bids or Binding Lease Proposals that third parties made (other than lease modification proposals that were identified to be opportunities available to going-concern bidders as prospective counterparties to modified leases). In particular, these individuals were not entitled to (and did not) receive information about third party Binding Bids or about Binding Lease Proposals. At all times, the communications proposal was adhered to.¹⁸

27. After the Binding Bid Deadline, certain members of management who had assisted in providing information to facilitate a potential bid were given Confidential Information or Bid Information on an as-needed basis, on the condition that this information would not be shared with any members of the management team that had submitted a bid.¹⁹

¹⁷ Process Affidavit, paras 21-25.

¹⁸ Process Affidavit, para. 26-27.

¹⁹ Process Affidavit, para. 27.

28. All inquiries and communications related to potential bids were directed to and handled by the Sale Advisor.²⁰

29. The Monitor, the Sale Advisor and the Applicants also developed and implemented a detailed management protocol to preserve the integrity and fairness of the SISP, for all participants, in light of a potential management bid.²¹

Consultation with DIP Lenders, PBGF, Employee and Pension Representative Counsel

30. As required under the SISP, the Applicants have been providing regular updates to the DIP Lenders and their advisors with respect to matters relating to the SISP. Additionally, under the SISP, confidential Bid Information was to be shared with Restricted Process Observers (as defined in the SISP), including specific personnel of the financial and legal advisors to the DIP Lenders. As such, the Sale Advisor attended update calls with the DIP Lenders and provided Restricted Process Observers access to a data room containing Bid Information (the “**Bid Results Data Room**”) following receipt of the bids on the Binding Bid Deadline.²²

31. Further, in accordance with the terms of an agreement reached in July 2017 with the Pension Benefits Guarantee Fund (“**PBGF**”), the PBGF’s legal counsel and financial advisor, as well as specified individual representatives of the PBGF (collectively, the “**Permitted PBGF Recipients**”), were to be provided with the same updates with respect to the SISP as the updates provided to representatives of the DIP Lenders who had been designated as Restricted Process Observers. As such, the Sale Advisor attended regular update calls with the Permitted PBGF

²⁰ Process Affidavit, para. 27.

²¹ Process Affidavit, para. 28., Third Report of FTI Consulting Canada Inc., as Monitor’s dated October 2, 2017, [the “Monitor’s Third Report”], para. 49.

²² Process Affidavit, para. 29.

Recipients and provided the Permitted PBGF Recipients with access to the Bid Results Data Room following the Binding Bid Deadline. Additionally, Pension Representative Counsel and Employee Representative Counsel also attended update calls with the Sale Advisor regarding the implementation of the SISP. Further information on the results of the SISP was provided to the Pension and Employee Representative Counsel through their Financial Advisor.²³

Oversight by Monitor and Special Committee

32. The Sale Advisor was in frequent contact with the Monitor and the Special Committee throughout the sale process, including regularly reporting on the progress of the SISP to members of the Special Committee.²⁴

33. The Monitor has been closely involved throughout the SISP, including: (a) reviewing and approving the Landlord Process Letter and the Process Letter; (b) having full access to the data room; (c) approving the Template Transaction Agreements; (d) attending SISP update calls with the DIP Lenders, representatives of the PBGF and Representative Counsel; and (e) attending management presentations.²⁵

34. In addition, the Monitor was also actively involved and consulted in developing the management protocol, responding to inquiries from stakeholder groups, including landlords, regarding the status and progress of the SISP, and maintaining the list of Restricted Process Observers.²⁶

²³ Process Affidavit, paras. 30-32.

²⁴ Process Affidavit, para. 33.

²⁵ Process Affidavit, para. 34(a). See also Monitor's Third Report, paras. 49 and 51.

²⁶ Process Affidavit, para. 34(b)-(d).

Results of the SISP

35. On August 31, 2017, the Sale Advisor received 69 bids and proposals, including bids for the acquisition of the full-line business as a going concern, for the Corbeil and SLH business lines, for the Home Improvements Business, for the prime loan book, for various trademarks and licences, and for various owned and leased properties.²⁷

36. The Sale Advisor and counsel for the Applicants immediately commenced a comprehensive review of the bids and proposals to identify different potential combinations of bids and proposals that would maximize value for the Applicants' stakeholders. The Monitor also reviewed the bids and proposals received. In accordance with paragraph 11 of the SISP, the Sale Advisor met with both the Monitor and the Special Committee on several occasions in early September to assess the bids received and to determine, among other things, which should be pursued. The Sale Advisor also met with the DIP Lenders and with representatives of the PBGF.²⁸

37. In consultation with the Monitor and the DIP Lenders, the Sale Advisor negotiated on behalf of the Applicants with a number of bidders that had submitted bids or proposals, with a view to selecting one or more non-overlapping Successful Bid(s), as defined in the SISP, upon approval of the Board.²⁹

38. The Applicants and their advisors also took steps, in consultation with the Monitor and the DIP Lenders, to settle definitive agreements with bidders. The Applicants consulted the

²⁷ Process Affidavit, para. 35.

²⁸ Process Affidavit, para. 36.

²⁹ Process Affidavit, para. 37.

Monitor and the DIP Lenders on revisions to the transaction documents, and revised agreements were posted to the Bid Results Data Room as they were prepared or received from counterparties.³⁰

Potential Going Concern Bid

39. On August 31, 2017, the Sale Advisor and the Monitor received a potential going-concern bid (the “**Initial Management Bid**”) put forward by Brandon Stranzl, Sears Canada’s executive chairman (the “**Stranzl Group**”). The Initial Management Bid was a going-concern bid for Sears Canada’s full-line business that could, if successfully implemented, preserve several thousand jobs and result in the assumption of significant liabilities. It did not include either the Corbeil or the SLH business lines. The Initial Management Bid had numerous conditions, including financing and due diligence conditions. It was therefore not SISP compliant.³¹

40. After consultation with the Sale Advisor and the Monitor, the Special Committee determined that it would continue to pursue the Initial Management Bid, recognizing the potential benefits of a going concern transaction. The SISP provides the flexibility, with the consent of the Monitor and the DIP Lenders, to accept an initially non-compliant bid. At the same time, the Sale Advisor continued to pursue other non-overlapping transactions for different business lines as well as real estate transactions that would potentially overlap with the Initial Management Bid.³²

41. The Sale Advisor and the Monitor participated in several calls as well as email exchanges with the Stranzl Group during the month of September to discuss (a) the potential need to remove certain assets from the going concern bid in order to maximize recovery for the Applicants’ stakeholders; (b) the due diligence requests of the Stranzl Group in order to remove

³⁰ Process Affidavit, para. 38.

³¹ Process Affidavit, para. 39.

³² Process Affidavit, para. 40.

conditions (including financing conditions) to the Initial Management Bid; and (c) the timeframe for revising the Initial Management Bid, given timing and liquidity constraints affecting the Company.³³

42. On September 25, 2017, the Sale Advisor and the Monitor received an amended management bid from the Stranzl Group (the “**Amended Management Bid**”). The Amended Management Bid addressed certain but not all of the issues presented by the Initial Management Bid. On September 26, 2017, the Stranzl Group provided financing term sheets in support of the Amended Management Bid.³⁴ The financing term sheets are subject to the fulfillment of certain conditions.

43. The Applicants’ advisors continue to engage in discussions with, and provide information to, the Stranzl Group. The goal of these discussions is to enhance the value and reduce the conditionality of the proposed transaction.³⁵

44. The Monitor and the Applicants, and their respective advisors, have worked diligently with the Stranzl Group to achieve a going concern transaction. However, as noted by the Monitor in its report, the Stranzl Group’s bid remains conditional in a number of respects and presents significant closing risk and uncertain recoveries. The above parties continue to work to address these deficiencies.³⁶

³³ Process Affidavit, para. 41. See also Monitor’s Third Report, paras. 68-69.

³⁴ Process Affidavit, para. 42.

³⁵ Process Affidavit, para. 43.

³⁶ Monitor’s Third Report, para. 71.

45. At the same time, the Applicants are operating under significant liquidity constraints and are dependent on ongoing funding under the DIP ABL Credit Agreement to continue operating. The Applicants face increasing DIP obligations, continuing operating losses and the upcoming holiday season. Under the terms of the DIP Credit Agreements, as amended, the Applicants are expected to be required to commence a liquidation of inventory in all stores in the very near future. The Applicants therefore have limited flexibility to continue attempting to achieve a going-concern transaction.³⁷

46. In the Monitor's view, the Stranzl Group proposal may not be executable within the very limited timeline and liquidity available to the Applicants.³⁸ In addition, the economic terms presented appear to provide lower recoveries to non-assumed unsecured creditors than are available through individual sales of the Applicants' remaining assets and a liquidation of remaining inventory and FF&E.³⁹

47. Nonetheless, the Monitor believes that the viability of a going-concern transaction can continue to be explored within the constraints of the Applicants' ongoing operating losses, liquidity constraints and inventory liquidation timelines. However, in light of these constraints, the going-concern transaction can only be pursued in conjunction with the other value-maximizing Transactions that are the subject of these motions.⁴⁰

48. In recommending that Sears Canada consummate the Transactions that are the subject of these motions, the Sale Advisor has, where applicable, weighed the Applicants need to

³⁷ Monitor's Third Report, para. 72.

³⁸ Monitor's Third Report, para. 72.

³⁹ Monitor's Third Report, para. 73.

⁴⁰ Monitor's Third Report, para. 74.

realize cash value from assets in the near term against the potential impact of removing these assets from the Amended Management Bid.⁴¹ Notwithstanding the concerns of the Stanzl Group that the completion of the Transactions may affect the viability of its currently conditional and uncertain going-concern transaction, the Monitor has expressed the view that, the potential prejudice and loss of value to all stakeholders of delaying approval of the executable Transactions, including the risks of erosion of recoveries, outweighs these concerns.⁴²

Business Line Transactions

49. The Applicants seek this Court's approval for three Business Line Transactions:

- (a) The sale of the assets of SLH (a wholly-owned subsidiary of Sears Canada) and 168886 Canada Inc. (a wholly-owned subsidiary of SLH) ("**168886**") to 8507597 Canada Inc. ("**8507597**"), as buyer (the "**SLH Transaction**").⁴³
- (b) The sale of the assets of Corbeil to Am-Cam Electromenagers Inc. ("**Am-Cam**"), guaranteed by Distinctive Appliances Inc. (the "**Guarantor**") (the "**Corbeil Transaction**").⁴⁴
- (c) The sale of the assets of Sears Canada's Home Improvements Business (including its contracts with customers) to Confort Expert Inc. ("**Confort**") (the "**Confort Transaction**").⁴⁵

⁴¹ Process Affidavit, para. 44.

⁴² Monitor's Third Report, para.s 75 and 192.

⁴³ Affidavit of Billy Wong, sworn September 29, 2017 [SLH Affidavit].

⁴⁴ Affidavit of Billy Wong, sworn October 1, 2017 [Corbeil Affidavit]

⁴⁵ Affidavit of Billy Wong, sworn September 28, 2017 [Confort Affidavit] at para. 2.

i. SLH Transaction

50. SLH is a federally-regulated business that provides domestic and cross-border truckload delivery and freight management services within North America to Sears Canada (and certain of its related businesses, including Corbeil) and to various third party customers. It operates as a stand-alone business, with separate management and operations from the Sears Canada retail business. It currently employs approximately 329 people located in Ontario and Quebec. Its affiliate, 168886, currently employs approximately 243 employees in other provinces and holds the Employee Plans relating to such employees.⁴⁶

51. SLH owns and operates a fleet of more than 268 trucks and 2,700 trailers. SLH also works with approximately 185 independent contractors who own and operated their own trucks.⁴⁷

52. The SLH Asset Purchase Agreement (the “**SLH APA**”) provides for the sale of the Purchased Assets (as defined in the SLH APA) to 8507597.⁴⁸ In addition, the SLH APA allows the Purchaser to designate additional Contracts (namely, six capital leases for Vehicles listed in the Schedule to the SLH APA) for inclusion in the Purchased Assets before closing,⁴⁹ and to designate additional Real Property Leases (namely, nine terminal leases to which either SLH or Sears Canada are parties listed in the Schedule to the SLH APA) for inclusion in the Purchased Assets after

⁴⁶ SLH Affidavit, paras. 2 & 12-16

⁴⁷ SLH Affidavit, para. 16.

⁴⁸ SLH Affidavit, para. 2.

⁴⁹ SLH Affidavit, para. 7, referring to s. 7.11 of the SLH APA (designation of additional Contracts).

closing.⁵⁰ The SLH business is not the subject of any bids from parties interested in other assets in the sale process.⁵¹

ii. Corbeil Transaction

53. The Corbeil Transaction provides for the sale as a going-concern of the Corbeil business line. Corbeil is a specialty retailer of major appliances, headquartered in Montreal and carrying on business through corporate and franchised stores in Quebec, the Greater Toronto Area and Eastern Ontario. Corbeil is a wholly-owned subsidiary of Sears Canada, but operates as an independent business, with a separate management structure, employees, brand name, merchandise, cash management system and business model.⁵²

54. Corbeil is a profitable business on a stand-alone basis, with positive EBITDA for fiscal years 2014 – 2017 (year-to-date) and year-over-year growth in revenues. Sears Canada has contemplated divestiture of the Corbeil business from time-to-time, and received a number of unsolicited offers in more recent years. None of these efforts resulted in a concluded transaction and the Corbeil business line was therefore included in the SISP.⁵³

55. Corbeil has strong relationships with over 30 highly recognized suppliers. Corbeil has approximately 180 employees (approximately 60 head-office and warehouse employees, and another approximately 120 corporate store employees. An additional 130 people are employed by the Corbeil Franchisees.⁵⁴

⁵⁰ SLH Affidavit, para. 7, referring to s. 7.12 of the SLH APA (designation of additional Real Property Leases).

⁵¹ Monitor's Third Report, para. 90.

⁵² Corbeil Affidavit, paras. 5, 8-10.

⁵³ Corbeil Affidavit, para. 18.

⁵⁴ Corbeil Affidavit, paras. 14 and 15.

56. The Corbeil Asset Purchase Agreement (the “**Corbeil APA**”) provides for Am-Cam to acquire all of Corbeil’s right, title and interest in the Purchased Assets. The Purchased Assets consist of, with certain exclusions, the entire business and operations of Corbeil, whether as operator of retail stores or as franchisor. The Purchased Assets do not include the business and operations of the franchisees at the franchise locations.⁵⁵ No bids received for the full line retail business of Sears Canada overlaps with the Corbeil business line.⁵⁶

iii. **Confort Transaction**

57. Under the proposed Confort Transaction, Confort will acquire substantially all of the assets associated with three businesses currently provided under various Sears Canada Home Improvements brands -- namely, the Sears Oil Services business, the Sears Heating and Cooling business and the Sears Duct Cleaning Services business (together, the “**Home Improvements Business**”).⁵⁷

58. Since 2013, Confort and Sears Canada have been parties to a Branded Concession Agreement (as amended, the “**BCA**”), which provides Confort with the right to among other things, operate the Sears Oil Services business, the right to sell home heating products and services under a Sears brand name, and a right to operate the Sears Duct Cleaning business. There are approximately 50,000 customers of the Home Improvements Business in Canada who currently

⁵⁵ Corbeil Affidavit, para. 28(e).

⁵⁶ Monitor’s Third Report, para. 79.

⁵⁷ Confort Affidavit, at para. 5.

lease equipment or otherwise avail themselves of products or services offered by Confort pursuant to the BCA.⁵⁸

59. Although customers acquire services for the Home Improvements Business under a lease agreement with Sears Canada, Confort administers these agreements and has been operating the Home Improvements Business on Sears Canada's behalf since 2013. There is no restriction in the lease agreements on Sears Canada's ability to transfer or assign the agreement to a third-party⁵⁹

Intellectual Property Transaction

60. The Applicants seek approval of one Intellectual Property Transaction – namely, the sale of certain trademarks exclusively related to the “Viking” trademark and brand to Canadian Tire Corporation Limited (“**Canadian Tire**”) under an Asset and Purchase Agreement (the “**Viking APA**”). Pursuant to the Viking Transaction, Sears Canada will sell to Canadian Tire the Purchased Assets, which include (i) the trademark VIKING; (ii) the trademark VIKING & DESIGN; (iii) the trademark application VIKING & Design; and (iv) the trade-mark Representation of a Single-Masted Viking Galley.⁶⁰

Owned Real Property Transaction

61. The Applicants seek approval of one transaction involving the sale of owned real property located in Winnipeg, Manitoba, to a third party Purchaser. Specifically, the Garden City Transaction contemplates the purchase by 1562903 Ontario Ltd. (“**1562903**”), an affiliate of RioCan Real Estate Investment Trust, of all of Sears Canada's right, title and interest in the lands

⁵⁸ Confort Affidavit, paras. 6-10. See also Exhibit A for a copy of the BCA, Exhibit B for a copy of the first amendment to the BCA, and Exhibit C for a copy of the second amendment to the BCA.

⁵⁹ Confort Affidavit, paras. 5 and 10. See also Exhibit D for a copy of a sample lease agreement.

⁶⁰ Affidavit of Billy Wong, sworn September 29, 2017 [Viking Affidavit] at paras. 2 and 3.

and building located at the Garden City Shopping Centre in Winnipeg, Manitoba where Sears Canada currently operates an outlet store (the “**Garden City Property**”).⁶¹

62. During the pre-filing period, Sears Canada marketed the Garden City Property by contacting a number of buyers, including national retailers, property developers and the landlord who owns the remainder of the Garden City Shopping Centre. It received several proposals in 2016 and 2017. Sears Canada and WCRE Investments Ltd. entered into an asset purchase agreement on April 12, 2017 (the “**Original Garden City APA**”).⁶²

63. Following the issuance of the Initial Order, and after the SISP Approval Order was granted, the Applicants determined to proceed with the Original Garden City APA for the reasons described in the Affidavit of Stephen Champion, affirmed August 11, 2017. The Garden City Property was therefore withdrawn from the SISP and the Original Garden City APA was amended (the “**Amendment**”, and together with the Original Garden City APA, the “**Garden City APA**”) to account for the requirement to obtain an Approval and Vesting Order of the Court to transfer the Garden City Property within the CCAA proceeding.⁶³

64. One day prior to the hearing of the Applicants’ motion to obtain this Court’s approval of the Garden City APA, Sears Canada received an unsolicited competing offer from 1562903 for greater consideration than being offered by WCRE. This motion was heard on August 22, 2017. At the hearing of the motion, 1562903 opposed the approval of the Garden City APA.

⁶¹ Affidavit, of Billy Wong, sworn September 28, 2017 [Garden City Affidavit] at para. 2.

⁶² Garden City Affidavit, paras. 8 and 9. See also Affidavit of Stephen Champion, affirmed August 11, 2017, attached as Exhibit B to the Garden City Affidavit.

⁶³ Garden City Affidavit, para. 11.

This Court subsequently denied the Applicants' motion (with written reasons to follow) and the Garden City Property was returned to the SISP.⁶⁴

65. 1562903 submitted its bid for the Garden City Property within the SISP.⁶⁵

Lease Transfer and Surrender Transactions

i. Lease Transfer Transaction

66. The Applicants seek approval of one Lease Transfer Agreement between Sears Canada, as assignor, and Indigo Books & Music Inc. ("**Indigo**") relating to the Lease held by Sears Canada for its distribution centre (the "**Calgary DC**") located in Calgary, Alberta (the "**Calgary DC Transaction**").⁶⁶

ii. Lease Surrender or Termination Transactions

67. The Applicants seek approval of 8 Lease Transactions involving the surrender or termination of one or more Leases to an existing Landlord (the "**Lease Surrender Transactions**").

68. The proposed Lease Surrender Transactions consist of:

- (a) A Lease Surrender Agreement between CF/Realty Holdings Inc. and Ontrea Inc. (the "**CF Landlord Entities**") relating to the Leases for the Sears Canada full-line stores located at CF Polo Park in Winnipeg, Manitoba and CF Lime Ridge in Hamilton, Ontario (the "**Lime Ridge/Polo Park Transaction**").⁶⁷

⁶⁴ Garden City Affidavit, paras. 12-13.

⁶⁵ Garden City Affidavit, para. 14.

⁶⁶ Affidavit of Billy Wong, sworn September 28, 2017 [Calgary DC Affidavit] at para. 2.

⁶⁷ Affidavit of Billy Wong, sworn September 28, 2017 [Lime Ridge/Polo Park Affidavit] at para. 2.

- (b) A Lease Surrender Agreement between Sears Canada and Scarborough Town Centre Holdings Inc. (“**STCHI**”) relating to the Lease held by Sears Canada for the Sears Canada full-line store located at Scarborough Town Centre in Scarborough, Ontario (the “**Scarborough Town Centre Transaction**”).⁶⁸
- (c) A Lease Surrender Agreement between Sears Canada and Fairmall Leaseholds Inc. and Fairview Point-Claire Leaseholds Inc. (the “**Fairview Landlord Entities**”) related to two Leases for the Sears Canada full-line stores located at CF Fairview Mall in North York, Ontario and CF Fairview Point Claire in Pointe Claire, Quebec (the “**Fairview Transaction**”).⁶⁹
- (d) A Lease Termination Agreement between Sears Canada and RioCan Holdings (Oakville Place) Inc. (“**RioCan (Oakville)**”) for the Sears Canada full-line store located at the Oakville Place Shopping Mall in Oakville, Ontario (the “**Oakville Place Transaction**”).⁷⁰
- (e) A Lease Amending Agreement between Sears Canada and Crombie Developments Limited (“**Crombie**”) relating to the Lease held by Sears Canada for its full-line store in the Avalon Mall, located in St. John’s, Newfoundland and Labrador (the “**Avalon Mall Transaction**”).⁷¹

⁶⁸ Affidavit of Billy Wong, sworn September 28, 2017 [Scarborough Town Centre Affidavit], para. 2.

⁶⁹ Affidavit of Billy Wong, sworn September 28, 2017 [Fairview Affidavit], para. 2.

⁷⁰ Affidavit of Billy Wong, sworn September 28, 2017 [Oakville Place Affidavit], para. 2.

⁷¹ Affidavit of Billy Wong, sworn September 28, 2017 [Avalon Mall Affidavit], para. 2. Note that although this transaction is described as a Lease amendment, it is grouped together with the Lease termination and surrender transactions because the proposed Lease amendment brings the Lease to an end prior to its agreed-upon expiry date in exchange for a surrender fee.

- (f) A Lease Surrender Agreement between Sears Canada and Shape Brentwood Limited Partnership, Brentwood Towncentre Limited Partnership and 0862223 B.C. Ltd. (collectively, “**Shape**”) relating to the Lease held by Sears Canada for its full-line store located at the Brentwood Mall in Burnaby, British Columbia (the “**Brentwood Transaction**”).⁷²

- (g) A Lease Surrender Agreement between Sears Canada and Shape Properties (Nanaimo) Corp., NNTC Equities Inc. and 1854 Holdings Ltd. (collectively, “**Shape (Nanaimo)**”) relating to the Lease held by Sears Canada for Sears Canada’s full-line store located at the Nanaimo North Town Centre in Nanaimo, British Columbia (the “**Nanaimo Transaction**”).⁷³

- (h) A Lease Surrender Agreement between Sears Canada and Orchard Park Shopping Centre Holdings Inc. (“**Orchard Park**”) relating to the Leases held by Sears Canada for Sears Canada’s full-line store and Home Store located in Kelowna, British Columbia (the “**Orchard Park Transaction**”).⁷⁴

PART III – ISSUES AND THE LAW

69. The issues on this motion are as follows:

- (a) Should this Honourable Court approve the Transaction Agreements and grant the proposed Approval and Vesting Orders and Assignment Orders?

⁷² Affidavit of Billy Wong, sworn September 28, 2017 [Brentwood Affidavit], para. 21.

⁷³ Affidavit of Billy Wong, sworn September 28, 2017 [Nanaimo Affidavit] para. 2.

⁷⁴ Affidavit of Billy Wong, sworn September 28, 2017 [Orchard Park Affidavit] at para. 2.

Test Under the CCAA is Met

70. Section 36 of the CCAA sets out the legal test for obtaining court approval that applies where a debtor company seeks to sell assets outside the ordinary course of business during a CCAA proceeding. Section 36 provides:

36(1) Restriction on disposition of business assets – A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

36(2) Notice to creditors – A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

36(3) Factors to be considered – In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

36(6) Assets may be disposed of free and clear – The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

36(7) Restriction – employers – The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(a) and (5)(a) if the court had sanctioned the compromise or arrangement.

71. In discussing section 36 of the CCAA, which was added to the CCAA as part of the 2009 amendments, this Honourable Court has stated:⁷⁵

The CCAA is remedial legislation designed to enable insolvent companies to restructure. As mentioned by me before in this case, the amendments do not detract from this objective. In discussing section 36, the Industry Canada Briefing Book on the amendments states that “The reform is intended to provide the debtor company with greater flexibility in dealing with its property while limiting the possibility of abuse.”

72. It is well-established that the factors listed in section 36(3) are, on their face, not intended to be exhaustive. Nor are they intended to be a formulaic checklist that must be followed in every sale transaction under the CCAA.⁷⁶ These factors overlap, to a certain degree, with the *Soundair* factors that were applied in approving sale transactions under pre-amendment CCAA case law.⁷⁷

73. As set out further below in relation to the specific Transactions for which approval is sought in these motions, the Applicants submit that, taking into account the factors listed in section 36(3) of the CCAA, and with regard to the general interpretative principles underlying the CCAA, this Honourable Court should grant the requested Approval and Vesting Orders.

74. The Applicants face significant liquidity constraints and remain dependent on ongoing DIP financing to continue to operate. The Applicants have elected to seek approval of the Transactions, in their informed business judgment, after considering the risks of loss of these

⁷⁵ *Re Canwest Global Communications*, 2009 CarswellOnt 7169 (S.C.J.) [Commercial List] at para. 32.

⁷⁶ See for example, *Re White Birch Paper Holding Co.*, 2010 QCCS 4915 [*White Birch*] at para. 48; leave to appeal refused 2010 CarswellQue 11534, 2010 QCCA 1950 (Que. C.A.); *Re Target Corp.*, 2015 ONSC 2066 at para. 15; and *Re Target Canada Co.*, 2016 ONSC 3651.

⁷⁷ *Re Canwest Publishing Inc./Publications Canwest Inc.*, 2010 ONSC 2870 at para. 13, citing *Royal Bank v. Soundair Corp.*, [1991] O.J. No. 1137 (C.A.) [*Soundair*] at para. 16. Under the *Soundair* test, it was necessary to consider (1) whether sufficient efforts had been made to obtain the best price and that the debtor had not acted improvidently; (2) whether the interests of all parties had been considered; (3) the integrity and efficacy of the process for obtaining offers; and (4) whether there was any unfairness in working out the process. See also *Target*, above note 77 at para. 15.

value-maximizing Transactions, as well as erosion to recoveries resulting from delay. The Applicants have relied upon the expert advice of the Sale Advisor in making this decision and have considered all available alternatives. The decision to proceed with the Transactions has the full support of the Monitor.

75. In the absence of any indication that the Applicants have acted improvidently, the informed business judgment of the Applicants that the Transactions are in the best interests of the Applicants and their stakeholders is entitled to deference by this Court.⁷⁸

a) Process Was Reasonable

76. Whether the process for achieving a sale transaction under the CCAA is fair and reasonable must be examined contextually, in light of the particular circumstances existing at the time.⁷⁹ Assessing the reasonableness of a sale process does not require the Court to examine in minute detail all of the circumstances leading up to the acceptance of a particular offer.⁸⁰ The Court must be satisfied overall that the debtor has not acted improvidently. As the Courts have held, by reference to the principles in *Soundair*, the decision to accept a particular offer is a matter of business judgment on the part of the debtor that should not lightly be interfered with in the absence of evidence of imprudence or unfairness.⁸¹

⁷⁸ *Re AbitibiBowater Inc.*, 2010 QCCS 1742 [*AbitibiBowater*] at paras. 70 to 72. See also *Re Sanjel Co*, 2016 ABQB 257 [*Sanjel*] at para 57.

⁷⁹ See *White Birch*, above note 81 at para. 49: “The Court has to look at the transaction as a whole and essentially decide whether or not the sale is appropriate, fair and reasonable. In other words, the Court could grant the process for reasons others than those mentioned in Section 36 CCAA or refuse to grant it for reasons which are not mentioned in Section 36 CCAA.” See also *Sanjel*, above note 74 at paras 77 and 80.

⁸⁰ *Soundair*, above, note 77 at paras. 48 and 49.

⁸¹ *Re Terrace Bay Pulp Inc.*, 2012 ONSC 4247 at paras. 45 and 51-52, citing *Soundair*, at paras. 21, 30-31; see also *Sanjel*, above note 74 at para 89.

77. Substantially the same process – which is described in detail above – was followed in order to achieve each of the Transactions. The process was designed to be flexible, to canvass the market, to capitalize on prior marketing efforts, and to ensure a level playing field for all bidders.

78. As set out below, each of the Transactions falls squarely within the range of successful outcomes that were contemplated at the time the SISP was approved. There is no reasonable basis on which the fairness of the SISP can be impugned.

b) Monitor Concurs

79. As required by section 36 of the CCAA and the SISP, the Monitor has been involved at virtually every stage related to the Transactions. The Monitor has overseen the SISP since its commencement.⁸² Moreover, the Monitor participated in the evaluation of the bids received by the Binding Bid Deadline and in subsequent discussions, negotiations and requests for clarification with parties that submitted bids by the deadline.⁸³

80. The Monitor has approved the process that has been followed by Sears Canada, concluding that it was appropriate in the circumstances.⁸⁴ With respect to the timeline for the SISP more generally, the Monitor has concluded that the timeline was reasonable and necessary in the circumstances in view of:

- (a) the continuing operating losses of the Applicants during the CCAA Proceedings, which resulted in material ongoing draws under the DIP ABL Credit Agreement;

⁸² Process Affidavit, paras. 4-7, 33-34; Monitor's Third Report, paras. 13 and 14.

⁸³ Process Affidavit, para. 36-37.

⁸⁴ Monitor's Third Report, para. 192.

- (b) the milestones established by the DIP Lenders who were funding the operating losses of the Applicants pursuant to the DIP Credit Agreements;
- (c) the need to determine on an expedited basis whether a going concern solution could be implemented so that, in the absence of such a going concern solution, the inventory of the business could be liquidated for maximum value during the busy holiday retail season; and
- (d) the fact that certain of the Applicants' assets, including its leases, may decrease in value over time.⁸⁵

81. The Monitor has filed a further report regarding the specific Transactions that are the subject of these motions. The Monitor has provided its opinion that the Transactions would be more beneficial to the Applicants' creditors than a sale or other transaction in a bankruptcy and has confirmed its support for this Court's approval of the Transactions and the granting of the proposed Approval and Vesting Orders.⁸⁶ The Monitor's views are entitled to considerable deference from this Court.⁸⁷

c) The Purchase Price is Fair and Reasonable

82. As described in relation to the individual Transactions below, the Applicants, the Monitor and the Sale Advisor are all of the view that the consideration to be received by the Applicants under each of the individual Transactions is fair and reasonable.

⁸⁵ Monitor's Third Report, para. 166.

⁸⁶ Monitor's Third Report, paras. 170-172.

⁸⁷ J. Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd Ed. (Toronto: Carswell, 2013) at p. 573.

83. CCAA case law both prior to and subsequent to the enactment of section 36 has applied the test from *Soundair* in evaluating this criterion.⁸⁸ The debtor must demonstrate that sufficient effort has been made to obtain the best price and that it has not acted improvidently. This requirement is evaluated based on the information available at the time the offer is accepted. It requires deference to the debtor's business judgment (which is supported by the Monitor) in order to avoid turning the process into an auction conducted by the Court.⁸⁹

84. Case law interpreting section 36 of the CCAA does not mandate that the purchase price of a debtor company's assets must be established following any specific type of process – such as an “auction” – before the Court can determine that the consideration offered is fair and reasonable.⁹⁰ As long as the process is fair and reasonable in the circumstances, it cannot be impugned.

85. The purchase price for the properties that are the subject of the Transactions is the result of the comprehensive and competitive marketing process undertaken by the Sale Advisor under the SISP. This process began with a broad canvass of approximately 145 interested parties.⁹¹ It was also based on information regarding the pre-filing marketing processes for Sears Canada's businesses and assets, including the real estate portfolio of Sears Canada.

86. The Sale Advisor engaged in robust discussions and negotiations with interested parties with a view to generating Successful Bids, thereby seeking to ensure that the bids accepted

⁸⁸ See for example *Terrace Bay*, above, note at paras. 50-55; *Sanjel*, above note 74 at para 56; and *Grafton-Fraser Inc. v. Cadillac-Fairview Corp.*, 2017 ONSC 2496 at para 19.

⁸⁹ *Terrace Bay*, above note 86 at para. 51, citing *Soundair*. See also *Sanjel*, above note 74 at para 80.

⁹⁰ As noted above, *Soundair* itself was a case in which the Court held that a reasonable process did not necessarily require an auction.

⁹¹ Process Affidavit, para. 8.

represented the highest value to the stakeholders of the Applicants. 69 bids were received by the Binding Bid Deadline.⁹² There can be no doubt that the market for has been thoroughly tested.

87. Each of the Transactions was accepted as being in the best interests of the Applicants, in light of the other available alternatives, including the conditionality of such alternatives and their ability to be consummated. In the Applicants' business judgment, pursuing these Transactions represented the best means of maximizing value for all stakeholders.

88. The Applicants and the Monitor have considered the concern that approval of certain of the Lease Transactions could affect the viability of the Stanzl Group's proposed going-concern transaction. In the Monitor's view, the Stanzl Group's proposal can only be pursued, in light of the liquidity and other constraints facing the Applicants, in conjunction with the Transactions. The potential prejudice associated with delaying approval of these Transactions – including the potential loss of value and erosion of recoveries that could arise from such delay – outweighs any concerns regarding the Stanzl Group's proposal, which currently remains uncertain and conditional.⁹³

89. As the Quebec Superior Court noted in *AbitibiBowater*, in appropriate circumstances it is permissible to “prefer a bird in the hand to two in the bush.”⁹⁴

e) Compliance with Additional Requirements Under Section 36

90. The Applicants submit that all of the other statutory requirements for obtaining relief under section 36 of the CCAA have been satisfied:

⁹² Process Affidavit, para. 35.

⁹³ Monitor's Third Report, para. 75. See also Process Affidavit, para. 44.

⁹⁴ *AbitibiBowater*, above note 83 at para. 73.

- (a) All parties who have registered security interests against the Applicants' interest in the properties to be transferred under the Transaction Agreements and who might be affected by the relief requested in this motion have been notified.⁹⁵
- (b) Pursuant to section 36(4) of the CCAA, certain mandatory criteria must be met for court approval of a sale or disposition to a related party. The Applicants and the counterparties to the Transaction Agreements are not related parties and these criteria are therefore not relevant for the purposes of this motion.
- (c) Section 36(6) of the CCAA permits this court to authorize a sale or disposition free and clear of any security, charge or other restriction. This authority is addressed further below in relation to specific Transactions.

Section 36(7) of the CCAA provides that relief under section 36 cannot be granted unless the Court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(a) and (5)(a) if the court had sanctioned the compromise or arrangement.⁹⁶ The amounts referred to under these subsections are amounts owing by a debtor company to its employees and former employees for unpaid wages that these employees would have been entitled to receive under the *Bankruptcy and Insolvency Act*, in addition to amounts that are owing for post-filing services to the debtor company. Given that the Applicants have been paying employees for all post-filing services, and are otherwise simply

⁹⁵ CCAA, s. 36(2).

⁹⁶ Section 36(7) appears to contain a drafting error, as it references amounts that would be required to be paid under section 6(4)(a) of the CCAA. Section 6(4) of the CCAA does not have any subparagraphs. It may be inferred that the intention was to require payments under section 6(5)(a) and 6(6)(a).

monetizing hard assets in these motions, the requirements of section 36(7) of the CCAA are either satisfied or inapplicable.

Each of the Transactions Should Be Approved

i. Business Line Transactions

a. SLH

91. The details of the SLH APA are set out in the SLH Affidavit.⁹⁷ The Applicants submit that the SLH Transaction satisfies all of the applicable requirements under section 36 of the CCAA.

92. *Fairness of Process:* The SLH Transaction is the product of the SISP, which was approved as fair and reasonable and is described in detail above.⁹⁸

93. *Monitor Approval:* The Monitor has approved the process leading up to the acceptance of the proposed SLH Transaction.⁹⁹

94. *Benefits of SLH Transaction:* The benefits of the SLH Transaction include more than simply the cash consideration to be received for the benefit of all stakeholders. In addition, the SLH Transaction contemplates that 8507587 will make firm offers of employment to at least the majority of existing SLH and 168886 employees on terms substantially similar in the aggregate to those currently enjoyed by such employees. Following the date of issuance of the proposed Approval and Vesting Order, 8507587 shall deliver a list of any additional Employees to whom 8507587 will offer continuing employment on terms substantially similar in the aggregate to those

⁹⁷ SLH Affidavit, para. 26.

⁹⁸ SLH Affidavit, para. 21.

⁹⁹ SLH Affidavit, para. 11; Monitor's Report, para 169, 192.

currently enjoyed by such employees.¹⁰⁰ Provision is also made for 8507597 to assume, if desired, one or more Employee Plans or to recognize prior SLH service under any 8507587 Employee Plan in which the Assumed Employees participate.¹⁰¹

95. ***Reasonable and Fair Price:*** The market for the SLH business line was broadly canvassed. BMO contacted 24 interested bidders, including all parties who had previously expressed an interest in the pre-filing period. 17 potentially interested bidders signed NDAs and 17 accessed the data room. BMO engaged in a number of discussions with 8507597 and other interested parties to secure bids for the business and its assets.¹⁰²

96. The SLH Transaction was selected after negotiations with 8507597 regarding the financial and legal aspects of its bid. After considering 8507597's offer and the alternatives available, the Sale Advisor recommended to the Special Committee, and the Special Committee subsequently recommended to the Board, that SLH enter into a transaction with 8507597 for the Purchased Assets (as defined in the SLH APA). The Board approved the SLH Transaction on the basis that the Purchase Price (which is contained in the Confidential Appendix to the Monitor's Report) is fair and reasonable and in the best interests of the Applicants' stakeholders.¹⁰³ This decision is entitled to deference from this court.¹⁰⁴

¹⁰⁰ SLH Affidavit, paras. 24, 26(i).

¹⁰¹ SLH Affidavit, para. 26(j).

¹⁰² SLH Affidavit, para. 20.

¹⁰³ SLH Affidavit, para. 22.

¹⁰⁴ See *Abitibi*, above.

97. 8507597 has represented that it has the financial ability to close the SLH Transaction and is otherwise qualified to perform its obligations in respect of the Purchased Assets.¹⁰⁵

98. In order to ensure continuity of services during the CCAA proceeding – and to provide flexibility depending on the outcome of this CCAA proceeding -- 8507597 and Sears Canada will negotiate and use their respective commercially reasonable efforts to enter into a Transition Services Agreement with Sears Canada under which 8507597 will continue to provide Sears Canada with services under the terms and conditions currently in place for the period from the Closing Date until December 31, 2017 (the “**TSA Termination Date**”). Sears Canada is entitled to extend the TSA Termination Date by an additional 120 days after December 31, 2017.¹⁰⁶

99. The SLH Transaction is conditional upon obtaining certain Regulatory Approvals, including approval under the *Competition Act* (Canada) and from the Canadian Minister of Transport, the Court issuing the proposed Approval and Vesting Order, and the delivery by 8507597 to SLH of the Transition Services Agreement.¹⁰⁷

100. Although the SLH Transaction involves the assignment of Key Contracts (as defined in the SLH APA) to the Purchaser, the SLH APA currently contemplates that SLH will obtain each counter-party’s consent as a condition of closing, failing which SLH will seek this court’s approval to grant an assignment order.¹⁰⁸

¹⁰⁵ SLH Affidavit, para. 23.

¹⁰⁶ SLH Affidavit, para. 26(k).

¹⁰⁷ SLH Affidavit, para. 26(n).

¹⁰⁸ SLH Affidavit, para. 6, 26(p). As noted above, the Purchaser under the SLH APA can designate additional Contracts to be included in the Purchased Assets prior to Closing. SLH will not seek Court approval for the assignment of such additional designated Contracts unless the Contracts are designated by the Purchaser on or before October 6, 2017 (SLH Affidavit, para. 7(a)). If the Purchaser chooses to designate additional Real Property

101. The Applicants submit that this Court should therefore approve the SLH Transaction and grant the requested Approval and Vesting Order.

b. Corbeil

102. The details of the Corbeil APA are set out in the Corbeil Affidavit.¹⁰⁹ The Applicants submit that the Corbeil Transaction satisfies all of the applicable requirements under section 36 of the CCAA.

103. *Fairness of Process:* The Corbeil Transaction is the product of the SISP,¹¹⁰ which was approved as fair and reasonable and is described in detail above.

104. *Monitor Approval:* The Monitor has approved the process leading up to the acceptance of the proposed Corbeil Transaction, and the Applicants' request for approval of the Transaction.¹¹¹ In addition, the approval of the proposed Corbeil Transaction has the support of both the Monitor and the DIP Lenders.¹¹²

105. *Benefits of Corbeil Transaction:* The Corbeil business is being sold as a going-concern. The benefits of the Corbeil Transaction therefore go beyond the cash consideration that will be received. These benefits include the fact that the approval and consummation of the Corbeil Transaction will result in the continued and seamless operation of 30 Corbeil stores.¹¹³

Leases after Closing, the parties will negotiate in good faith to reach agreement for the transfer of each such Real Property Lease and if successful, will return to Court to seek a further approval and vesting order and assignment order (if necessary): SLH Affidavit, para. 7(b).

¹⁰⁹ Corbeil Affidavit, para. 29.

¹¹⁰ Corbeil Affidavit, para. 3, para. 21.

¹¹¹ Corbeil Affidavit, para. 27; Monitor's Report, para. 169, 192.

¹¹² Corbeil Affidavit, para. 27.

¹¹³ Corbeil Affidavit, paras. 5, 25.

106. In addition, and importantly, at least 90% of the Corbeil employees in the assumed locations will receive offers of employment from Am-Cam, with at least 90% of those offers being on terms that are substantially similar in the aggregate to those currently available to each employee. The Corbeil Transaction is also intended to continue the operation of the Corbeil franchise network, to the benefit of the existing employees of those franchisees.¹¹⁴

107. ***Reasonable and Fair Price:*** The market for the Corbeil business line was broadly canvassed. The Sale Advisor contacted twenty-one potentially interested bidders with respect to the Corbeil business, including parties who had previously contacted Sears Canada to express an interest in the business in the pre-filing period. Eighteen potentially interested bidders signed NDAs and accessed the Data Room. A Template Transaction Agreement was available for the Corbeil business. Corbeil management, the Sale Advisor and the Monitor met with interested parties and made presentations specifically regarding Corbeil. Sears Canada received bids by the Binding Bid Deadline. These bids were then evaluated by the Sale Advisor, the Special Committee and Monitor, to identify which bids to pursue further.¹¹⁵

108. After negotiations with Am-Cam regarding the financial and legal aspects of its bid, and after considering the alternatives available, the Sale Advisor recommended to the Special Committee, and the Special Committee subsequently recommended to the Board that Corbeil enter into a transaction with Am-Cam for the acquisition of the Purchased Assets. The Board accepted this recommendation after concluding that the Purchase Price (set out in the Confidential Appendix

¹¹⁴ Corbeil Affidavit, paras. 5, 25, 29(i).

¹¹⁵ Corbeil Affidavit, para. 23.

to the Monitor's Report) is fair and reasonable and that the proposed transaction is in the best interests of the Applicants' stakeholders.¹¹⁶ This decision is entitled to deference from this court.¹¹⁷

109. The Corbeil Transaction is subject to obtaining certain Regulatory Approvals (e.g. *Competition Act* approval), and the Court issuing the proposed Approval and Vesting Order.¹¹⁸

110. Am-Cam has represented that it has the financial ability to close the Corbeil Transaction.¹¹⁹ In addition, Am-Cam's obligations under the Corbeil APA, including the obligation to pay the Purchase Price, are unconditionally guaranteed by the Guarantor.¹²⁰

111. As a condition of closing, Corbeil has agreed to use commercially reasonable efforts to obtain the written consent of (a) its Landlords for the assignment of its Real Property Leases to Am-Cam; (b) any person or counterparty to an Assumed Contract for the assignment of that contract to Am-Cam; (c) any person or counterparty to a Personal Property Lease for the assignment of that lease to Am-Cam; and (d) each Corbeil Franchisee for the assignment of its franchise agreement to Am-Cam. Corbeil has also undertaken to pay any Cure Costs that may be payable in respect of any assigned contract.¹²¹

¹¹⁶ Corbeil Affidavit, para. 24.

¹¹⁷ See *Abitibi*, above.

¹¹⁸ Corbeil Affidavit, para. 29(j).

¹¹⁹ Corbeil Affidavit, para. 26.

¹²⁰ Corbeil Affidavit, paras. 1 and 29(d).

¹²¹ Corbeil Affidavit, para. 29(n).

112. If such consent cannot be obtained, Corbeil will return to this Court to obtain an Assignment Order under section 11.3 of the CCAA to transfer all of its rights and obligations under the relevant contracts to Am-Cam.¹²²

113. The Applicants submit that this Court should therefore approve the Corbeil Transaction and grant the requested Approval and Vesting Order.

c. Confort

114. The details of the Confort Asset Purchase Agreement (the “**Confort APA**”) are set out in the Confort Affidavit.¹²³

i. Section 36 of the CCAA

115. The Applicants submit that the Confort Transaction satisfies all of the applicable requirements under section 36 of the CCAA.

116. *Fairness of Process*: The Confort Transaction is the product of the SISP, which was approved as fair and reasonable and is described in detail above.¹²⁴

117. *Monitor Approval*: The Monitor has approved the process leading up to the acceptance of the proposed Confort Transaction, the Applicants’ request for approval of the Confort Transaction, and supports the requested Approval and Vesting Order and Assignment Order.¹²⁵

¹²² Corbeil Affidavit, para. 29(o).

¹²³ Confort Affidavit, para. 17

¹²⁴ Confort Affidavit, paras. 3, 13

¹²⁵ Confort Affidavit, para. 15; Monitor’s Report, paras. 162, 184.

118. ***Benefits of Confort Transaction:*** The benefits of the Confort Transaction include not only the cash consideration to be received for the benefit of all stakeholders. Confort has already been carrying out the Home Improvements Business on Sears Canada's behalf for several years. The Confort Transaction will therefore result in the seamless continuation of service for Home Improvements Business customers, while maximizing the value of these assets for the benefit of Sears Canada's stakeholders and preserving the employment of the Confort employees.¹²⁶

119. ***Reasonable and Fair Price:*** The Confort bid was received by the Sale Advisor in advance of the Binding Bid Deadline. The Sale Advisor then engaged in negotiations with Confort regarding the financial and legal aspects of its bid. After considering Confort's offer and the available alternatives, the Sale Advisor recommended to the Special Committee, and the Special Committee subsequently recommended to the Board, that Sears Canada enter into the Confort Transaction. The Board approved the Confort Transaction on the basis that the Purchase Price is fair and reasonable (as set out in the Confidential Appendix to the Monitor's Report) and that the proposed transaction is in the best interests of the Applicants' stakeholders.¹²⁷

120. Confort has represented that it has the financial ability to close the Confort Transaction.¹²⁸

¹²⁶ Confort Affidavit, para. 5.

¹²⁷ Confort Affidavit, para 14.

¹²⁸ Confort Affidavit, para. 17(c).

121. The Confort Transaction is conditional primarily upon this Court's determination to grant the requested Approval and Vesting Order and the Assignment Order.¹²⁹

ii. Section 11.3 of the CCAA

122. The Home Improvements Business provides products and services to approximately 50,000 customers pursuant to lease agreements or maintenance and servicing agreements with Sears Canada. These contracts have historically been administered by Confort on behalf of Sears Canada.¹³⁰ The Confort Transaction contemplates the assignment to Confort of Sears Canada's rights and obligations under the Assumed Contracts, which include all of Sears Canada's contracts with customers in respect of the Home Improvements Business.¹³¹

123. There is no provision in these agreements that restricts the ability of Sears Canada to transfer or assign the agreement to a third-party such as Confort.¹³² As noted above, the Applicants are requesting the proposed Assignment Order pursuant to section 11.3 of the CCAA as one of the conditions requested by Confort in connection with the Confort Transaction.

124. Section 11.3 of the CCAA gives this Court the jurisdiction and the discretion to make an order assigning the rights and obligations of the debtor company under an agreement to a third party who agrees to the assignment. Each requirement under section 11.3 is addressed below.

¹²⁹ Confort Affidavit, para. 17(i).

¹³⁰ Confort Affidavit, para. 10, 18.

¹³¹ Confort Affidavit, para. 2(b).

¹³² Confort Affidavit, para. 18.

Section 11.3(1): Notice Requirement

125. Section 11.3(1) provides as follows:

11.3 (1) On application by a debtor company and on notice to every party to an agreement and the monitor, the court may make an order assigning the rights and obligations of the company under the agreement to any person who is specified by the court and agrees to the assignment.

126. In compliance with s. 11.3(1) and applicable case law, the debtor company has, in each case, made reasonable efforts to notify each contractual counterparty.

127. Given that there over 50,000 customers of the Home Improvements Business, it is not practicable or economical to provide individual notice to each and every counterparty to these contracts. However, the parties, in consultation with the Monitor, are proposing to take a number of steps to notify customer counterparties to these contracts of the proposed assignment. In particular, at the time of serving the motion materials seeking the Assignment Order, Sears Canada posted a notice on its website providing notice to customers of the motion to approve the Confort Transaction and providing a link to the motion materials.¹³³

128. Moreover, the proposed Approval and Vesting Order, if granted, requires Confort to send or cause to be sent, as part of Confort's first invoice delivery to customers following closing, or by specific mailing (in either event not later than 75 days after the issuance of the Approval and Vesting Order), a customer notice advising of the Confort Transaction. The notice confirms that customer contracts will remain in force and effect and that all services will continue

¹³³ Confort Affidavit, para. 18. This notice was posted at www.searshomeimprovements.ca in the form attached as Exhibit A to the Confort Affidavit.

to be provided to customer in the normal course. Customers will be entitled to terminate their agreements in accordance with the termination provisions of those agreements.¹³⁴

129. In light of the fact that these customer contracts do not expressly require customer consent for the assignment to Confort, the Monitor has advised that these steps are appropriate.¹³⁵

Section 11.3(2): No Exception Applies

130. The assignment of the customer contracts does not fall within any exception set out in section 11.3(2), which precludes an order under subsection (1) from being made in respect of obligations that are not assignable by reason of their nature. Subsection 11.3(2) also provides that subsection (1) does not apply (a) to an agreement entered into after the filing date; (b) an eligible financial contract; or (c) a collective agreement.¹³⁶

Section 11.3(3): Assignment is Appropriate

131. The factors identified in s. 11.3(3)¹³⁷ have all been satisfied.

132. In particular, in accordance with s. 11.3(3)(a), the Monitor supports the Applicants' request for the proposed Assignment Order.¹³⁸

¹³⁴ Confort Affidavit, para. 19.

¹³⁵ Confort Affidavit, para. 18.

¹³⁶ CCAA, s. 11.3(2): "Subsection (1) does not apply in respect of rights and obligations that are not assignable by reason of their nature or that arise under (a) an agreement entered into on or after the day on which proceedings commence under this Act; (b) an eligible financial contract; or (c) a collective agreement."

¹³⁷ CCAA, s. 11.3(3): "In deciding whether to make the order, the court is to consider, among other things, (a) whether the monitor approved the proposed assignment; (b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and (c) whether it would be appropriate to assign the rights and obligations to that person.

¹³⁸ Confort Affidavit, paras. 18.

133. In accordance with s. 11.3(3)(b), Confort, as the proposed assignee, will have the ability to perform the obligations under the assigned contracts post-closing. Confort has a proven track record in servicing these contracts on behalf of Sears Canada over the course of the last several years.¹³⁹

134. For the same reasons, in accordance with s. 11.3(c), it is appropriate to assign the rights and obligations under these contracts to Confort. As Confort is already performing the Home Improvements Business on Sears Canada's behalf, the proposed assignment will result in a seamless transition from the prior legal arrangements, in which Sears Canada is the counterparty to the assumed contracts, to the new legal arrangements in which Confort is the counterparty to the contracts. In addition, the preservation of the Home Improvements Business line is consistent with the objectives of the CCAA – it maximizes value for the Sears Canada stakeholders while minimizing disruption to customers of this business line and to the employees of Confort.

Section 11.3(4): Monetary Defaults Satisfied

135. Finally, in compliance with section 11.3(4), all monetary defaults (if such defaults exist), other than those arising by reason only of the Applicants' insolvency, the commencement of these proceedings or the Applicants' failure to perform a non-monetary obligations, will be remedied upon closing.¹⁴⁰ Confort agrees that, as of the closing date, it will perform certain of

¹³⁹ Confort Affidavit, paras. 5, 19.

¹⁴⁰ CCAA, 11.3(4): "The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement — other than those arising by reason only of the company's insolvency, the commencement of proceedings under this Act or the company's failure to perform a non-monetary obligation — will be remedied on or before the day fixed by the court."

Sears Canada's obligations and liabilities, including all obligations under the Assumed Contracts arising on or after closing and all Cure Costs relating to the Assumed Contracts.¹⁴¹

136. The Applicants submit that this Court should therefore approve the Confort Transaction and grant the requested Approval and Vesting Order and the requested Assignment Order].

Intellectual Property Transaction

137. The details of the Viking APA are set out in the Viking Affidavit.¹⁴²

i. Section 36 of the CCAA

138. The Applicants submit that the Viking Transaction satisfies all of the applicable requirements under section 36 of the CCAA.

139. ***Fairness of Process:*** The Viking Transaction is the product of the SISF, which was approved as fair and reasonable and is described in detail above.¹⁴³

140. ***Monitor Approval:*** The Monitor has approved the process leading up to the acceptance of the Viking Transaction, the Applicants' request for approval of the Transaction, and supports the requested Approval and Vesting Order and Assignment Order.¹⁴⁴

141. ***Benefits of Viking Transaction:*** The benefits of the Viking Transaction primarily arise out of the cash consideration to be received for the benefit of all stakeholders.

¹⁴¹ Confort Affidavit, para. 17(f).

¹⁴² Viking Affidavit, para 19.

¹⁴³ Viking Affidavit, paras. 5, 14.

¹⁴⁴ Viking Affidavit, para. 8; Monitor's Report, para. 169, 192.

142. ***Reasonable and Fair Price:*** The Viking bid was received by the Sale Advisor on the Binding Bid Deadline. The Sale Advisor then engaged in negotiations with Canadian Tire regarding the financial and legal aspects of its bid. As a result of these negotiations and considering the available alternatives, the Sale Advisor recommended to the Special Committee, and the Special Committee subsequently recommend to the Board, that Sears Canada enter into the Viking Transaction. The Board approved the Viking Transaction on the basis that the Purchase Price is fair and reasonable (as set out in the Confidential Appendix to the Monitor's Report) and that the Viking Transaction is in the best interests of the Applicants and their stakeholders.¹⁴⁵ The business judgment of the Applicants and the Monitor is entitled to considerable deference by this Court.¹⁴⁶

143. Canadian Tire has represented that it has sufficient cash immediately available to close the Viking Transaction.¹⁴⁷

144. The only material conditions to the Viking Transaction are

- (a) the granting of the requested Approval and Vesting Order and that the Approval and Vesting Order shall have become Final, as defined in the Viking APA, and
- (b) that Sears Canada shall have commenced the disclaimer process in respect of the Viking Range License Agreement (described below), and that any one of the following events shall have occurred: (i) the time period in which the licensee is required to apply to a court for an order that such agreement is not to be disclaimed shall have expired; (ii) in the event a Disclaimer Order is required, then such

¹⁴⁵ Viking Affidavit, paras. 15, 17.

¹⁴⁶ *Abitibi*, above.

¹⁴⁷ Viking Affidavit, para. 18.

Disclaimer Order shall be Final; or (iii) the CCAA Court shall otherwise have made an order providing for the disclaimer of the Viking Range License Agreement, which shall be Final.¹⁴⁸

ii. Viking “ROFR”

145. The requested Approval and Vesting Order will transfer the Purchased Assets (as defined under the Viking APA), free and clear of all prior rights, interests and encumbrances, including rights of first negotiation, rights of first refusal and any other similar rights. This includes certain surviving contractual rights in favour of The Middleby Corporation (“**Middleby**”).¹⁴⁹

146. In 2002, Sears Canada licensed the Purchased Assets (as defined in the Viking APA) to Viking Range Corp. (“**Viking Range**”) pursuant to a license agreement (the “**Viking Range License Agreement**”). Viking Range was subsequently acquired by Middleby.¹⁵⁰

147. Section 10.06 of the Viking Range License Agreement gave Middleby a right of first negotiation in respect of the Purchased Assets and a right of refusal to purchase the Purchased Assets (together, the “**ROFR**”). The Viking License Agreement has since expired. However, pursuant to article 7.04 of this expired agreement, certain provisions survive expiry (the “**Surviving Provisions**”), including the ROFR provision.¹⁵¹

148. On September 27, 2017, with consent of the Monitor and in consultation with the DIP Lenders, Sears Canada disclaimed the Surviving Provisions of the Viking Range License

¹⁴⁸ Viking Affidavit, para. 19(g).

¹⁴⁹ Viking Affidavit, para. 19(l).

¹⁵⁰ Viking Affidavit, para. 9. See also Exhibit B for a copy of the Viking Range License Agreement.

¹⁵¹ Viking Affidavit, para. 10.

Agreement pursuant to section 32 of the CCAA, including the ROFR, in order to facilitate the sale of the Purchased Assets.¹⁵² In the Monitor's view, this disclaimer is appropriate, as it allows the Applicants to maximize the value of these assets, does not cause financial hardship to Middleby as Middleby's rights to use the intellectual property has lapsed, and Middleby had the opportunity to put forth its highest and best bid in the SISP both before and after the Binding Bid Deadline.¹⁵³

149. The Applicants submit that since the ROFR is a purely contractual right in relation to intangible property, it is no different from any other executory obligation that is permitted to be disclaimed under section 32 of the CCAA¹⁵⁴ in order to facilitate the restructuring of the debtor company. Moreover, since the Viking Range License Agreement has expired, this disclaimer does not violate section 32(6) of the CCAA, which precludes a debtor company, if it is a licensor under an agreement in relation to intellectual property, from disclaiming the license agreement.¹⁵⁵

150. To the extent that Middleby has suffered damage from the disclaimer, it is entitled to assert such claim as against the Applicants, in accordance with section 32(7) of the CCAA.¹⁵⁶

151. Section 36(6) of the CCAA permits this Court to make an order vesting assets in a purchaser "free and clear of any security, charge or other restriction". If it does so, "it shall also

¹⁵² Viking Affidavit, para 11. See also Exhibit C for a copy of the Disclaimer.

¹⁵³ Monitor's Third Report, para. 112.

¹⁵⁴ Section 32(1) of the CCAA provides that "Subject to subsections (2) and (3), a debtor company may — on notice given in the prescribed form and manner to the other parties to the agreement and the monitor — disclaim or resiliate any agreement to which the company is a party on the day on which proceedings commence under this Act. The company may not give notice unless the monitor approves the proposed disclaimer or resiliation."

¹⁵⁵ CCAA, s. 32(6): "If the company has granted a right to use intellectual property to a party to an agreement, the disclaimer or resiliation does not affect the party's right to use the intellectual property — including the party's right to enforce an exclusive use — during the term of the agreement, including any period for which the party extends the agreement as of right, as long as the party continues to perform its obligations under the agreement in relation to the use of the intellectual property."

¹⁵⁶ CCAA, s. 32(7): "If an agreement is disclaimed or resiliated, a party to the agreement who suffers a loss in relation to the disclaimer or resiliation is considered to have a provable claim."

order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.”¹⁵⁷

152. To the extent Middleby takes the position that the Purchased Assets are subject to any security or other charge in its favour (which the Applicants deny), it will be free to advance this argument as against the proceeds from the Viking Transaction, as contemplated under section 36(6) of the CCAA. However, the Applicants submit that this is not an impediment to the approval of the Viking Transaction.

153. Moreover, as set out in the Monitor’s Report, the disclaimer of the ROFR is appropriate in the circumstances as:

- (a) it will allow the Applicants to maximize the value of these assets;
- (b) the disclaimer does not cause significant financial hardship to Middleby as Middleby’s rights to utilize the licensed trademarks has already been terminated; and
- (c) Middleby elected to participate in the SISP bidding process and was provided a full opportunity both at the Binding Bid Deadline and through subsequent rounds of negotiations to put its best bid forward in that process, which ultimately was not the highest or otherwise best bid.¹⁵⁸

¹⁵⁷ CCAA, s. 36(6). See proposed Viking Approval and Vesting Order, para. 5.

¹⁵⁸ Monitor’s Third Report, para. 112.

Sale of Owned Real Property

154. The details of the Garden City Transaction are set out in the Garden City Affidavit.¹⁵⁹ The Applicants submit that the Garden City Transaction satisfies all of the applicable requirements under section 36 of the CCAA.

155. ***Fairness of Process:*** The Garden City Transaction is the product of the SISP, which was approved as fair and reasonable and is described in detail above.¹⁶⁰

156. ***Monitor Approval:*** The Monitor has approved the process leading up to the acceptance of the proposed Garden City Transaction and supports the requested Approval and Vesting Order.¹⁶¹

157. ***Benefits of Garden City Transaction:*** The benefits of the Garden City Transaction primarily arise out of the cash consideration to be received for the benefit of all stakeholders.

158. ***Reasonable and Fair Price:*** The Garden City bid was received by the Sale Advisor before the Binding Bid Deadline. As described above, the market for the Garden City Property has been thoroughly canvassed and tested in the pre-filing period, resulting in the Amendment, and the Garden City APA with WCRE, and then in the subsequent offer from 1562903 within the SISP.¹⁶²

159. Upon receipt of 1562903's bid, the Sale Advisor engaged in negotiations with 1562903 regarding the financial and legal aspects of its bid. As a result of these negotiations and

¹⁵⁹ Garden City Affidavit, para. 17.

¹⁶⁰ Garden City Affidavit, para. 4.

¹⁶¹ Garden City Affidavit, para. 7; Monitor's Report, para. 162, 184.

¹⁶² Garden City Affidavit, paras 11 and 12.

considering 1562903's offer in light of the available alternatives, the Sale Advisor recommended to the Special Committee, and the Special Committee subsequently recommend to the Board, that Sears Canada enter into the Garden City Transaction. The Board approved the Garden City Transaction on the basis that the Purchase Price is fair and reasonable (as set out in the Confidential Appendix to the Monitor's Report) and that the Garden City Transaction is in the best interests of the Applicants and their stakeholders.¹⁶³

160. In accepting 1562903's bid, Sears Canada and the Special Committee, in consultation with the Sale Advisor, took into account the fact that the consideration offered by 1562903 was the highest price offered for the Garden City Property. In particular, the Purchase Price exceeded all other bids, including the amount previously offered on August 17, 2017 (the eve of the motion seeking approval of the Garden City APA).¹⁶⁴ The business judgment of the Applicants and the Monitor is entitled to considerable deference by this Court.¹⁶⁵

161. There are no financing conditions to the APA.¹⁶⁶ Moreover, the anticipated closing date can be extended by Sears Canada until no later than October 16, 2017 to ensure that the ongoing liquidation sale, which is being conducted in accordance with the Liquidation Sale Approval Order, can be completed.¹⁶⁷

¹⁶³ Garden City Affidavit, para. 15.

¹⁶⁴ Garden City Affidavit, para. 16.

¹⁶⁵ *Abitibi*, above.

¹⁶⁶ Garden City Affidavit, para. 17(d).

¹⁶⁷ Garden City Affidavit, para. 17(e), 18

Successful Lease Transactions

i. Lease Transfer – Calgary DC

162. The details of the Calgary DC Lease Transfer Agreement are set out in the Calgary DC Affidavit.¹⁶⁸ The Applicants submit that the Calgary DC Transaction satisfies all of the applicable requirements under section 36 of the CCAA.

163. ***Fairness of Process:*** The Calgary DC Transaction is the product of the SISP, which was approved as fair and reasonable and is described in detail above.¹⁶⁹

164. ***Monitor Approval:*** The Monitor has approved the process leading up to the acceptance of the proposed Calgary DC Transaction, the Applicants' request for approval of the Transaction, and supports the requested Approval and Vesting Order.¹⁷⁰

165. ***Benefits of Calgary Distribution Centre Transaction:*** The benefits of the Calgary DC Transaction primarily arise out of the cash consideration to be received for the benefit of all stakeholders.

166. ***Reasonable and Fair Price:*** The bid submitted by Indigo was received by the Sale Advisor on the Binding Bid Deadline.¹⁷¹ Upon receipt of Indigo's bid, the Sale Advisor engaged in negotiations with Indigo regarding the financial and legal aspects of its bid. As a result of these negotiations and considering Indigo's offer in light of the available alternatives, the Sale Advisor recommended to the Special Committee, and the Special Committee subsequently recommend to

¹⁶⁸ Calgary DC Affidavit, para. 16.

¹⁶⁹ Calgary DC Affidavit, paras. 4 and 11.

¹⁷⁰ Calgary DC Affidavit, para. 8; Monitor's Third Report, para. 169, 192.

¹⁷¹ Calgary DC Affidavit, para. 12.

the Board, that Sears Canada enter into the Calgary DC Transaction. The Board approved the Transaction on the basis that the Purchase Price is fair and reasonable (as set out in the Confidential Appendix to the Monitor's Report) and that the Transaction is in the best interests of the Applicants and their stakeholders.¹⁷² This decision is entitled to deference from this Court.¹⁷³

167. The Calgary DC Lease Transfer Agreement is conditional upon obtaining the proposed Approval and Vesting Order.¹⁷⁴

168. In addition, under the terms of the Lease Transfer Agreement and as a condition of closing, Sears Canada has agreed to use commercially reasonable efforts to obtain the Landlord's consent to the Calgary DC Transaction – which contemplates the assignment of Sears Canada's Lease to Indigo, the retention of certain FF&E and trade fixtures by Indigo and the release by the Landlord of certain claims regarding leasehold improvement allowances – on or prior to closing.¹⁷⁵

169. In addition, the Lease Transfer Agreement is conditional upon obtaining the consent of the counterparty to the Assigned Software Contracts for the assignment of these contracts to Indigo, or upon obtaining an assignment order.¹⁷⁶

170. As such, no assignment order under section 11.3 of the CCAA is being sought at this time.

¹⁷² Calgary DC Affidavit, paras. 13, 14.

¹⁷³ *Abitibi*, above.

¹⁷⁴ Calgary DC Affidavit, para. 16(e).

¹⁷⁵ Calgary DC Affidavit, para. 6.

¹⁷⁶ Calgary DC Affidavit, para. 16(b).

171. Indigo has the ability to perform the obligations under the Calgary DC Lease Transfer Agreement and the Lease. Indigo is a publicly traded Canadian company and is Canada's largest book, gift and specialty toy retailer. Indigo has represented that it has the financial ability to close the Transaction. Moreover, Indigo is required under the Lease Transfer Agreement to provide all necessary information to Sears Canada demonstrating that it is qualified to perform the obligations under the Lease.¹⁷⁷ Indigo bears sole responsibility for negotiating any necessary amendments to the Lease to allow it to use the Premises for its purposes.¹⁷⁸

172. The Lease Transfer Agreement does not contemplate any post-closing access to the Premises for Sears Canada as all of the inventory formerly located on the Premises has already been removed.¹⁷⁹

ii. Lease Surrenders or Terminations

173. The Applicants seek approval of the following 8 Lease Surrender Transactions:

- (a) the Lime Ridge/Polo Park Transaction;
- (b) the Scarborough Town Centre Transaction;
- (c) the Fairview Transaction;
- (d) the Oakville Place Transaction;
- (e) the Avalon Mall Transaction;

¹⁷⁷ Calgary DC Affidavit, para. 15.

¹⁷⁸ Calgary DC Affidavit, para. 16(i).

¹⁷⁹ Calgary DC Affidavit, para. 17.

- (f) the Brentwood Transaction;
- (g) the Orchard Park Transaction; and
- (h) the Nanaimo Transaction.

174. The details of the Lease Surrender Transactions are set out in the Lease Surrender Affidavits.¹⁸⁰ The Applicants submit that the Lease Surrender Transactions satisfy all of the applicable requirements under section 36 of the CCAA. These Transactions are addressed in the aggregate on the basis that they are essentially identical from the perspective of compliance with section 36. Unique issues in relation to particular Transaction are analyzed separately below.

175. ***Fairness of Process:*** The Lease Surrender Transactions are the product of the SISF, which was approved as fair and reasonable and is described in detail above.¹⁸¹

176. ***Monitor Approval:*** The Monitor has approved the process leading up to the acceptance of the Lease Surrender Transactions, the Applicants' request for approval of the Transactions, and supports the requested Approval and Vesting Order.¹⁸²

177. ***Benefits of Lease Surrender Transactions:*** The benefits of the Lease Surrender Transactions primarily arise out of the cash consideration to be received for the benefit of all

¹⁸⁰ Lime Ridge/Polo Park Affidavit, para. 14; Scarborough Town Centre Affidavit, para. 15; Fairview Affidavit, para. 14; Oakville Place Affidavit, para. 14; Avalon Mall Affidavit, para. 14; Brentwood Affidavit, para. 25; Orchard Park Affidavit, para. 14; Nanaimo Affidavit, para. 14.

¹⁸¹ Lime Ridge/Polo Park Affidavit, paras. 4 and 10; Scarborough Town Centre Affidavit, para. 4 and 10; Fairview Affidavit, paras. 4 and 10; Oakville Place Affidavit, paras. 4 and 10; Avalon Mall Transaction, paras. 4 and 10; Brentwood Affidavit, paras. 4 and 19; Orchard Park Affidavit, paras. 4 and 10; Nanaimo Affidavit, paras. 4 and 9.

¹⁸² Lime Ridge/Polo Park Affidavit, para. 7; Scarborough Town Centre Affidavit, para. 7; Fairview Affidavit, para. 7; Oakville Place Affidavit, para. 7; Avalon Mall Affidavit, para. 7; Orchard Park Affidavit, para. 7. The Nanaimo Transaction and the Brentwood Transaction are supported by the Sale Advisor and the Applicants, who believe that the process leading up to the transaction was reasonable in the circumstances. Nanaimo Affidavit, para. 6; Brentwood Affidavit, para 6; Monitor's Report, para. 169, 192.

stakeholders in exchange for the Landlords' ability to repossess the leased premises prior to the expiry of the Lease term. The Landlords are therefore free to re-let these premises to tenants of their choosing.

178. In addition, the proposed Leased Surrender Transactions eliminate certain potential claims into the Applicants' estate, including pre-filing claims from the Landlords relating to the Leases and any claims that might otherwise be asserted by a Landlord upon a disclaimer of the applicable Leases.¹⁸³

179. ***Reasonable and Fair Price:*** With one exception, the Lease Surrender Transaction bids were received by the Sale Advisor on or before the Binding Bid Deadline.¹⁸⁴ As described above, the market for the applicable Leases has been thoroughly canvassed.

180. The Sale Advisor engaged in negotiations with the Landlords regarding the financial and legal aspects of their bids. As a result of these negotiations and considering the available alternatives, the Sale Advisor recommended to the Special Committee, and the Special Committee subsequently recommend to the Board, that Sears Canada enter into the Lease Surrender Transactions. The Board approved the Lease Surrender Transactions on the basis that the Purchase Price is fair and reasonable (as set out in the Confidential Appendix to the Monitor's

¹⁸³ Lime Ridge/Polo Park Affidavit, para. 13; Scarborough Town Centre Affidavit, para. 14; Fairview Affidavit, para. 13; Oakville Place Affidavit, para. 13; Avalon Mall Affidavit, para. 13; Brentwood Mall Affidavit, para. 23; Orchard Park Affidavit, para. 13; Nanaimo Affidavit, para. 13.

¹⁸⁴ Note that the Avalon Mall bid was received on September 21, 2017: Avalon Mall Affidavit, para. 11. Moreover, although the initial Brentwood and Nanaimo bids were received on August 31, 2017, Shape submitted revised Lease Surrender Agreements increasing the Surrender Consideration on September 21, 2017, which was only open for acceptance until 7 pm. on September 21, 2017: Brentwood Affidavit, para. 21; Nanaimo Affidavit, para. 11.

Report) and that the Lease Surrender Transactions are in the best interests of the Applicants and their stakeholders.¹⁸⁵

181. The Lease Surrender Agreements (or separate Access Agreements) each provide for a period of time post-closing in which Sears Canada or an agent under the Liquidation Sale Approval Order will be permitted to conduct a Sale (as defined in the Liquidation Sale Order) and to sell any FF&E from the Premises during the Sale and/or remove any Excluded Assets. During this period, Sears Canada will remain bound by the terms of the Leases (except provisions such as the obligation to pay rent and taxes) and will comply with both the relevant Lease Surrender Agreement and the Liquidation Sale Approval Order.¹⁸⁶

182. Subject to the individual issues discussed below, each of the Lease Surrender Transactions is conditional primarily upon this Court issuing the proposed Approval and Vesting Order and the Monitor issuing the Monitor's Certificate.¹⁸⁷

¹⁸⁵ Lime Ridge/Polo Park Affidavit, paras. 6, 11 and 12; Scarborough Town Centre Affidavit, paras. 6, 11, 13; Fairview Affidavit, paras. 6, 11 and 12; Oakville Place Affidavit, paras. 6, 11 and 12; Avalon Mall Affidavit, paras. 6, 11 and 12; Brentwood Affidavit, paras. 6, 20 to 22; Orchard Park Affidavit, paras. 6, 11, 12; Nanaimo Affidavit, paras. 6, 11 and 12.

¹⁸⁶ Lime Ridge/Polo Park Affidavit, para. 14(i); Scarborough Town Centre Affidavit, para. 15(f) (see also Schedule L to the Lease Surrender Agreement for the terms of the Access Agreement); Fairview Affidavit, para. 14(j); Oakville Place Affidavit, para. 14(g); Avalon Mall Affidavit, para. 14(d); Brentwood Affidavit, para. 25(h); Orchard Park Affidavit, para. 14(h); Nanaimo Affidavit, para. 14(h).

¹⁸⁷ Lime Ridge/Polo Park Affidavit, para. 14(e); Scarborough Town Centre Affidavit, para. 15(b); Fairview Affidavit, para. 14(e); Oakville Place Affidavit, para. 14(c); Avalon Mall Affidavit, para. 14(c); Brentwood Affidavit, para. 25(c); Orchard Park Affidavit, para. 14(b); Nanaimo Affidavit, para. 14(c).

Unique Issues Arising Under Specific Lease Surrender Transactions

a. Vesting Free and Clear of Construction Liens

183. Several Lease Surrender Transactions¹⁸⁸ require Sears Canada, on or before the Closing Date, to vacate or discharge certain Encumbrances, which include construction liens arising as a result of work completed by or behalf of Sears Canada that have been registered on or prior to the Closing Date against the Leased Property owned by the applicable Landlord or their affiliates.¹⁸⁹ Charts showing the identity of the construction lien claimants and the amount of the liens are found in the applicable Lease Surrender Transaction Affidavits.¹⁹⁰

184. In addition, the Lime Ridge/Polo Park Transaction and the Fairview Transaction require construction liens to be vacated or discharged in relation to all Leased Property owned by the CF Landlord Entities or the Fairview Landlord Entities, respectively, whether or not the Leased Property is the subject of the Lime Ridge/Polo Park Lease Surrender Agreement or the Fairview Lease Surrender Agreement.¹⁹¹ A chart showing the construction liens registered against other Leased Property owned by the CF Landlord Entities and the Fairview Landlord Entities is also set out in the Lime Ridge/Polo Park Affidavit and the Fairview Affidavit.¹⁹²

¹⁸⁸ Lime Ridge/Polo Park Transaction; Scarborough Town Centre Transaction; Fairview Transaction; Oakville Place Transaction; Orchard Park Transaction.

¹⁸⁹ Lime Ridge/Polo Park Affidavit, para. 14(e); proposed Scarborough Town Centre Approval and Vesting Order, para. 4; Fairview Affidavit, para. 14(e); Oakville Place Affidavit, para. 14(g); Orchard Park Affidavit, para. 14(e).

¹⁹⁰ Lime Ridge/Polo Park Affidavit, para. 15; Scarborough Town Centre Affidavit, para. 16; Fairview Affidavit, para. 15; Oakville Place Affidavit, para. 15. There are currently no liens registered against the Orchard Park Property: Orchard Park Affidavit, para. 14(e).

¹⁹¹ Lime Ridge/Polo Park Affidavit, para. 14(e); Fairview Affidavit, para. 14(e). (Note that since the CF Landlord Entities and the Fairview Landlord Entities are related parties, the non-Lease Surrender Transaction Properties that are subject to liens that are to be vacated cross-reference each other and overlap).

¹⁹² Lime Ridge/Polo Park Affidavit, para. 18; Fairview Affidavit, para. 18.

185. In relation to the Leased Property that is the subject of a Lease Surrender Agreement (for example, the Lime Ridge Property, the Scarborough Town Centre Property, or the CF Fairview Mall Property), the Applicants submit that this Court has the jurisdiction to provide for the vesting of this Property in the Landlord free and clear of all encumbrances, including construction liens. Pursuant to section 36(6), any security interest possessed by construction lien holders will attach to the proceeds from this Lease Surrender Transaction.¹⁹³

186. To the extent that there is any dispute as to priority among the lienholders and any other secured creditor, this dispute can be resolved in due course as against these proceeds, and is not an impediment to the approval of the applicable Lease Surrender Agreement. To this end, the proposed Approval and Vesting Order for the applicable Lease Surrender Transaction provides for a Construction Lien Claim Reserve in an amount up to the aggregate total amount of lien claims listed in the Schedule to the proposed Approval and Vesting Order. The Construction Lien Claim Reserve can only be distributed upon further order of this Court.¹⁹⁴

187. In relation to the Leased Properties owned by the CF Landlord Entities or the Fairview Landlord Entities that are not the subject of a Lease Surrender Agreement, the Applicants intend to pay out any valid construction liens prior to Closing. No relief is being sought from this Court in relation to these encumbrances.

¹⁹³ CCAA, section 36(6). See also proposed Lime Ridge/Polo Park Approval and Vesting Order, para. 6; proposed Scarborough Town Centre Approval and Vesting Order, para. 6; proposed Fairview Approval and Vesting Order, para. 6.

¹⁹⁴ Lime Ridge/Polo Park Affidavit, para. 17; proposed Lime Ridge/Polo Park Approval and Vesting Order, para. 10; Scarborough Town Centre Affidavit, para. 17; proposed Scarborough Town Centre Approval and Vesting Order, para. 10; Fairview Mall Affidavit, para. 17; proposed Fairview Approval and Vesting Order, para. 10; Oakville Place Affidavit, para. 16; proposed Oakville Place Approval and Vesting Order, para. 10; Note that since the Surrender Consideration allocated to the Fairview Mall property is less than the aggregate of the lien amounts registered against that property, the Monitor will reserve the full amount of the Surrender Consideration to address any dispute between the lien claimants and any other party claiming a priority entitlement to those proceeds: Fairview Affidavit, para. 17.

188. The Monitor supports the Lease Surrender Transactions and is aware of the requirement imposed by the CF Landlord Entities and the Fairview Landlord Entities to vacate liens against properties that are not subject to the Lease Surrender Agreements.¹⁹⁵ The total Surrender Consideration to be paid in relation to the Lime Ridge/Polo Park Surrender Transaction, and under the related transaction for Sears Canada's Leases at CF Fairview Mall and Point Claire, is materially greater than the aggregate amount of the liens to be vacated and expunged.¹⁹⁶

189. The Applicants have concluded, in their business judgment, that the applicable Lease Surrender Transactions are fair and reasonable, notwithstanding the above conditions, and in the best interests of the Applicants and their stakeholders.

b. Co-Tenancy Stay in Favour of CF Landlord Entities and Fairview Landlord Entities

190. Under the Lime Ridge/Polo Park Transaction and the Fairview Transaction, the Applicants have agreed to exercise reasonable commercial efforts in order to seek, as part of the Approval and Vesting Order, the continued protections of the Initial Order, including the stay of proceedings, for the benefit of the CF Landlord Entities and the Fairview Landlord Entities for until the earlier of (i) six months from the date of the Approval and Vesting Order, and (ii) the period during which any other owners, operators, managers or landlords of commercial shopping centres or other commercial properties in which there is a store, office or warehouse owned or operated by Sears Canada is bound by or obtains any benefit from this stay.¹⁹⁷

¹⁹⁵ Monitor's Third Report, paras. 169, 151, 184, 192.

¹⁹⁶ Lime Ridge/Polo Park Affidavit, para. 19; Fairview Affidavit, para. 19.

¹⁹⁷ Lime Ridge/Polo Park Affidavit, para. 14(j); Fairview Affidavit, para. 14(j).

191. Paragraph 15 of the Initial Order imposes a “Co-tenancy Stay” which temporarily precludes any third parties that may have rights against the Applicants’ landlords arising from the insolvency of the Applicants from exercising those rights (e.g. the right of a non-anchor tenant to terminate its lease when the anchor tenant “goes dark”).¹⁹⁸ By its terms, the Co-tenancy Stay applies during the CCAA stay period, in relation to premises where there is a store “owned and operated” by the Applicants. Once a particular store is no longer owned and operated by the Applicants, such as upon closing of a Lease Transaction Agreement, the Co-tenancy Stay no longer applies.

192. A similar extended Co-tenancy Stay was granted by this Honourable Court in *Target*.¹⁹⁹ The requested extension of the Co-tenancy Stay beyond the date of the closing of these two Transactions directly supports and flows from the significant value provided by the CF Landlord Entities and the Fairview Landlord Entities. It provides breathing space, recognizing that the effects of the Applicants’ insolvency are not immediately alleviated upon closing of a Lease Transaction Agreement. There will inevitably be a transition period while a landlord Purchaser finds new tenants, or a third party Purchaser carries out necessary alterations before opening. If third parties were to be immediately entitled to exercise co-tenancy rights upon closing of the Lease Transaction, such actions could materially prejudice the CF Landlord Entities and the Fairview Landlord Entities.²⁰⁰

193. The basis for this Court’s jurisdiction to grant or extend the Co-tenancy Stay in appropriate circumstances has not changed since the date of the Initial Order. It is based on the

¹⁹⁸ Amended and Restated Initial Order, para. 15.

¹⁹⁹ *Re Target Canada Co*, 2015 CarswellOnt 7633 at para 11.

²⁰⁰ Lime Ridge/Polo Park Affidavit, para. 14(j); Fairview Affidavit, para. 14(j).

broad powers under sections 11 and 11.02(1) of the CCAA to make orders (including an initial order) on “any terms that [the Court] may impose.”²⁰¹

194. No third party with rights that could be exercised against the CF Landlord Entities or the Fairview Landlord Entities will lose or be deprived of those rights if the requested relief is granted. Instead, their rights will simply be postponed temporarily, in the same manner as they have been postponed since the date of the Initial Order. The Co-tenancy Stay in these proceedings has been in place for over 3 months. Any third parties who experienced prejudice from the effect of the Co-Tenancy Stay on their rights had ample opportunity to raise and fully argue any objections to the Co-Tenancy Stay. No party has come forward to do so.

195. If the proposed extension of the Co-tenancy Stay is granted, it remains open to any person who alleges that they are particularly prejudiced by the application to move to lift the stay, on notice to all concerned. Such persons rights can thereby be determined on an orderly basis, within the stable forum of the CCAA proceeding.

e) Request for Sealing Order

196. The Applicants request that certain confidential and commercially sensitive information in connection with the Transactions for which approval is sought in these motions, including (i) the purchase price/surrender consideration for each Transaction, (ii) information included in the Schedules to the SLH APA and Corbeil APA, and (iii) the Letter Agreement between Shape Brentwood, Sears Canada and third party developers (the “**Letter Agreement**”), be sealed. Such confidential information is contained in the Confidential Appendix to the

²⁰¹ CCAA, s. 11.02(1). See also CCAA, s. 11. *Re T. Eaton Co.*, 1997 CarswellOnt 1914 (Gen. Div.) [*Eaton’s*] and *Re Target Canada Co.*, 2015 ONSC 303.

Monitor's Report. In the Applicants' submission, the test for such an order, as established by the Supreme Court of Canada, has been satisfied.²⁰²

197. In the view of the Applicants and the Sale Advisor, information about the amount of the consideration to be paid for particular Transactions is confidential. In addition, in view of the Applicants and the Sale Advisor, the information included in the Schedules to the Corbeil and SLH APAs and in the Letter Agreement is also confidential. General disclosure of such information could be materially prejudicial to the Applicants and the Buyers/Purchasers in connection with the SISP generally. Significant and specific prejudice could arise in the event of any further marketing of the Assets, Leases or business lines, such as if one or more of the proposed Transactions does not close as anticipated.²⁰³

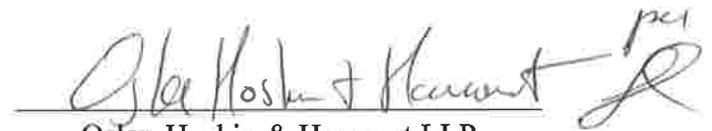
²⁰² *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 at para 53; see also *Re Target Canada Corp*, 2015 ONSC 1487 at paras 28-30.

²⁰³ SLH Affidavit, para. 5; Corbeil Affidavit, para. 4; Confort Affidavit, para. 16; Viking Affidavit, para. 6; Garden City Affidavit, para. 5; Lime Ridge/Polo Park Affidavit, para. 5; Scarborough Town Centre Affidavit, para. 5; Fairview Affidavit, para. 5; Oakville Place Affidavit, para. 5; Avalon Mall Transaction, para. 5; Brentwood Affidavit, para. 5; Orchard Park Affidavit, para. 5; Calgary Distribution Centre Affidavit, para. 5; Nanaimo Affidavit, para. 5. See also Monitor's Third Report, paras. 59 and 60 and Confidential Appendix.

PART IV – NATURE OF THE ORDER SOUGHT

198. For all of the reasons above, the Applicants submit that this Honourable Court should grant the relief sought by the Applicants in these motions.

ALL OF WHICH IS RESPECTFULLY SUBMITTED:


Osler, Hoskin & Harcourt LLP

Schedule "A"

LIST OF AUTHORITIES

Case Law

1. *AbitibiBowater Inc. (Re)*, 2010 QCCS 1742
2. *Canwest Global Communications (Re)*, 2009 CarswellOnt 7169 (S.C.J.)
3. *Canwest Publishing Inc./Publications Canwest Inc. (Re)*, 2010 ONSC 2870
4. *Grafton-Fraser Inc v Cadillac-Fairview Corp*, 2017 ONSC 2496
5. *Royal Bank v. Soundair Corp.*, [1991] O.J. No. 1137 (C.A.)
6. *Salima Investments Ltd. v. Bank of Montreal* (1985), 59 C.B.R. (N.S.) 242 (Alta C.A.)
7. *Sanjel Co. (Re)*, 2016 ABQB 257
8. *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41
9. *T. Eaton Co. (Re)*, 1997 CarswellOnt 1914 (Gen. Div.)
10. *Target Canada Co. (Re)*, 2015 ONSC 303
11. *Target Canada Co. (Re)*, 2015 ONSC 1028
12. *Target Canada Co. (Re)*, 2015 ONSC 1487
13. *Target Canada Co. (Re)*, 2015 ONSC 2066
14. *Re Target Canada Co*, 2015 CarswellOnt 7633
15. *Target Canada Co. (Re)*, 2016 ONSC 3651
16. *Terrace Bay Pulp Inc. (Re)*, 2012 ONSC 4247
17. *White Birch Paper Holding Co. (Re)*, 2010 QCCS 4915; leave to appeal refused 2010 CarswellQue 11534, 2010 QCCA 1950 (Que. C.A.)

Secondary Sources

18. J. Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd Ed. (Toronto: Carswell, 2013)

Schedule "B"

COMPANIES' CREDITORS ARRANGEMENT ACT

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

Compromises to be sanctioned by court

6. (1) If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be — other than, unless the court orders otherwise, a class of creditors having equity claims, — present and voting either in person or by proxy at the meeting or meetings of creditors respectively held under sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court and, if so sanctioned, is binding

[...]

Restriction — default of remittance to Crown

(4) If an order contains a provision authorized by section 11.09, no compromise or arrangement is to be sanctioned by the court if, at the time the court hears the application for sanction, Her Majesty in right of Canada or a province satisfies the court that the company is in default on any remittance of an amount referred to in subsection (3) that became due after the time of the application for an order under section 11.02.

Restriction — employees, etc.

(5) The court may sanction a compromise or an arrangement only if

(a) the compromise or arrangement provides for payment to the employees and former employees of the company, immediately after the court's sanction, of

(i) amounts at least equal to the amounts that they would have been qualified to receive under paragraph 136(1)(d) of the Bankruptcy and Insolvency Act if the company had become bankrupt on the day on which proceedings commenced under this Act, and

(ii) wages, salaries, commissions or compensation for services rendered after proceedings commence under this Act and before the court sanctions the compromise or arrangement, together with, in the case of travelling salespersons, disbursements properly incurred by them in and about the company's business during the same period; and

(b) the court is satisfied that the company can and will make the payments as required under paragraph (a).

Restriction — pension plan

(6) If the company participates in a prescribed pension plan for the benefit of its employees, the court may sanction a compromise or an arrangement in respect of the company only if

(a) the compromise or arrangement provides for payment of the following amounts that are unpaid to the fund established for the purpose of the pension plan:

(i) an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund,

(ii) if the prescribed pension plan is regulated by an Act of Parliament,

(A) an amount equal to the normal cost, within the meaning of subsection 2(1) of the Pension Benefits Standards Regulations, 1985, that was required to be paid by the employer to the fund, and

(B) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the Pension Benefits Standards Act, 1985,

(C) an amount equal to the sum of all amounts that were required to be paid by the employer to the administrator of a pooled registered pension plan, as defined in subsection 2(1) of the Pooled Registered Pension Plans Act, and

(iii) in the case of any other prescribed pension plan,

(A) an amount equal to the amount that would be the normal cost, within the meaning of subsection 2(1) of the Pension Benefits Standards Regulations, 1985, that the employer would be required to pay to the fund if the prescribed plan were regulated by an Act of Parliament, and

(B) an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the Pension Benefits Standards Act, 1985, if the prescribed plan were regulated by an Act of Parliament,

(C) an amount equal to the sum of all amounts that would have been required to be paid by the employer in respect of a prescribed plan, if it were regulated by the Pooled Registered Pension Plans Act; and

(b) the court is satisfied that the company can and will make the payments as required under paragraph (a).

[...]

General power of court

11. Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

[...]

Stays, etc. — initial application

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act;

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

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

Stays, etc. — other than initial application

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

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

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

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

[...]

Assignment of agreements

11.3 (1) On application by a debtor company and on notice to every party to an agreement and the monitor, the court may make an order assigning the rights and obligations of the company under the agreement to any person who is specified by the court and agrees to the assignment.

Exceptions

(2) Subsection (1) does not apply in respect of rights and obligations that are not assignable by reason of their nature or that arise under

- (a) an agreement entered into on or after the day on which proceedings commence under this Act;
- (b) an eligible financial contract; or
- (c) a collective agreement.

Factors to be considered

(3) In deciding whether to make the order, the court is to consider, among other things,

- (a) whether the monitor approved the proposed assignment;
- (b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and
- (c) whether it would be appropriate to assign the rights and obligations to that person.

Restriction

(4) The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement — other than those arising by reason only of the company's insolvency, the commencement of proceedings under this Act or the company's failure to perform a non-monetary obligation — will be remedied on or before the day fixed by the court.

Copy of order

(5) The applicant is to send a copy of the order to every party to the agreement.

[...]

Disclaimer or resiliation of agreements

32 (1) Subject to subsections (2) and (3), a debtor company may — on notice given in the prescribed form and manner to the other parties to the agreement and the monitor — disclaim or resiliate any agreement to which the company is a party on the day on which proceedings commence under this Act. The company may not give notice unless the monitor approves the proposed disclaimer or resiliation.

Court may prohibit disclaimer or resiliation

(2) Within 15 days after the day on which the company gives notice under subsection (1), a party to the agreement may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement is not to be disclaimed or resiliated.

Court-ordered disclaimer or resiliation

(3) If the monitor does not approve the proposed disclaimer or resiliation, the company may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement be disclaimed or resiliated.

Factors to be considered

- (4) In deciding whether to make the order, the court is to consider, among other things,
- (a) whether the monitor approved the proposed disclaimer or resiliation;
 - (b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and
 - (c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

Date of disclaimer or resiliation

- (5) An agreement is disclaimed or resiliated
- (a) if no application is made under subsection (2), on the day that is 30 days after the day on which the company gives notice under subsection (1);
 - (b) if the court dismisses the application made under subsection (2), on the day that is 30 days after the day on which the company gives notice under subsection (1) or on any later day fixed by the court; or
 - (c) if the court orders that the agreement is disclaimed or resiliated under subsection (3), on the day that is 30 days after the day on which the company gives notice or on any later day fixed by the court.

Intellectual property

(6) If the company has granted a right to use intellectual property to a party to an agreement, the disclaimer or resiliation does not affect the party's right to use the intellectual property — including the party's right to enforce an exclusive use — during the term of the agreement, including any period for which the party extends the agreement as of right, as long as the party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

Loss related to disclaimer or resiliation

(7) If an agreement is disclaimed or resiliated, a party to the agreement who suffers a loss in relation to the disclaimer or resiliation is considered to have a provable claim.

Reasons for disclaimer or resiliation

(8) A company shall, on request by a party to the agreement, provide in writing the reasons for the proposed disclaimer or resiliation within five days after the day on which the party requests them.

Exceptions

- (9) This section does not apply in respect of
- (a) an eligible financial contract;
 - (b) a collective agreement;
 - (c) a financing agreement if the company is the borrower; or
 - (d) a lease of real property or of an immovable if the company is the lessor.

[...]

Restriction on disposition of business assets

36. (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Notice to creditors

(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Factors to be considered

- (3) In deciding whether to grant the authorization, the court is to consider, among other things,
- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
 - (b) whether the monitor approved the process leading to the proposed sale or disposition;
 - (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
 - (d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

Additional factors — related persons

(4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

Related persons

(5) For the purpose of subsection (4), a person who is related to the company includes

(a) a director or officer of the company;

(b) a person who has or has had, directly or indirectly, control in fact of the company; and

(c) a person who is related to a person described in paragraph (a) or (b).

Assets may be disposed of free and clear

(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

Restriction — employers

(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(a) and (5)(a) if the court had sanctioned the compromise or arrangement.

2005, c. 47, s. 131; 2007, c. 36, s. 78.

COURTS OF JUSTICE ACT

RSO 1990, c C.43,

137. (1) On payment of the prescribed fee, a person is entitled to see any document filed in a civil proceeding in a court, unless an Act or an order of the court provides otherwise.

Sealing documents

(2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

Court lists public

(3) On payment of the prescribed fee, a person is entitled to see any list maintained by a court of civil proceedings commenced or judgments entered.

Copies

(4) On payment of the prescribed fee, a person is entitled to a copy of any document the person is entitled to see.

R.S.O. 1990, c. C.43, s. 137.

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SEARS CANADA INC., CORBEIL ÉLECTRIQUE INC., S.L.H. TRANSPORT INC., THE CUT INC., SEARS CONTACT SERVICES INC., INITIUM LOGISTICS SERVICES INC., INITIUM COMMERCE LABS INC., INITIUM TRADING AND SOURCING CORP., SEARS FLOOR COVERING CENTRES INC., 173470 CANADA INC., 2497089 ONTARIO INC., 6988741 CANADA INC., 10011711 CANADA INC., 1592580 ONTARIO LIMITED, 955041 ALBERTA LTD., 4201531 CANADA INC., 168886 CANADA INC., AND 3339611 CANADA INC.

Applicants

Ontario

SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

FACTUM OF THE APPLICANTS
(Approval of Lease and Real Property Transaction
Agreements)
(Motions Returnable October 4, 2017)

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