

**ONTARIO
SUPERIOR COURT OF JUSTICE - COMMERCIAL LIST**

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF THE
CASH STORE FINANCIAL SERVICES INC., THE CASH STORE INC., TCS CASH STORE
INC., INSTALOANS INC., 7252331 CANADA INC., 5515433 MANITOBA INC., 1693926
ALBERTA LTD. DOING BUSINESS AS "THE TITLE STORE"

APPLICANTS

FACTUM OF TRIMOR ANNUITY FOCUS LIMITED PARTNERSHIP #5
(Motion returnable June 11, 2014)

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TO: SERVICE LIST

TABLE OF CONTENTS

PART I - OVERVIEW..... 1

PART II - THE FACTS3

PART III - ISSUES AND LAW17

SCHEDULE “A”
LIST OF AUTHORITIES28

SCHEDULE “B”
RELEVANT STATUTES.....29

PART I - OVERVIEW

1. Trimor Annuity Focus Limited Partnership #5 (“**Trimor**”) seeks to assume administration of the Trimor Loans¹ and the Trimor Receipts² (collectively, the “**Trimor Loans and Receipts**”) to ensure that they do not vanish like the millions of dollars in Trimor’s cash that has already disappeared.

2. It is clear that Trimor owns the Trimor Loans and Receipts and other stakeholders should not be allowed to use nebulous preference claims as an excuse to lock the Trimor Loans and Receipts in a business with no future, which has huge realization costs and which, according to the Applicants’ own evidence, cannot reasonably be expected to maximize recoveries. Trimor should be allowed to realize on its property in the most efficient and effective manner possible.

3. The Applicants say they have already initiated an “orderly cessation” of their brokering business. Accordingly, they have no use for the third party lenders’ funds. They are nonetheless insisting that the Applicants be entitled to collect the Trimor Loans despite the fact that, unlike other potential servicers, they are unable or unwilling to make new loans available to their former customers.

4. The Applicants’ own evidence is that their inability to make new loans in Ontario has resulted in their “ability to collect outstanding customer accounts receivable [being] *significantly*

¹ “Trimor Loans” means any loan in existence immediately prior to the effective time of the Initial Order (in accordance with paragraph 34 of the Amended and Restated Initial Order): i) for which Trimor is listed as the lender; ii) which are attributable to Trimor according to the Applicants’ records; or (iii) which have been assigned to Trimor. (See paragraphs 3 and 4 of the April 30, 2014 Additional TPL Protection Order).

² “Trimor Receipts” means any amounts received by Cash Store from Customers in repayment of the Trimor Loans.

impaired".³ In fact, collections on the Trimor Loans decreased by 75 percent in Ontario from January to March, 2014, and the proportion of Trimor Loans that are more than 30 days overdue increased from 0 percent as at January 31, 2014 to 39 percent as at April 13, 2014.⁴ As highlighted in the Monitor's Third Report,⁵ the difficulties in collecting on accounts in Ontario will now apply to all jurisdictions in which the Applicants previously operated the brokering business.

5. In addition to this significant impairment arising from the fact that the Applicants can no longer make new loans, the Applicants are also unable, or unwilling, to take all steps necessary to ensure collections on the Trimor Loans are maximized. The Chief Restructuring Officer (the "CRO") has indicated that Cash Store's "ability to collect on Ontario brokered loans *has been curtailed*"⁶ and that outside Ontario he can only take "reasonable steps to effect the receipt of outstanding brokered loan receivables in a manner that preserves, to the extent possible, the value of the [third party lender] receivables".⁷ The CRO has duties to a number of stakeholders, and is understandably concerned with the costs and management resources necessary to preserve the value of the Trimor Loans. However, his reluctance to take the necessary steps to maximize realizations should not prejudice Trimor.

³ Affidavit of Steven Carlstrom sworn April 14, 2014 ("Carlstrom Affidavit") at para. 101; Motion Record of the Applicants at Tab 1.

⁴ Report of PricewaterhouseCoopers dated May 14, 2014 (the "PwC Report") at p. 6 (internal); Motion Record of Trimor, Tab 4.

⁵ Monitor's Third Report at para. 39(c)(i).

⁶ Affidavit of William Aziz sworn May 9, 2014 (the "Aziz Affidavit") at para. 26; Motion Record of the Applicants at Tab 2. We understand that the CRO relies on the Applicants' interpretation of section 30.1 of the *Payday Loan Act, 2008* regulations for this position.

⁷ Aziz Affidavit at para. 38.

6. Because Trimor owns the Trimor Loans, it is prepared to invest the time and resources necessary to maximize recoveries. Doing so will assist the CRO and the Applicants by eliminating the cost and management resources needed to collect the Trimor Loans. The relief sought by Trimor would relieve the Applicants, the CRO, and the Monitor of this burden and allow them to focus on restructuring the parts of the business that the Applicants believe continue to be viable. It will also allow Trimor to realize the maximum recovery from the Trimor Loans at its own expense.

7. In the past two months, the third party lenders have seen the stated value of their loans and restricted cash reduced from approximately \$42 million to less than half of that amount. Trimor is extremely concerned that if the issue of ownership is not determined on a timely basis and administration of the loans is not assumed by an independent party with the capacity to make new loans in regulated jurisdictions, then what little value is left will simply evaporate in a cloud of bad debts and fees.

8. In light of the foregoing, Trimor respectfully requests that this Court grant a declaration that Trimor owns the Trimor Loans and Receipts, and order that Cash Store immediately transfer the Loans, and pay the Receipts, to Trimor or its designated administrator.

PART II - THE FACTS

9. Cash Store is a broker and lender of short-term loans. It also offers a range of other products and services to help its customers (“**Customers**”) meet their day to day financial service needs.⁸

⁸ Carlstrom Affidavit at para 4.

10. Cash Store brokers loans on behalf of the Customers under broker agreements with third party lenders (“**TPLs**”), including Trimor. TPLs directly lend to Customers or purchase loans that Cash Store has made to Customers.⁹

11. Trimor transferred funds totalling \$27,002,000 to Cash Store under the Broker Agreements (as defined below) and for the sole purpose of brokering the loans to Customers (the “**Trimor Funds**”).¹⁰ Other TPLs transferred funds to Cash Store for the purpose of brokering loans to Customers (the “**TPL Funds**”).

The Broker Agreements

12. Trimor is a party to the following broker agreements with Cash Store (the “**Broker Agreements**”):¹¹

(a) broker agreement between Trimor and The Cash Store Inc. (“**TCSI**”) dated February 1, 2012 and made as of June 5, 2012; and

(b) broker agreement between Trimor and 1693926 Alberta Ltd. dated September 24, 2012 and made as of June 5, 2012.

The Broker Agreements are similar (if not identical) to the broker agreements that Cash Store has entered into with other TPLs, including 0678786 B.C. Ltd. (“**067**”).

⁹ Carlstrom Affidavit at para. 76.

¹⁰ Affidavit of Erin Armstrong sworn April 13, 2014 (the “**Armstrong Affidavit**”) at para. 9; Motion Record of Trimor, Tab. 2.

¹¹ Armstrong Affidavit, Exhibits “A” and “B”.

Cash Store Expressly Stated that Trimor Owns the Trimor Loans and Receipts

13. In or about January 2012, TCSI offered \$132.5 million in senior secured notes due in 2017 through a private placement (the “**Secured Note Offering**”). Cash Store’s Confidential Preliminary Canadian Offering Circular dated January 12, 2012 (“**Circular**”) for the Secured Note Offering advises potential investors that Cash Store “currently act[s] primarily as a broker of short-term advances between our customers and third-party lenders, *the effect of which is that the loan portfolio we service is not financed on our balance sheet.*”¹² Cash Store further states that “*the advances provided by the third-party lenders are repayable by the customer to the third-party lenders and represent assets of the lenders;* accordingly, they are not included on our balance sheet.”¹³

14. Cash Store repeated this express statement in its recent financial statements: When the Company acts as a broker on behalf of income earning consumers seeking short-term advances, the funding of short-term advances is provided by independent third party lenders. “*The advances provided by the third party lenders are repayable by the customer to the third party lenders and represent assets of the lenders;* accordingly, they are not included on the

¹² Second Armstrong Affidavit sworn May 8, 2014 (“**Second Armstrong Affidavit**”), Exhibit “A” - Preliminary TCSI Circular at p. 4 (internal); Motion Record of Trimor, Tab 3.

¹³ Second Armstrong Affidavit, Exhibit “A” at p. 38 (internal).

Company's balance sheet."¹⁴ At no time has Cash Store included the Trimor Loans as assets on its balance sheet.¹⁵

15. The Report of PricewaterhouseCoopers Inc. ("PwC") states that senior management of Cash Store expressly advised PwC that Cash Store has always considered the TPL Funds, such as the Trimor Funds, to be third party funds.¹⁶

Cash Store is Merely a Broker – Trimor is the Owner of the Trimor Loans and Receipts

16. When Trimor Funds are deployed as loans to Customers the creditor or lender is Trimor and Cash Store takes a brokerage fee. The supporting agreements and disclosure statements signed by Customers name Trimor as the credit grantor and the Customer as the borrower for the Trimor Loans.¹⁷

17. In its own financial statements and affidavit evidence filed in this and another proceeding, Cash Store describes its relationship with the TPLs and Customers as follows:

- (a) Cash Store "acts as either a broker between the customer and the third-party lenders or as the direct lender to the customer;"¹⁸

¹⁴ Second Armstrong Affidavit, Exhibit "A" – Notes to the Consolidated Financial Statements for the twelve and fifteen months ended September 30, 2011 and September 30, 2010 at p. F-11; Exhibit "B" – Financial Statements of TCSI for the fifteen months ended September 30, 2010 and for the year ended June 30, 2009 at p. 8; Exhibit "C" – Management's Discussion and Analysis of TCSI for the three and twelve months ended September 30, 2011 at p. 26.

¹⁵ PwC Report at p. 6 (internal). Affidavit of Murray McCann sworn April 22, 2014 (the "McCann Affidavit") at para. 4; Motion Record of Trimor, Tab 8.

¹⁶ PwC Report at p. 6 (internal).

¹⁷ PwC Report at p. 6 (internal).

¹⁸ Second Armstrong Affidavit, Exhibit "A" - Preliminary TCSI Circular at p. 1 (internal).

(b) Cash Store “serves as an alternative to traditional banks, acting either as a broker between the customer and the third-party lenders or as the direct lender to the customer;”¹⁹

(c) Under the broker agreements, “the TPLs make loans to Cash Store’s customers and Cash Store provides services to the TPLs related to the collection of documents and information from Cash Store’s customers, as well as loan repayment services. Cash Store collects fees for brokering these transactions;”²⁰

(d) “When an advance becomes due and payable, the [Broker Customer] must make repayment of the principal and interest owing to the lender through [Cash Store], which remits such amounts to the third party lender;”²¹ and

(e) “[Cash Store] generates revenue by charging loan fees or broker fees and interest...The third party lenders earn revenue through the interest charged and collected on the short term advances to [Customers].”²²

18. In the Circular, Cash Store describes the relationship as follows:

(a) “The TPL Funds are deployed by Cash Store to broker customers, subsequently received by Cash Store as repayment for such broker loans (subject to loan losses), and then redeployed, repeating the process;”²³

¹⁹ Second Armstrong Affidavit, Exhibit “A” - Preliminary TCSI Circular at p. 1 (internal).

²⁰ Carlstrom Affidavit at para. 76.

²¹ Second Armstrong Affidavit, Exhibit “T” – Affidavit of C. Warnock sworn September 30, 2013 at para. 25.

²² Second Armstrong Affidavit, Exhibit “T” – Affidavit of C. Warnock sworn September 30, 2013 at para. 26.

(b) “Similar to what is described above for brokered payday loans, TPLs provide the funds for the line of credit, Cash Store arranges the line of credit, and Cash Store earns fees on these transactions;”²⁴ and

(c) In a chart setting out the relationship of certain stakeholders to Cash Store, the TPLs’ amount is listed as \$42.0 million with the following note: “Consisting of the TPL Funds originally advanced, including funds deployed in brokered loans, Restricted Cash, and cumulative losses.”²⁵

Trimor Could Refuse to Allow the Brokering of the Trimor Funds in its Sole Discretion

19. At any time during the term of the Broker Agreements, Trimor had the right to reduce the funds it was willing to make available to Customers on 120 days notice. In other words, Trimor could reduce the funds it made available for brokering to \$0 and effectively terminate the Broker Agreements on 120 days notice to Cash Store.²⁶

20. The Broker Agreements further provide that Trimor may give notice to Cash Store that Trimor Funds that have not yet been advanced as loans to Customers should not be advanced. In addition, Trimor is not obligated to approve any particular loan or amount of loans.²⁷ Lastly, as stated in more detail below, the Broker Agreements also provide Trimor with the right to transfer the Trimor Loans to another service provider.

²³ Carlstrom Affidavit at para. 78.

²⁴ Carlstrom Affidavit at para. 34.

²⁵ Carlstrom Affidavit at para. 58.

²⁶ Armstrong Affidavit, Exhibits “A” and “B” at ss. 2.2.

²⁷ Armstrong Affidavit at para. 13, Exhibits “A” and “B” at ss. 2.3.

21. In its Circular, Cash Store advised potential investors Trimor could reduce or withdraw the Trimor Funds. The Circular states that “... our business will remain dependant on third-party lenders who are willing to make funds available for lending to our customers. *There are no assurances that the existing or new third-party lenders will continue to make funds available to our customers.*”²⁸

22. The TPLs, including Trimor, only made the TPL Funds available as a result of representations that the funds were segregated, held in trust, and used for only a specific purpose.²⁹ The TPLs relied on these representations by the Company, and, to the extent that these representations were false, it should not be able to rely on those misrepresentations to Trimor and the other TPLs’ detriment.

Trimor Assumed the Credit Risk of the Trimor Loans

23. Cash Store’s own evidence filed in this application is that, under the Broker Agreements, “the TPLs are responsible for losses suffered due to uncollectible advances.”³⁰ Section 7.1 of each of the Broker Agreements states that the TPLs assumed the credit risk of the loans (*i.e.* that Customers would not repay), unless a loan was not repaid as a result of Cash Store’s improper performance under the Broker Agreements.³¹

²⁸ Second Armstrong Affidavit, Exhibit “A” at p. 16 (internal).

²⁹ Second Armstrong Affidavit at para. 6, Exhibit “G” and Armstrong Cross-Examination Transcript, questions 58 – 64.

³⁰ Carlstrom Affidavit at para. 77.

³¹ Armstrong Affidavit, Exhibits “A” and “B” at para. 7.1 and Exhibit “I”, Affidavit of C. Warnock at para. 25.

24. If the interest received by the TPLs was less than 17.5 percent of the TPL funds, Cash Store would make a payment to bring cash received up to 17.5 percent (a “**Retention Payment**”). Cash Store made the Retention Payments as an inducement to ensure that TPLs were receiving a return that was commensurate with the risk of lending.³²

25. In its Circular, Cash Store advised potential purchasers of its bonds that “we have made the decision to voluntarily make retention payments to the third-party lenders as consideration for continuing to advance funds to our customers.”³³ Although the third-party lenders have not been guaranteed a return, “*the decision has been made to voluntarily make retention payments to the lenders to lessen the impact of loan losses experienced by the third-party lenders.*”³⁴

26. Cash Store’s practice of paying a retention payment to the TPLs implies that it recognized the need to compensate the TPLs for the use of their funds and to encourage the TPLs to continue to lend their funds to the Customers through Cash Store’s brokerage.³⁵

27. The DIP Lenders/Bond Holders were well aware of this practice and took no issue with it.

Cash Store Represented that it Would Not Fund Operating Expenses with Trimor Funds

³² Transcript of Cross-Examination of Erin Armstrong on her affidavits sworn April 13 and May 8, 2014 held on May 21, 2014 (“**Armstrong Cross-Examination Transcript**”), questions 53 – 55; Motion Record of Trimor at Tab 6. Transcript of Cross-Examination of Sharon Fawcett on her affidavits sworn April 11 and 22, 2014 held on May 21, 2014 (“**Fawcett Cross-Examination Transcript**”), question 131; Motion Record of Trimor at Tab 7.

³³ Second Armstrong Affidavit, Exhibit “A” at p. 17 (internal).

³⁴ Second Armstrong Affidavit, Exhibit “A” at p. 38 (internal).

³⁵ PwC Report at p. 11 (internal).

28. Cash Store advised Trimor that it would not use Trimor Funds for any purpose other than advancing loans in accordance with the Broker Agreements, unless Cash Store first obtained Trimor's written permission.³⁶ Trimor always understood that Cash Store could not use Trimor Funds for the payment of Cash Store's general operating expenses.³⁷ Cash Store also advised Trimor that it had "never used [Trimor Funds] for any other purpose than loans to customers or maintaining a loan float."³⁸

29. In a 2011 report to its auditors, the issue of using the Trimor Funds for operating expenses was raised by and Trimor made it clear that Trimor Funds "are only to be used for loans to broker customers."³⁹

30. Further, Cash Store's sworn evidence in a proceeding relating to one TPL is that the TPL Funds would be accounted for as restricted cash and that "no operating expenses are funded from any cash in the restricted cash account."⁴⁰ Cash Store definitively stated that its "finance team monitors and reconciles the restricted and unrestricted cash accounts to ensure no operating expenses are funded by any cash in the restricted cash account."⁴¹

³⁶ Armstrong Cross-Examination Transcript, questions 97, 98, 168 and Exhibits "1", "2", "3" and "9".

³⁷ Armstrong Cross-Examination Transcript, question 75.

³⁸ Armstrong Cross-Examination Transcript, Exhibit "3" and "9".

³⁹ Armstrong Cross-Examination Transcript, Exhibit "2".

⁴⁰ Second Armstrong Affidavit, Exhibit "I" – Affidavit of C. Warnock sworn September 30, 2013 at para. 36.

⁴¹ Second Armstrong Affidavit, Exhibit "I" – Affidavit of C. Warnock sworn September 30, 2013 at para. 36.

Trimor Funds Were Held in a Segregated Account

31. Any Trimor Funds or other TPL Funds that were not deployed as loans to Customers were to be held separate and apart from Cash Store's general operating account. The Broker Agreements provide that all funds advanced by Trimor are to be held in a Designated Broker Bank Account, which is a Cash Store bank account that is "designated by [Cash Store] for the purposes of temporarily receiving funds from [Trimor]... before they are advanced to a [Customer]."⁴²

32. Similarly, all payments made by Customers on account of any Trimor Loans are to be deposited into a Designated Financier Bank Account, which is "the bank branch and account designated by [Trimor] from time to time where (and into which) deposits of cash and cheques received from [Customers], in respect of such [Trimor] funded loans, are to be cleared (deposited) from time to time."⁴³

33. Cash Store advised another TPL, 067, that its funds would be held in an account that was separate and apart from Cash Store's own accounts and only contained TPL Funds.⁴⁴

34. Until January 2014 a separate bank account was used for deposit of TPL Funds, including the Trimor Receipts, and the payment of Retention Payments.⁴⁵ Cash Store's own evidence filed in another proceeding provides that TPL Funds were "pooled with all funds received from third

⁴² Armstrong Affidavit, Exhibits A and B, s. 1.1(g) "Designated Broker Bank Account".

⁴³ Armstrong Affidavit, Exhibits A and B, s. 1.1(h) "Designated Broker Bank Account".

⁴⁴ Armstrong Affidavit at para. 17. Armstrong Cross-Examination Transcript, questions 39 – 41. Fawcett Cross-Examination Transcript, questions 33 – 38 and 48.

⁴⁵ PwC Report at p. 27 (internal).

party lenders” and were “segregated and accounted for in the general ledger restricted cash account.”⁴⁶ Funds loaned directly to Customers by TPLs were drawn from the pool of available TPL Funds in the account and transferred to the Customers. Cash Store collected interest and loan repayments from the Customer on behalf of a TPL and deposited the funds into the pool.⁴⁷ Trimor understood that the Trimor Funds and Trimor Receipts were segregated and pooled in this manner.⁴⁸

35. In addition, PwC has confirmed that when Trimor Receipts were collected, and not yet redeployed, they were segregated as restricted cash (the “**Restricted Cash**”) on Cash Store’s balance sheet.⁴⁹

Cash Store Assured Trimor that it Held the Trimor Funds in Trust

36. Cash Store also assured Trimor that it would treat the Trimor Funds as being held in trust for Trimor’s benefit. In an email from Michael Zvonkovic (former Vice-President, Financial Reporting at TCSI) dated November 9, 2011, Mr. Zvonkovic stated that Cash Store “have not use [*sic*] the [TPL Funds] for general operating expenses and is under the trust conditions as outlined in the [Broker Agreements].”⁵⁰ Trimor always understood that Cash Store agreed to

⁴⁶ Second Armstrong Affidavit, Exhibit “I” – Affidavit of C. Warnock sworn September 30, 2013 at paras. 35 and 36.

⁴⁷ Second Armstrong Affidavit, Exhibit “I” – Affidavit of C. Warnock sworn September 30, 2013 at paras. 37 and 43.

⁴⁸ Second Armstrong Affidavit at para. 10.

⁴⁹ PwC Report at p. 6 (internal); Affidavit of Murray McCann sworn April 22, 2014 (the “**McCann Affidavit**”) at para. 4; Motion Record of Trimor, Tab 8.

⁵⁰ Second Armstrong Affidavit at para. 6, Exhibit “G” – Email from Michael Zvonkovic dated November 9, 2011.

hold the Trimor Funds and Receipts in trust for its benefit.⁵¹ Cash Store also represented to 067, another TPL, that it would hold 067's funds in trust and not co-mingle them with other funds.⁵²

Broker Agreements are Terminated and Trimor is Entitled to Transfer Administration

37. The CRO has determined, in consultation with the Monitor, that it is necessary and appropriate to implement a cessation of the brokered loan business and cease brokering new loans in all jurisdictions in which the Cash Store operates.⁵³ Cash Store's intention to cease all brokered loan operations effectively terminates the Broker Agreements.

38. Upon termination of the Broker Agreements, Trimor has the option to allow the Applicants to continue to administer the Trimor Loans, transfer the administration of them to a new service provider, or sell the Trimor Loans to a third party. Paragraph 6.4 of the Broker Agreements provides that:

Upon the ending of the Term:

a. Unless [Trimor] determines to appoint a new broker (as contemplated by Subsection 6.4(b)), [Cash Store] shall continue to provide the Broker Services with respect to all Loans still outstanding as at the end of the Term;

b. If [Trimor] notifies [Cash Store] that [Trimor] is designating a new broker to handle the Loan portfolio (or [Trimor] is going to administer the Loan portfolio directly or sell the Loan portfolio) and demands that [Cash Store] deliver the Records related to the Loan portfolio, ***[Cash Store] shall***, unless and to the extent that the [Cash Store] elects to otherwise transfer the same under Section 2.10, ***immediately deliver to [Trimor] (or the new broker or owner designated by [Trimor]) all original Records related to all Loans and copies of all electronic files containing information relating to the Loans. [Trimor] (or any new broker***

⁵¹ Armstrong Cross-Examination Transcript, questions 64 and 95.

⁵² McCann Affidavit at paras. 4 and 5.

⁵³ Aziz Affidavit at para. 29.

or owner) shall be entitled to contact and carry out such realization actions against the borrowers of the Loans which [Trimor] (or any new broker or owner) determines in its complete discretion. The exercise by [Trimor] of this right shall not diminish [Trimor's] right to recover from [Cash Store] as a result of breaches of this Agreement by [Cash Store] and to recover from [Cash Store] under the indemnities set out in Article 7 (if applicable). [Emphasis added]⁵⁴

39. Trimor is accordingly entitled to treat the Broker Agreements as terminated and transfer the administration of the Trimor Loans immediately.

Significant Prejudice to Trimor if the Trimor Loans are not Transferred

40. Cash Store's inability to broker new loans has already had a devastating impact on its ability to collect payments due on the Trimor Loans. If Cash Store no longer brokers loans, there is little incentive for Customers to repay.⁵⁵ The CRO has already stated that the Applicants' "ability to collect on Ontario brokered loans has been curtailed."⁵⁶ Cash Store admits that "the TPLs will likely encounter some difficulty collecting outstanding loans, as the Ontario Cash Store branches are currently unable to broker new loans for customers"⁵⁷ and "its ability to collect outstanding customer accounts receivable has...been significantly impaired."⁵⁸

⁵⁴ Armstrong Affidavit, Exhibits "A" and "B" at paras. 6.4.

⁵⁵ Second Armstrong Affidavit at para. 12.

⁵⁶ Aziz Affidavit at para. 26.

⁵⁷ Carlstrom Affidavit at para. 175; Transcript of Cross-Examination of Steven Carlstrom held April 22, 2014, questions 286-292, 307 and 314; Motion Record of Trimor at Tab 6.

⁵⁸ Carlstrom Affidavit at para. 101.

41. In fact, both Trimor and 067 collections have been declining significantly since January 2014.⁵⁹ Trimor's collections in Ontario decreased by 75 percent from January to March, 2014, while its outstanding loan balance has only declined by 15 percent during this same period.

42. Trimor's loan position has also been declining rapidly since January 2014. The proportion of Ontario Trimor Loans that are more than 30 days overdue (the "**Overdue Loans**") increased from 0 percent as at January 31, 2014 to 39 percent as at April 13, 2014.⁶⁰ This decline was caused by Cash Store's inability to relend in Ontario and the same will occur in other jurisdictions now that the brokering business is being shut down.

No Evidence of Prejudice to the Applicants if Trimor Loans Transferred

43. There is no direct evidence of prejudice to the Applicants if Trimor takes the Trimor Loans, and the related customer information, and commences collection activities to preserve their value. In fact, the only evidence is that this is what the Applicants agreed to when they entered into the Broker Agreements.

44. As stated above, the Applicants have agreed that upon termination they would "immediately deliver to [Trimor] (or the new broker or owner designated by [Trimor]) *all original Records related to all Loans and copies of all electronic files containing information relating to the Loans*. [Trimor] (or any new broker or owner) shall be *entitled to contact and carry out such realization actions against the borrowers of the Loans* which [Trimor] (or any

⁵⁹ PwC Report at p. 19 (internal).

⁶⁰ PwC Report at pp. 6 and 15 (internal).

new broker or owner) determines in its complete discretion.” Trimor is simply seeking to take the steps that the Applicants have agreed to. This is in no way prejudicial to the Applicants.

PART III - ISSUES AND LAW

45. On this motion, the Court is asked to confirm Trimor’s ownership of the Trimor Loans and Receipts and to allow Trimor or its agent to assume administration of the Trimor Loans to maximize realizations in accordance with Trimor’s contractual rights.

A. Trimor Owns the Trimor Loans

46. The evidence clearly demonstrates that Trimor owns the Trimor Loans and Receivables. The Trimor Funds were made available and lent directly to the Customers pursuant to the Broker Agreements. Cash Store merely facilitated and brokered the Trimor Loans on behalf of the Customers. Cash Store did not acquire an interest in the Trimor Loans.⁶¹

47. Although proceeds from the Trimor Loans and Receipts may have been co-mingled with other TPL Funds and Cash Store’s general operating funds in breach of the terms of the Broker Agreements, the Trimor Funds have always been accounted for separately. The Trimor Funds were segregated with all funds received from third party lenders and accounted for as restricted cash. As a result, the Applicant’s creditors and other stakeholders could always discern from

⁶¹ PwC Report at p. 6 (internal). Second Armstrong Affidavit, Exhibit “A” - Preliminary TCSI Circular at p. 1 (internal). Second Armstrong Affidavit, Exhibit “I” – Affidavit of C. Warnock sworn September 30, 2013 at paras. 25 and 26. Carlstrom Affidavit at para. 76.

public sources the amount of Trimor Funds that were deployed as loans to Customers or held as a float for future loans.⁶²

48. The Bondholders, the DIP Lender, and the other secured lenders (collectively the “**Secured Creditors**”) have always known the nature of the relationship between Cash Store and the TPLs. It is absurd for these parties to now claim that the Trimor Loans are property of Cash Store and thereby potentially subject the Secured Creditors’ security interests.

49. The Secured Creditors have benefitted from the broker fees paid on TPL loans for years. They had knowledge that the TPL loans were being made with TPL Funds. They cannot complain about the state of affairs when things go badly for Cash Store. Further, the Secured Creditors should not be permitted to benefit from Cash Store’s breaches of its Broker Agreements.

50. While the nature of the relationship between Trimor and Cash Store is not typical, the position of Trimor is analogous to that of a consignor of goods under a true consignment or a purchaser of a true sale of receivables. A secured creditor of a consignee of goods under a true consignment or of a purchaser of receivables under a true sale has no interest in the goods or receivables consigned or sold. Similarly, the Secured Creditors have no interest in the TPL Loans or their proceeds.

⁶² Second Armstrong Affidavit, Exhibit “T” – Affidavit of C. Warnock sworn September 30, 2013 at paras. 35 to 37, 43.

i) True sale of receivables

51. The leading decision on the factors that a court should consider when determining whether a transfer of financial assets is a sale or loan is *Metropolitan Toronto Police Widows and Orphans Fund v. Telus Communications Inc.* (“*Metropolitan*”).⁶³ In *Metropolitan*, the Court considered whether the assignment of certain trade receivables was a true sale or a financing. While the issue in the present motion is not the nature of an assignment, the indicia of ownership set out in *Metropolitan* provides guidance on the factors to be considered when determining ownership of the Trimor Loans.

52. The Court in *Metropolitan* set out the following factors as indicia of ownership:

- (a) The intention of the parties as evidenced by the language of the agreement and subsequent conduct of the parties (para. 40);
- (b) Whether the risks of ownership are transferred to the purchaser and the extent and nature of recourse to the seller (para. 41);
- (c) The right of the seller to surplus collections (para. 51);
- (d) Certainty of determination of the purchase price (para. 57);
- (e) The extent to which the assets are identifiable (para. 61); and
- (f) Whether the seller has a right to redeem the receivables on payment of a specified amount (para. 67).

53. With respect to those factors, the Court noted the following:

⁶³ (2003), 30 B.L.R. (3d) 288, 2003 CarswellOnt 168 (Sup. Ct.) rev'd on other grounds (2005) 75 OR (3d) 784; 5 B.L.R. (4th) 251 (ONCA) leave to appeal to SCC refused.

(a) When interpreting a contract, one must look not only to the intention of the parties as expressed by the language of the contract itself but also to “the substance of the transaction and not merely to the form” (paras. 38 and 40).

The Broker Agreements and evidence of all parties involved in the implementation of those agreements demonstrate that it was a brokering arrangement, not a financing agreement.⁶⁴

(b) “In any true sale transaction, there must be a transfer of ownership risk to the purchaser. In the case of the sale of accounts receivable, the risk with regard to the non-payment of the receivable must pass to the purchaser subject to whatever forms of recourse the purchaser may have against the vendor” (para. 41).

Trimor took the credit risk on the Trimor Loans and has over \$8 million in bad loans in its loan portfolio according to Cash Store’s records.⁶⁵ The Secured Creditors take the position that any limited capital protection that Trimor was to receive from Cash Store was voluntary and, if they are to be believed, illusory.

(c) The absence of a right of the purchaser to retain the surplus from collection of accounts receivable is not fatal to the transaction being categorized as a true sale (para. 56).

Trimor received the principal and interest paid on the Trimor Loans.⁶⁶

⁶⁴ PwC Report at p. 6 (internal). Second Armstrong Affidavit, Exhibit “A” - Preliminary TCSI Circular at p. 1 (internal). Second Armstrong Affidavit, Exhibit “I” – Affidavit of C. Warnock sworn September 30, 2013 at paras. 25 and 26. Carlstrom Affidavit at para. 76.

⁶⁵ Carlstrom Affidavit at para. 77. Armstrong Affidavit, Exhibits “A” and “B” at para. 7.1 and Exhibit “I”, Affidavit of C. Warnock at para. 25.

⁶⁶ Transcript of Cross-Examination of Erin Armstrong on her affidavits sworn April 13 and May 8, 2014 held on May 21, 2014 (“**Armstrong Cross-Examination Transcript**”), questions 53 – 55; Motion Record of Trimor at Tab 6. Transcript

(d) While all the factors must be considered, whether the seller has a right of redemption is “the ultimate test to be applied to determine whether a particular transaction should be interpreted as a secured loan or as a true sale” (para 67).

There is no provision in the Broker Agreements that allows the Applicants to redeem the Trimor Loans. Instead, under the Broker Agreements Trimor has the right both to take back its funds at any time on 120 days notice and to take over the administration of the Trimor Loans upon the termination of Broker Agreement.⁶⁷

54. The Court also made it clear that the fact that the seller acts as the collection agent is not inconsistent with a finding that the transaction was a true sale (para. 66).

ii) Consignment of goods under a non-security “true” consignment

55. The relationship of a credit broker and credit grantor outlined in the Broker Agreements is analogous to that of a non-security consignment, otherwise known as a “true” consignment. In a true consignment the supplier of the consigned goods retains legal title until goods are sold and title passes directly from the consignor to the ultimate purchaser. Similarly, the Broker Agreements establish a commercial and legal relationship whereby the funds available for lending to the Customers are supplied by the TPLs, like Trimor, who enter directly into a debtor/creditor relationship with each of the Customers. In differentiating between a consignment, which is in substance a security interest, and a true consignment which is not, courts have set out several key indicia.

of Cross-Examination of Sharon Fawcett on her affidavits sworn April 11 and 22, 2014 held on May 21, 2014 (“**Fawcett Cross-Examination Transcript**”), question 131; Motion Record of Trimor at Tab 7.

⁶⁷ Armstrong Affidavit, Exhibits “A” and “B” at ss. 2.2 and 6.4.

56. In *Access Cash International Inc. v Elliot Lake and North Shore Corporation for Business Development*, the Court set out the following key indicia that differentiate a true consignment from a security consignment:⁶⁸

- a) The goods are shown as an asset in the books/records of the supplier and are not shown as an asset in the books/records of the merchant.
- b) It is apparent in the merchant's dealings with others that the goods belong to the supplier rather than the merchant.
- c) Title of goods remains with the supplier.
- d) The supplier has the right to demand the return of the goods at any time.
- e) The merchant has right to return unsold goods to the supplier.
- f) The merchant is required to segregate the supplier's goods from his own.
- g) The merchant is required to maintain separate books and records in respect of the supplier's goods.
- h) The merchant is required to hold sale proceeds in trust for the supplier.
- i) The supplier has the right to stipulate a fixed price or a price floor for the goods.
- j) The merchant has the right to inspect the goods and the premises in which they are stored.

57. A number of the above indicia exist in respect of the relationship between Trimor and Cash Store, including the fact that Trimor has the right to demand the return of the Trimor Funds⁶⁹ and the fact that Cash Store is required to segregate the Trimor Funds and were only allowed to use them for brokering.⁷⁰ Further, the loan documentation in respect of the Trimor

⁶⁸ (2000), 1 P.P.S.A.C. (3d) 209, 2000 CarswellOnt 2824 at para. 21 (Sup. Ct.) [*Access Cash*].

⁶⁹ Armstrong Affidavit, Exhibits "A" and "B" at ss. 2.2.

⁷⁰ Armstrong Affidavit, Exhibits "A" and "B" at ss. 1.1(g) and (h).

Loan is directly between the Customers and Trimor.⁷¹ Paragraph 4 of the April 30, 2014 order makes it clear that any non-Ontario loans that were advanced after that Order was made belong to Trimor.

B. Trimor Should be Allowed to Realize on the Trimor Loans

58. The Broker Agreements make it clear that upon termination Trimor has the option to take over the administration of the Trimor Loans.⁷² Despite this fact, the Applicants are seeking to trap the Trimor Loans with Cash Store and allow them to realize on the Trimor Loans in a situation where it is clear that Cash Store cannot maximize recoveries or minimize costs.

59. Although the CCAA is broad in scope, its scope is not limitless and there are circumstances, such as here in respect of the Trimor Loans, in which the granting of a stay or continuation of a stay is not justified.

60. As Justice Tysoe said on behalf of the British Columbia Court of Appeal in *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.* (“*Cliffs*”),⁷³

[...] the ability of the court to grant or continue a stay under s. 11 is not a free standing remedy that the court may grant whenever an insolvent company wishes to undertake a “restructuring”, a term with a broad meaning including such things as refinancings, capital injections and asset sales and other downsizing. Rather, s. 11 is ancillary to the fundamental purpose of the CCAA, and a stay of proceedings freezing the rights of creditors should only be granted in furtherance of the CCAA’s

⁷¹ PwC Report at p. 6 (internal). Second Armstrong Affidavit, Exhibit “A” - Preliminary TCSI Circular at p. 1 (internal). Second Armstrong Affidavit, Exhibit “I” – Affidavit of C. Warnock sworn September 30, 2013 at paras. 25 and 26. Carlstrom Affidavit at para. 76.

⁷² Armstrong Affidavit, Exhibits “A” and “B” at ss. 6.4.

⁷³ 2008 BCCA 323, 2008 CarswellBC 1756 at para. 26.

fundamental purpose.

61. The Applicants are seeking the Court's assistance to allow them to effectively terminate the Broker Agreements, but at the same time refusing to allow Trimor to mitigate its damages by assuming administration of the Trimor Loans in accordance with the terms of the Broker Agreement. This is not conduct that the CCAA stay was intended to accommodate and the Court ought not to extend the ambit of the CCAA stay in this manner to the prejudice of Trimor.

62. *Cliffs* was cited with approval in a recent decision of the Ontario Superior Court in *Romspen Investment Corporation v. 6711162 Canada Inc.*,⁷⁴ where the Court was faced with competing applications by the secured creditor for the appointment of a receiver and the debtor company for an initial CCAA order. In coming to the conclusion that an initial order ought not to be granted, Justice Brown made the following observations:⁷⁵

At a high level, a certain unfairness characterizes the plan of the CCAA Applicants. Under their plan, they would see the development of the Midland Condo Project to its end and use the unit sales proceeds to pay off Romspen in full and, evidently, to pay most of the amounts sought by the lien claimants. They would then develop out the other secured properties to propose a plan to the other unsecured creditors, but according to Soorty most of the unsecured debt consists of shareholders loans from Cocov and himself. Reduced to its essence, the plan seems to be no more than asking the court to impose on Romspen an extension of the term of the Loan beyond its 2-year term and to allow management to continue operating as they have in the past. In other words, the CCAA Applicants do not propose the compromise of debt or the liquidation of part of their businesses – they want to carry on just as they have in the past.

I accept the evidence of Romspen about the unfairness of such an approach. Romspen stated that it had “absolutely no confidence” in the ability of Soorty and Cocov to manage the affairs of the CCAA Applicants during any stay period, pointing to them

⁷⁴ 2014 ONSC 2781, 2014 CarswellOnt 5836 [*Romspen*].

⁷⁵ *Romspen* at paras. 72 and 73.

letting the first general contractor on the Midland Condo Project, Dineen, place liens on it, and allowing subsequent contractors to do so as well [...].

63. In concluding that CCAA relief was not appropriate in the circumstances, the Court also cited the decision in *Dondeb Inc. (Re)* (“*Dondeb*”),⁷⁶ where the Court also determined that CCAA relief should not be granted to the applicant company. At the conclusion of his reasons in *Dondeb*, Justice Campbell stated as follows:⁷⁷

The CCAA is a flexible instrument, which with judicial discretion, is capable of permitting restructuring, including in appropriate situations, liquidation.

In my view the use of the CCAA for the purpose of liquidation must be used with caution when liquidation is the end goal, particularly when there are alternatives such as an overall less costly receivership that can accomplish the same overall goal.

64. In his earlier decision in *Romspen Investment Corporation v. Edgeworth Properties et al.*,⁷⁸ Justice Campbell determined that a better alternative in that case was to carve the applicant, who held a mortgage over certain of the debtor companies’ real property, out of the CCAA proceeding, to make a declaration as to the validity and priority of the applicant’s mortgage, and to permit the applicant to proceed with judicial sale/foreclosure proceedings in respect of the real property subject to its security. Justice Campbell made this order over the objections of certain investors in the debtor companies who challenged the validity of the applicant’s security.

65. Cash Store does not intend to carry out a restructuring of the brokering business. It intends to close that business down. In fact, it states in its materials that it has already

⁷⁶ 2012 ONSC 6087, 2012 CarswellOnt 15528 [*Dondeb*].

⁷⁷ *Dondeb* at paras. 33 and 34.

⁷⁸ 2012 ONSC 4693, 2012 CarswellOnt 10902.

commenced that process without prior consultation with the TPLs. There is no benefit to Cash Store continuing to administer the TPL Loans. There is, however, significant prejudice to Trimor and the other TPLs if the CCAA stay continues to stand in the way of the efficient and effective collection of the TPL Loans. This prejudice arises from, among other things:

- (a) the fact that the Cash Store cannot broker new loans, which will “significantly impair” its ability to collect the Trimor Loans;⁷⁹
- (b) the fact that the Cash Store intends to take no steps to collect in Ontario and only limited steps in other jurisdictions;⁸⁰
- (c) the potential for huge professional fees and other expenses associated with any liquidation conducted under the CCAA, and the projected fees for these proceedings in particular; and
- (d) the risk that Cash Store’s restructuring may not succeed and that the task of collecting the Trimor Loans will be left for yet another future (and potentially costly) insolvency proceeding.

66. The fundamental purpose of the CCAA is not advanced by permitting Cash Store to continue to administer the TPL loans as there is to be no restructuring of that business.

67. Trimor should be allowed to take over the administration of its loans at its cost.

⁷⁹ Carlstrom Affidavit at para. 101.

⁸⁰ Aziz Affidavit at para. 38.

ORDER REQUESTED

68. For the reasons set out above, Trimor respectfully requests that this Court grant a declaration that Trimor owns the Trimor Loans and Receipts, and order that Cash Store immediately transfer the Loans, and pay the Receipts, to Trimor or its designated administrator.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 30th day of May, 2014.



Brett Harrison and Adam Maerov
McMillan LLP

Lawyers for Trimor Annuity Focus Limited
Partnership #5

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Access Cash International Inc. v. Elliot Lake and North Shore Corporation for Business Development* (2000), 1 P.P.S.A.C. (3d) 209, 2000 CarswellOnt 2824.
2. *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 323, 2008 CarswellBC 1756.
3. *Dondeb Inc. (Re)*, 2012 ONSC 6087, 2012 CarswellOnt 15528.
4. *Metropolitan Toronto Police Widows and Orphans Fund v. Telus Communications Inc.* (2003), 30 B.L.R. (3d) 288, 2003 CarswellOnt 168.
5. *Romspen Investment Corp. v. 6711162 Canada Inc.*, 2014 ONSC 2781, 2014 CarswellOnt 5836.
6. *Romspen Investment Corp. v. Edgeworth Properties*, 2012 ONSC 4693, 2012 CarswellOnt 10902.

SCHEDULE "B"
RELEVANT STATUTES

Payday Loans Act, 2008 regulations

30.1 (1) A licensee shall not request or require the borrower under a payday loan agreement to do any of the following or suggest to the borrower that the borrower do any of the following:

1. Repay or pay the advance or any part of it to the lender or anyone else until the end of the term of the agreement.

2. Pay the cost of borrowing or any part of it to anyone until the end of the term of the agreement.

(2) A licensee shall not, directly or indirectly on behalf of any other person, request or require the borrower under a payday loan agreement to do any of the actions described in paragraph 1 or 2 of subsection (1) or suggest to the borrower that the borrower do any of those actions.

(3) If a licensee contravenes subsection (1) or (2), the borrower is only required to repay the advance to the lender and is not liable to pay the cost of borrowing.

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT,
R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF THE CASH STORE FINANCIAL
SERVICES INC., THE CASH STORE INC., TCS CASH STORE INC., INSTALOANS INC., 7252331 CANADA INC., 5515433
MANITOBA INC., 1693926 ALBERTA LTD DOING BUSINESS AS "THE TITLE STORE"

APPLICANTS

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

**ONTARIO
SUPERIOR COURT OF JUSTICE -
COMMERCIAL LIST**

Proceeding commenced at Toronto

**FACTUM OF
TRIMOR ANNUITY FOCUS LP #5**
(Motion returnable June 11, 2014)

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