

COURT FILE NUMBER

2401- 01778

COURT

COURT OF KING'S BENCH OF ALBERTA

JUDICIAL CENTRE

CALGARY

PROCEEDING

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



LL

C20413

Feb 7, 2024
COM

AND IN THE MATTER OF A PLAN OF
COMPROMISE OR ARRANGEMENT OF
COLLISION KINGS GROUP INC., CMD HOLDINGS
INC., EAST LAKE COLLISION LTD., MAYLAND
HEIGHTS COLLISION LTD., SUNRIDGE
COLLISION LTD., ARROW AUTO BODY LTD.,
CMD GLASS LTD., ROYAL VISTA COLLISION
LTD., STATHKO INVESTMENTS LTD., 2199931
ALBERTA LTD., COLLISION KINGS 3 LTD., NICK'S
REPAIR SERVICE LTD., 10026923 MANITOBA
LTD. and BUNZY'S AUTO BODY LTD.

APPLICANTS

COLLISION KINGS GROUP INC., CMD HOLDINGS
INC., EAST LAKE COLLISION LTD., MAYLAND
HEIGHTS COLLISION LTD., SUNRIDGE
COLLISION LTD., ARROW AUTO BODY LTD.,
CMD GLASS LTD., ROYAL VISTA COLLISION
LTD., STATHKO INVESTMENTS LTD., 2199931
ALBERTA LTD., COLLISION KINGS 3 LTD., NICK'S
REPAIR SERVICE LTD., 10026923 MANITOBA
LTD. and BUNZY'S AUTO BODY LTD.

DOCUMENT

BRIEF

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I. INTRODUCTION

1. This Brief is submitted on behalf of the Applicants, Collision Kings Group Inc. (“**CKGI**”), CMD Holdings Inc. (“**CMD Holdings**”), East Lake Collision Ltd. (“**East Lake**”), Mayland Heights Collision Ltd. (“**Mayland Heights**”), Sunridge Collision Ltd. (“**Sunridge**”), Arrow Auto Body Ltd. (“**Arrow**”), CMD Glass Ltd. (“**CMD Glass**”), Royal Vista Collision Ltd. (“**Royal Vista**”), Stathko Investments Ltd. (“**Stathko Investments**”), 2199931 Alberta Ltd. (“**219 Alberta**”), Collision Kings 3 Ltd. (“**CK3L**”), Nick’s Repair Service Ltd. (“**Nick’s Repair**”), 10026923 Manitoba Ltd. (“**100 Manitoba**”) and Bunzy’s Auto Body Ltd. (“**Bunzy’s**”) (collectively, the “**Applicants**” or the “**Collision Kings Group**”), in support of two Applications:

- (a) an Application for Initial Order (the “**Initial Order**”) under the *Companies’ Creditors Arrangement Act*, RSC 1985, c C-36 (“**CCAA**”),¹ scheduled for February 7, 2024 before the Honourable Justice J.T. Neilson (the “**Initial Order Application**”); and
- (b) the comeback hearing scheduled for February 14, 2024 before the Honourable Justice M.J. Lema (the “**Comeback Hearing**”).

2. At the Initial Order Application, the Applicants are seeking an Initial Order providing for the following relief:

- (a) declaring that the Applicants are companies to which the CCAA applies;
- (b) authorizing the Applicants to remain in possession and control of their current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the “**Property**”) and continue to carry on business in a manner consistent with the preservation of their business (the “**Business**”) and the Property;
- (c) authorizing the Applicants to pay their reasonable expenses incurred in carrying out their business in the ordinary course, including certain expenses incurred prior to the date of the Initial Order;
- (d) staying, for an initial period of not more than ten (10) days (the “**Stay Period**”), all proceedings, rights and remedies against or in respect of the Applicants or their

¹ *Companies’ Creditors Arrangement Act*, RSC 1985, c C-36 (“**CCAA**”), **TAB 1**.

Business or Property, or the Monitor (as defined below), except as otherwise set forth in the Initial Order or otherwise permitted by law;

- (e) appointing FTI Consulting Canada Inc. ("**FTI**") as the monitor (the "**Monitor**") of the Applicants in these proceedings;
- (f) restraining any Person (as defined in the Initial Order) from accelerating performance of any rights in respect of the Applicants, except with the written consent of the Applicants and the Monitor, or leave of this Honourable Court;
- (g) restraining any Person from interfering with the supply of goods or services to the Applicants;
- (h) authorizing the Applicants to pay the reasonable fees and disbursements of the Monitor and its counsel, the Applicants' professional advisors and legal advisors;
- (i) granting the following charges on the Property of the Applicants:
 - (i) First – an administration charge (the "**Administration Charge**") not exceeding an aggregate amount of \$500,000 as security for the professional fees and disbursements of the Monitor, counsel for the Monitor and counsel for the Applicants, both before and after the approval of the Initial Order;
 - (ii) Second – an interim financing charge (the "**Interim Lender's Charge**") not exceeding the principal sum of \$600,000, plus interest, costs and expenses in favour of The Toronto-Dominion Bank (the "**Interim Lender**" or "**TD Bank**") as security for any advances made from the Interim Lender pursuant to the terms of the interim financing term sheet (the "**Interim Financing Term Sheet**"); and
 - (iii) Third – a directors and officers charge (the "**Directors' Charge**") up to the aggregate amount of \$400,000 as security for the liabilities to which the Applicants' directors and officers may be exposed after the commencement of these CCAA proceedings, except to the extent any obligation was incurred as a result of any director or officer's gross negligence or willful misconduct;

- (j) approving the proposed form of Sale Investment and Solicitation Process enclosed as Schedule “A” to the Initial Order (the “**SISP**”);
 - (k) approving the proposed form of stalking horse asset purchase agreement (the “**Stalking Horse Bid**” or “**APA**”) between Lift Auto Group Operation Corporation, as purchaser (“**Lift**” or the “**Stalking Horse Bidder**”) and CMD Holdings, East Lake, Sunridge, 219 Alberta, CK3L, Arrow, Stathko Investments, Nick’s Repair, 100 Manitoba and Bunzy’s (in such capacity, the “**Vendors**”);
 - (l) sealing the Confidential Supplemental Affidavit of Shane Daerden, sworn on January 30, 2024 (the “**Confidential Affidavit**”) until further Order of this Court; and
 - (m) such further and other relief as this Honourable Court may deem just.
3. At the Comeback Hearing, the Applicants will be seeking approval of the following:
- (a) an Amended and Restated Initial Order (the “**ARIO**”) providing for the following relief:
 - (i) extending the Stay Period to March 29, 2024;
 - (ii) increasing the Interim Lender’s Charge to the principal sum of \$1,125,000.00, plus interest, costs and expenses as set out in the Interim Financing Term Sheet;
 - (iii) granting a fourth-ranking charge against the Applicants’ Property for a retention and incentive (“**RIP**”) charge (the “**RIP Charge**”) up to the amount of \$425,000 for individuals identified as critical management personnel of the Applicants in order to retain and incentivize those parties to ensure the success of the CCAA Proceedings; and
 - (iv) declaring certain essential suppliers to be critical suppliers in accordance with section 11.4 of the CCAA;
 - (b) a Sale Approval and Vesting Order (the “**SAVO**”) approving the Stalking Horse Bid and authorizing the Applicants to enter into and close the transaction contemplated

therein, in the event that the Stalking Horse Bid is selected as the Successful Bid (as defined in the SISP); and

(c) such further and other relief as this Honourable Court may deem just.

4. The Applicants' underlying objectives in seeking the Initial Order and the ARIO are:

(a) to realize and maximize the value of the Property and the Business; and

(b) to preserve the Business as a going concern.

5. Both of these objectives are in the interest of the stakeholders of the Applicants.

II. BACKGROUND

A. Overview of Companies

6. The facts relevant to this Action are contained in the Affidavit of Shane Daerden, sworn on January 30, 2024 (the "**Daerden Affidavit**").² Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Daerden Affidavit.

7. The operating entities of the Collision Kings Group are comprised of a group of 10 collision repair shops and two autobody mechanic shops, operating primarily out of Alberta, with locations in Saskatchewan and Manitoba.³

8. CKGI is the parent company of CMD Holdings, 219 Alberta, CK3L, Nick's Repair, 100 Manitoba and Bunzy's,⁴ which operate out of the following locations:

(a) 219 Alberta operates two collision repair shops: one in Lloydminster, Alberta and one in Lloydminster, Saskatchewan;⁵

(b) CK3L operates a collision repair shop in Grande Prairie, Alberta;⁶

² Affidavit of Shane Daerden, sworn on January 30, 2024 (the "**Daerden Affidavit**").

³ Daerden Affidavit, at paras. 27 and 31.

⁴ Daerden Affidavit, at para. 24.

⁵ Daerden Affidavit, at paras. 28(j) and 29.

⁶ Daerden Affidavit, at para. 28(i).

- (c) Nick's Repair operates a collision repair shop in Neepawa, Manitoba in conjunction with 100 Manitoba, which owns the premises on which Nick's Repair operates;⁷ and
- (d) Bunzy's operates a collision repair shop in Winnipeg, Manitoba⁸ (collectively, Nick's Repair, 100 Manitoba and Bunzy's are referred to herein as the "**Manitoba Locations**").

9. CMD Holdings is an Alberta corporation and the parent company of the following entities operating in Calgary, Alberta: East Lake, Mayland Heights, Sunridge, Arrow, Royal Vista, CMD Glass and Stathko Investments (collectively, the "**Calgary Locations**"; together with CK3L and 219 Alberta's Lloydminster, AB operation, the "**Alberta Locations**").⁹

10. All of the Calgary Locations except Royal Vista and Mayland Heights operate collision repair shops; Royal Vista and Mayland Heights operate autobody mechanic shops.¹⁰

11. Collectively, the Collision Kings Group employs approximately 120 employees, 97 of which work out of the Alberta Locations.¹¹ A significant number of these employees are highly skilled technicians and mechanics.¹²

12. Each of the entities within the Collision Kings Group are funded through separate loans with various banks and operate independent, site-specific banking accounts. CKGI manages all entities within the Collision Kings Group, including their finances, for a fee.¹³

13. All of the entities within the Collision Kings Group, other than the Manitoba Locations, operate under various licensing and franchise agreements (collectively, the "**Franchise Agreement**") with CARSTAR Canada Partnership, LP ("**Carstar**").¹⁴

⁷ Daerden Affidavit, at para. 30(a).

⁸ Daerden Affidavit, at para. 30(b).

⁹ Daerden Affidavit, at para. 25.

¹⁰ Daerden Affidavit, at para. 31.

¹¹ Daerden Affidavit, at para. 34.

¹² Daerden Affidavit, at para. 32.

¹³ Daerden Affidavit, at para. 35.

¹⁴ Daerden Affidavit, at para. 33.

14. In September 2020, CKGI acquired all of the Calgary Locations through a transaction whereby CKGI acquired 100% of the issued and outstanding shares of CMD Holdings (the “**Calgary Acquisition**”).¹⁵

B. Loans and Security Documents

15. TD Bank is the Applicants’ primary secured creditor, and holds secured loans with CMD Holdings, East Lake, Mayland Heights, Sunridge, CK3L, 219 Alberta and 227 Alberta (collectively, the “**TD Borrowers**”).¹⁶ 227 Alberta amalgamated with CMD Holdings in September 2020 as part of the Calgary Acquisition.

16. Arrow, CMD Glass, Royal Vista, Stathko Investments and CKGI (collectively, and in such capacity, the “**TD Guarantors**”, and together with the TD Borrowers, the “**TD Loan Parties**”) all provided various guarantees for the TD Borrowers. The TD Borrowers have further granted cross-guarantees of each other’s debt obligations to TD Bank.¹⁷

17. All of the TD Loan Parties have provided general security agreements in favour of TD Bank.¹⁸

18. Royal Bank of Canada (“**RBC**”) holds a secured loan for 100 Manitoba (the “**RBC Loan**”),¹⁹ as secured by a general security agreement and real property mortgage from 100 Manitoba. The RBC Loan is further secured by guarantees from [REDACTED], [REDACTED], Shane Daerden, [REDACTED], Nick’s Repair and CKGI, as well as by postponements and assignments of claim from Gail White and Garth White.²⁰

19. Access Credit Union (“**ACU**”) holds a secured loan for Bunzy’s (the “**ACU Loan**”),²¹ as secured by a general security agreement and real property mortgage from Bunzy’s. The ACU Loan is further secured by corporate guarantees from [REDACTED], [REDACTED] and CKGI, up to the maximum amount of \$598,000; personal guarantees from Shane Daerden, [REDACTED], [REDACTED] and [REDACTED], up to the maximum amount of \$598,000; and an assignment and postponement of shareholder loans.²²

¹⁵ Daerden Affidavit, at para. 36.

¹⁶ Daerden Affidavit, at paras. 77, 80, 84 and 88; see Exhibits “30”, “32”, “34” and “36”.

¹⁷ Daerden Affidavit, at paras. 78, 82, 86 and 89; see Exhibits “31”, “33”, “35” and “37”.

¹⁸ Daerden Affidavit, at paras. 78, 82, 86 and 89; see Exhibits “31”, “33”, “35” and “37”.

¹⁹ Daerden Affidavit, at para. 91 and Exhibit “38”.

²⁰ Daerden Affidavit, at para. 92 and Exhibit “39”.

²¹ Daerden Affidavit, at para. 94 and Exhibit “40”.

²² Daerden Affidavit, at para. 96 and Exhibit “41”.

20. Don Golden Autobody Ltd. holds a promissory note from CK3L in the principal amount of \$320,000,²³ as secured by a general security agreement from CK3L and an unlimited personal guarantee granted by Shane Daerden.²⁴

21. Christos Stathonikos Family Trust, Matthew Stathonikos Family Trust, David Stretz Family Trust, Domna Investments Inc., 1427916 Alberta Inc. and 1427913 Alberta Inc. (collectively, the “**Stathonikos Vendors**”) hold a promissory note from 227 Alberta (now CMD Holdings) in the principal amount of \$500,000 (the “**Stathonikos Promissory Note**”).²⁵ The Stathonikos Promissory Note is secured by a general security agreement from 227 Alberta (now CMD Holdings).²⁶

22. Gail White and Garth White hold promissory notes from 100 Manitoba in the collective principal sum of \$250,000, or \$127,500 each (the “**White Promissory Notes**”).²⁷ The White Promissory Notes are secured by a vendor take back mortgage against property owned by 100 Manitoba.²⁸

23. Axalta Coating Systems Canada Company (“**Axalta**”) and 5993092 Manitoba Ltd., o/a Rondex (“**Rondex**”), hold various triparty and incentive agreements with certain Applicants providing for the exclusive supply and distribution of automotive paint.²⁹ As part of this arrangement, Rondex entered into a loan agreement with CKGI and CMD Holdings in the original principal amount of \$700,000, which was to be reduced on a certain schedule (the “**Rondex Loan**”).³⁰ The Rondex Loan is secured by a general security agreement from 227 Alberta, CMD Holdings and CKGI and guarantees from Bunzy’s and 100 Manitoba.³¹

C. Assets and Liabilities

24. As at January 29, 2024, the estimated total value of the Collision Kings Group’s cash, account receivables, work in progress, prepaid expenses/deposits, and assessed value of equipment, buildings and vehicles is \$7,205,553.³²

²³ Daerden Affidavit, at para. 98 and Exhibit “42”.

²⁴ Daerden Affidavit, at para. 99 and Exhibit “43”.

²⁵ Daerden Affidavit, at para. 101 and Exhibit “44”.

²⁶ Daerden Affidavit, at para. 102 and Exhibit “45”.

²⁷ Daerden Affidavit, at para. 104 and Exhibit “46”.

²⁸ Daerden Affidavit, at para. 105 and Exhibit “47”.

²⁹ Daerden Affidavit, at paras. 121-123.

³⁰ Daerden Affidavit, at para. 127 and Exhibit “52”.

³¹ Daerden Affidavit, at para. 129.

³² Daerden Affidavit, at para. 57.

25. As at January 29, 2024, 2024, the estimated total value of the Collision Kings Group's liabilities is approximately \$27,235,740, consisting of accounts payable, accrued liabilities and secured loans.³³

26. As at January 29, 2024, the Applicants' secured liabilities comprised of the following:

- (a) TD Bank loans – \$12,946,474.41;
- (b) RBC loans – \$268,925 (plus \$60,000 unsecured);
- (c) ACU – \$515,359;
- (d) 255318 Alberta Ltd. & Don Golden Autobody Ltd. – \$34,909
- (e) Stathonikos Family Trust Vendor – \$525,000;
- (f) Garth and Gail White – \$100,000; and
- (g) Rondex secured liabilities – \$572,917.³⁴

27. As at January 29, 2024, the Applicants' unsecured liabilities comprised the following:

- (a) ACU – \$60,000;
- (b) Accounts payable – \$7,557,012;
- (c) Axalta and Rondex – \$3,750,000;
- (d) Axalta trade accounts payable – \$230,772;
- (e) Carstar franchise fee – \$400,112.01; and
- (f) Equipment lease payments – \$150,851.³⁵

28. As at January 29, 2024, the Applicants were sent nine civil claims seeking judgment in the aggregate amount of \$396,848.55, and four demand letters demanding payment of the aggregate

³³ Daerden Affidavit, at para. 58.

³⁴ Daerden Affidavit, at para. 59(a).

³⁵ Daerden Affidavit, at para. 59(b).

amount of \$513,392.94.³⁶ The Applicants continue to receive demands and civil claims on an ongoing basis.

29. As of January 29, 2024, the Applicants collectively owe \$17,745.84 in outstanding provincial sales tax in Manitoba and approximately \$266,391 in outstanding federal GST.³⁷ The Applicants are all current with their source deductions.³⁸

30. All of the Applicants are current on their commercial lease payments.³⁹

D. Financial Difficulties

31. As a result of the Calgary Acquisition, CKGI was required to carry a higher debt load at a time when the COVID-19 pandemic and the associated restrictions and disruptions were in full force and effect. Consumers were driving significantly less due the remote work protocols and travel restrictions, which in turn reduced intake due to fewer collisions. There were also substantial delays in the global supply chain.⁴⁰

32. With reduced intake and turnaround times to complete repairs nearly doubled, the amount of work in progress invoices the Applicants turned each month was reduced by about half – from approximately \$5 million to \$2.5 million each month.⁴¹

33. Initially, the Applicants accessed COVID-19 wage subsidies and rent subsidies to help meet payroll and stay current on monthly lease payments. The Applicants further reduced general and administrative overhead in an effort to improve their margins.⁴² However, when the pandemic-era subsidies were wound down, the Applicants posted a significant loss and were required to take on more debt to continue meeting their liabilities as they became due.⁴³

34. Around the fall of 2021, East Lake, Mayland Heights, Sunridge and 219 Alberta approached their primary secured lender, TD Bank, for additional working capital. These entities

³⁶ Daerden Affidavit, at para. 59(c).

³⁷ Daerden Affidavit, at para. 59(d).

³⁸ Daerden Affidavit, at para. 59(d).

³⁹ Daerden Affidavit, at para. 137.

⁴⁰ Daerden Affidavit, at para. 38.

⁴¹ Daerden Affidavit, at para. 45.

⁴² Daerden Affidavit, at para. 52.

⁴³ Daerden Affidavit, at para. 53.

applied for HASCAP loans, as guaranteed by the Business Development Bank of Canada. These applications were eventually processed and approved in the spring of 2022.⁴⁴

35. The additional injection of HASCAP funding was not enough to service the debt in combination with low revenues. From 2022 through to 2023, certain vendors would only supply parts and materials to the Applicants on a cash-on-delivery basis, while other vendors entirely ceased providing services and materials to the Applicants.⁴⁵ Around late summer 2022, the Applicants were moved into TD Bank's special loans group.⁴⁶

E. Efforts to Restructure

36. For over a year, the Applicants have directed considerable efforts toward reducing their debt load, negotiating with creditors and suppliers and working to steer their businesses back to a sustainable and profitable business model.⁴⁷

37. These efforts have further including engaging Deloitte Restructuring Inc. ("**Deloitte**") around the fall of 2022 to assist with developing plans to market the Applicants' businesses, approaching other automotive repair companies to canvas interest in a sale, listing the Manitoba Locations on the market, negotiating reduced or paused payments with suppliers, obtaining rent relief and reduced rent for certain locations and sourcing the Lift as an interested party.⁴⁸

F. Demands and Forbearance

38. On October 27, 2023, the Stathonikos Vendors issued a demand letter to CMD Holdings pursuant to Stathonikos Promissory Note, demanding payment of the entire principal balance of \$500,000.⁴⁹ The Stathonikos Vendors are stayed under a priority agreement with TD Bank that requires them to provide 120 days' notice prior to taking enforcement steps.⁵⁰ Concurrently with serving CMD Holdings, the Stathonikos Vendors also served TD Bank with the Stathonikos Demand.

⁴⁴ Daerden Affidavit, at para. 53.

⁴⁵ Daerden Affidavit, at para. 56.

⁴⁶ Daerden Affidavit, at para. 55.

⁴⁷ Daerden Affidavit, at para. 149 and 151.

⁴⁸ Daerden Affidavit, at para. 151.

⁴⁹ Daerden Affidavit, at para. 159 and Exhibit "64".

⁵⁰ Daerden Affidavit, at para. 160 and Exhibit "45".

39. Shortly thereafter, on November 8, 2023, TD Bank, in turn, issued demand letters and Notice of Intention to Enforce Security pursuant to section 244 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 to each of the TD Loan Parties.⁵¹

40. On December 22, 2023, the TD Loan Parties and TD Bank entered into a forbearance agreement, as amended on January 11, 2024 and again on January 26, 2023 (collectively, the “**Forbearance Agreement**”).⁵²

41. Pursuant to the Forbearance Agreement, TD Bank provided the TD Loan Parties with a bulge facility (the “**Bulge Facility**”) on the condition that the TD Loan Parties source an Indication of Interest (“**IOI**”) and eventually a Letter of Interest (“**LOI**”) for the purchase of all or substantially all of the TD Loan Parties’ assets, among other conditions.⁵³

42. Pursuant to the Forbearance Agreement, the Applicants were required and did provide an executed LOI from Lift; a draft form of purchase and sale agreement with Lift Group; and 13-week cashflow statements.⁵⁴

43. As of the date of filing, the Bulge Facility is currently \$4,000,000.

G. SISP and Stalking Horse Bid

44. Since the Fall of 2022, the Applicants have been developing various marketing plans to source parties interested in purchasing the Applicants’ Property or investing in the Applicants’ Business. Part of those efforts have included negotiating the Stalking Horse Bid with Lift for the Vendors’ assets, which, as proposed, will run as a baseline bid as for those assets as part of the SISP.

45. The proposed SISP contemplates the Monitor preparing:

- (a) a non-confidential teaser letter describing the opportunity to acquire the Applicants’ Business and/or Property, either separately or as a whole (the “**Teaser Letter**”);
- (b) a form of non-disclosure agreement (the “**NDA**”); and

⁵¹ Daerden Affidavit, at para. 161 and Exhibit “65”.

⁵² Daerden Affidavit, at para. 163 and Exhibit “66”; para. 167 and Exhibit “67”; and para. 169 and Exhibit “68”.

⁵³ Daerden Affidavit, at para. 164.

⁵⁴ Daerden Affidavit, at para. 171.

- (c) a virtual data room (the “**Data Room**”) with key financial, operational and other due diligence documents for potential purchasers to conduct due diligence on the Applicants’ Business and Property and evaluate the acquisition opportunity.⁵⁵

46. The SISP will be implemented by the Monitor, in conjunction with the Applicants, and includes the following timeline for certain key milestones (all capitalized terms as defined in the SISP):⁵⁶

MILESTONE	DEADLINE
Applicants to create a list of Known Potential Bidders	February 7, 2024
Monitor to prepare and have available for potential bidders the Data Room	February 7, 2024
Monitor to distribute the Teaser Letters and NDAs to Known Potential Bidders	February 10, 2024
Bid Deadline	March 8, 2024
Auction (if required)	March 13, 2024
Transaction Approval Application Hearing (if required)	March 18-22, 2024
Closing Date Deadline (other than the Stalking Horse Bid)	March 29, 2024

47. Pursuant to the SISP, if no Qualified Bids have been received by the Bid Deadline that improve on the terms and conditions of the Stalking Horse Bid, the Stalking Horse Bid will be declared the Successful Bid.⁵⁷

48. If one or one or more Qualified Bids other than the Stalking Horse Bid have been received for the same Property, the Monitor may either designate one of the Qualified Bids as the Successful Bid and one or more of the other Qualified Bids as the Back-up Bid, or provide all parties that have made the Qualified Bids, including the Stalking Horse Bidder, the opportunity to make further bids through the auction process (the “**Auction**”).⁵⁸

⁵⁵ Daerden Affidavit, at para. 217.

⁵⁶ Daerden Affidavit, at para. 220.

⁵⁷ Daerden Affidavit, at para. 219(i).

⁵⁸ Daerden Affidavit, at para. 219(k).

49. If the circumstances provide for an Auction, the Auction will be held on March 13, 2024 at the offices of the Monitor's legal counsel. Bidding will begin with the Starting Bid and continue for as long as at least one Subsequent Bid is advanced, until no new Subsequent Bid is made.⁵⁹

50. The Stalking Horse Bid includes the acquisition of the Business and the Property on an "as-is, where-is" basis. The Stalking Horse Bid provides for the estimated purchase price of \$6,660,000.00, subject to adjustments (the "**Purchase Price**"), and a break fee of \$150,000 (the "**Break Fee**") representing approximately 2.27% of the Purchase Price.

III. ISSUES

51. The issues to be determined by this Honourable Court in the Initial Order Application are:

- (a) whether the CCAA applies to the Collision Kings Group;
- (b) whether the requested stay of proceedings is necessary and appropriate in the circumstances;
- (c) whether the proposed Monitor should be appointed;
- (d) whether the proposed priority charges for the Administration Charge, the Interim Lender's Charge, and the Directors' Charge, are necessary and appropriate in the circumstances;
- (e) whether the form of SISP should be approved;
- (f) whether the form of Stalking Horse Bid should be approved; and
- (g) whether the Confidential Affidavit should be sealed.

52. The issues to be determined by this Honourable Court in the Comeback Hearing are:

- (a) whether the Stay Period should be extended to March 29, 2024;
- (b) whether the Interim Lender's Charge should be increased to \$1,125,000;
- (c) whether the RIP Charge is an appropriate amount and should be granted; and

⁵⁹ Daerden Affidavit, at para. 219(l) and (m).

- (d) whether certain suppliers should be designated critical suppliers in accordance with section 11.4 of the CCAA.

IV. LAW AND ARGUMENT

A. The CCAA Applies to the Applicants

53. The Court has jurisdiction to grant protection under the CCAA to a “debtor company” where the total claims against such company exceed \$5,000,000.⁶⁰ The CCAA defines “debtor company” as including “any company that is bankrupt or insolvent” – but it does not define “insolvent”.⁶¹

54. While the CCAA does not define the term “insolvent” or “insolvency”, reference is commonly made to the definition of “insolvent person” under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the “**BIA**”). “[I]nsolvent person” is defined in section 2 of the BIA, as follows:

“insolvent person” means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

- (i) *who is for any reason unable to meet his obligations as they generally become due,*
- (ii) *who has ceased paying his current obligations in the ordinary course of business as they generally become due, or*
- (iii) *the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.*⁶²

55. If a company is insolvent under the BIA, it is necessarily insolvent for the purposes of the CCAA.⁶³ The CCAA is remedial legislation, which should be given a broad and liberal interpretation. A financially troubled company is insolvent for the purpose of the CCAA if it is

⁶⁰ CCAA, at section 3(1), at **TAB 1**.

⁶¹ CCAA, at sections 2 and 3, at **TAB 1**.

⁶² *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (“**BIA**”), at section 2, at **TAB 2**; *Re Stelco Inc* (2004), [2004] OJ No 1257 (Ont SCJ) (“**Stelco**”), at paras. 21-22, at **TAB 3**.

⁶³ *Stelco*, at para. 22, at **TAB 3**.

*“reasonably expected to run out of liquidity within a reasonable proximity of time as compared with the time reasonably required to implement a restructuring.”*⁶⁴

56. In this case, the Collision Kings Group are insolvent on a cash flow basis. The Collision Kings Group have suffered significant and sustained losses over the past several years, caused predominantly by significant slow-down in the number of vehicle collisions and incidents, declines related to the COVID-19 pandemic, increased costs associated with materials, service, labour, and shipping, lack of sufficient cash flow, significant delays in supply chains, and significant secured and unsecured debt.⁶⁵

57. The Applicants are unable to meet their obligations as they become due, and have further ceased paying their ordinary obligations as they become due in the ordinary course of further. Lastly, as of January 29, 2024, the estimated value of the Applicants’ assets was approximately \$20 million less than their liabilities, in the aggregate.⁶⁶

58. Accordingly, the Applicants are insolvent for the purposes of the CCAA and for the purposes of the BIA.

59. The Companies therefore satisfy the statutory requirements of section 3(1) of the CCAA, and are companies to which the CCAA applies.⁶⁷

60. FTI has consented to act as Court-appointed Monitor of the Applicants. With the Court’s consent, FTI is qualified to act in such capacity under section 11.7 of the CCAA.⁶⁸

B. The Court Should Grant the Initial Order

61. Pursuant to *Re Ted Leroy Trucking [Century Services] Ltd.*, an Initial Order under the CCAA should be granted if it accords with the remedial purposes of the CCAA, which include rehabilitation, the avoidance of social and economic loss resulting from liquidation, and the building of consensus among interested stakeholders.⁶⁹

⁶⁴ Stelco, at para. 26, at **TAB 3**.

⁶⁵ Daerden Affidavit, at paras. 39, 104, 105, and 112.

⁶⁶ Daerden Affidavit, at paras. 57-58.

⁶⁷ CCAA, section 3(1), at **TAB 1**.

⁶⁸ CCAA, section 11.7, at **TAB 1**.

⁶⁹ *Re Ted Leroy Trucking [Century Services] Ltd.*, 2010 SCC 60 at paras 15, 59, 70 (“**Century Services**”), at **TAB 4**.

62. An Initial Order may include any relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course during the restructuring period.⁷⁰

63. Such relief may, and typically does, include a stay of proceedings, which ensures that creditor enforcement does not interfere with the company's ability to maintain operations while restructuring its affairs.⁷¹ The stay of proceedings maintains the status quo while the company develops a plan for the benefit of its creditors.⁷²

64. The threshold for a debtor company to obtain a stay of proceedings under the CCAA is low. The company only has to satisfy the Court that a stay of proceedings would “*usefully further*” its efforts to reorganize. The debtor company is not required to put forward anything more than a germ of a plan that requires protection.⁷³

65. A debtor company is expected to act in good faith and with due diligence both before and after the commencement of proceedings under the CCAA; however, any in-depth analysis of good faith and due diligence is ordinarily deferred to subsequent applications.⁷⁴

66. Here, the Applicants have acted with good faith and due diligence in addressing their cash flow and illiquidity, and by filing under the CCAA to facilitate a restructuring of their businesses and affairs.

67. The Interim Lender has agreed to provide an interim lending facility pursuant to the terms of the Interim Financing Term Sheet attached as Exhibit “71” to the Daerden Affidavit.⁷⁵ As a result, the Applicants will have sufficient financing to continue their business operations as a going concern through at least the initial Stay Period.

C. The Monitor Should be Appointed

68. Pursuant to section 11.7 of the CCAA, the Court is required to appoint a person to monitor the business and financial affairs of a debtor company upon the granting of an initial CCAA Order.

⁷⁰ CCAA, section 11.01, at **TAB 1**; see also *Century Services*, at paras. 60-62, at **TAB 4**.

⁷¹ CCAA, section 11.02, at **TAB 1**.

⁷² *Re Lehndorff*, [1993] OJ No 14 (Ont SCJ) at paras 5-6, at **TAB 5**; *Meridian Developments v Toronto Dominion Bank*, (1984), 53 AR 39 at para 21 (QB), **TAB 6**.

⁷³ *Century Services*, at para. 70, at **TAB 4**; *Industrial Properties Regina Limited v Copper Sands Land Corp*, 2018 SKCA 36 at para 21 (“*Industrial Properties*”), at **TAB 7**; *Alberta Treasury Branches v Tallgrass Energy Corp*, 2013 ABQB 432, at para. 14, at **TAB 8**.

⁷⁴ *Industrial Properties*, at paras. 22-23, at **TAB 7**.

⁷⁵ Daerden Affidavit, at paras. 200-201 and Exhibit “71”.

The monitor must be a trustee within the meaning of subsection 2(1) of the BIA and there are certain restrictions on who may be monitor set forth in subsection 11.7(2) of the CCAA.

69. In this case, the proposed Monitor is a trustee within the meaning of subsection 2(1) of the BIA and has consented to act in the within CCAA proceedings.

70. Further, the Collision King Group's largest secured creditor and interim lender, TD Bank, has expressed support for the appointment of FTI as Monitor.⁷⁶ FTI was engaged by TD Bank to assist in the negotiation of the Forbearance Agreement and is familiar with the Applicants' Business and assets.

D. The Priority Charges are Necessary and Appropriate

71. The Applicants seek approval of certain priority charges as part of the Initial Order, which are intended to secure payment of the Applicants' obligations to their advisors, creditors and stakeholders (collectively, the "**Charges**"). The Charges are necessary and appropriate in the circumstances to ensure the Companies have a reasonable opportunity to restructure their affairs with support from key stakeholders.

72. The Charges sought in the Initial Order include:

- (a) The \$500,000 Administration Charge – to secure the professional fees of the proposed Monitor, the proposed Monitor's counsel and the Companies' counsel;
- (b) The \$600,000 Interim Lender's Charge – to facilitate and finance the Companies' operations during the CCAA proceedings; and
- (c) The \$400,000 Directors' Charge – to secure the indemnity given by the Companies to their directors and officers.

73. Each of these are examined in detail below.

(i) The Administration Charge

74. The CCAA authorizes the Court to grant a priority charge in respect of professional fees and disbursements on notice to affected secured creditors.⁷⁷

⁷⁶ Daerden Affidavit at para 188.

⁷⁷ CCAA, section 11.52, at **TAB 1**.

75. In *Re Canwest Publishing Inc. / Publications Canwest Inc.*, the Ontario Superior Court of Justice stated that the factors to consider in determining whether to approve an administration charge include:

- (a) the size and complexity of the businesses being restructured;
- (b) the proposed role of the beneficiaries of the charge;
- (c) whether there is an unwarranted duplication of roles;
- (d) whether the quantum of the proposed charge appears to be fair and reasonable;
- (e) the position of the secured creditors likely to be affected by the charge; and
- (f) the position of the Monitor.⁷⁸

76. Courts have recognized that administration charges, as well as charges in favour of directors and officers, are often necessary to ensure a debtor company's successful restructuring. For example, in *Re Timminco*, Justice Morawetz (as he then was) stated that failing to provide such charges would frustrate the objectives of the CCAA and would "*result in the overwhelming likelihood that the CCAA proceedings would come to an abrupt halt, followed, in all likelihood, by bankruptcy proceedings*".⁷⁹

77. In the within Application, an Administration Charge is necessary in light of the size and complexity of the restructuring and the necessary involvement of qualified professionals.

78. The Applicants require the knowledge, expertise, and continuing participation of the beneficiaries of the Administration Charge in order to successfully restructure their significant debt and carry out the CCAA proceedings.⁸⁰ The beneficiaries of the Administration Charge have a vital role in the CCAA proceeding and the SISF, and there is no unwarranted duplication as each of the beneficiaries have distinct and critical responsibilities.

79. The proposed quantum of the Administration Charge, in the amount of \$500,000, is reasonable in the circumstances. The quantum of the proposed Administration Charge reached

⁷⁸ *Re Canwest Publishing Inc. / Publications Canwest Inc.*, 2010 ONSC 222 ("*Canwest*"), at para. 54, at **TAB 9**.

⁷⁹ *Re Timminco Ltd.*, 2012 ONSC 506 ("*Timminco*"), at para. 66, at **TAB 10**.

⁸⁰ Daerden Affidavit, at para. 198.

in consultation with the proposed Monitor and TD Bank. The quantum is appropriate in light of the nature of the Applicants' operations and the Business, the scope of duties of the Monitor, and the scope of duties of counsel to the Companies and the Monitor.⁸¹

80. Further, the Monitor has expressed its support of the Administration Charge.⁸² This factor further weighs in favour for the granting of the Administration Charge.

(ii) The Interim Lender's Charge

81. Pursuant to section 11.2 of the CCAA, the Court has authority to approve interim financing and grant a priority charge respecting the interim financing, considering, among other things:

- (a) the period during which the company is expected to be subject to the CCAA;
- (b) how the company's business and financial affairs are to be managed during the proceedings;
- (c) whether the company's management has the confidence of its major creditors;
- (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
- (e) the nature and value of the company's property;
- (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
- (g) the monitor's report referred to in paragraph 23(1)(b), if any.⁸³

82. The Applicants require access to funding throughout the Stay Period to continue making payments to their commercial landlords, employees and critical suppliers, all of which are critical to the Applicants continuing as a going concern.⁸⁴

83. The Interim Lender's Charge is critical and necessary to allow and permit the continuation of the Applicants' operations, without which the Applicants may not have the ability to cover their

⁸¹ Darden Affidavit, at para. 156.

⁸² Daerden Affidavit, at para. 200.

⁸³ CCAA, section 11.2 at **TAB 1**.

⁸⁴ Daerden Affidavit, at para. 191.

expenses during the CCAA Proceedings to the detriment and prejudice of its stakeholders.⁸⁵ The failure to grant the Interim Lender's Charge will result in the Applicants being unable to have sufficient capital to cover their expenses and will negatively impact the Business.⁸⁶

84. The Applicants will not be seeking the approval of a critical supplier charge; rather, the Applicants will direct the funds under the Interim Financing Term Sheet towards payments for critical suppliers.⁸⁷

85. The Companies are proposing that the Interim Lender's Charge be capped at \$600,000 for the initial Stay Period, and will seek an increase to the Interim Lender's Charge to the full amount of the funds available under the Interim Financing Term Sheet at the Comeback Hearing.

86. Accordingly, the Applicants respectfully submit that the Interim Lender's Charge should be approved.

(iii) Directors' Charge

87. Pursuant to section 11.51 of the CCAA, the Court may grant a charge in favour of directors and officers in an amount the Court considers appropriate.⁸⁸ The purpose of the Directors' Charge is to indemnify directors and officers against any obligations or liabilities that may arise after the Initial Order is granted.⁸⁹ The Applicants are seeking approval of the Directors' Charge in the amount of \$400,000 to secure the indemnity in respect of liabilities they may incur during the CCAA proceedings in their capacities as directors and officers.

88. Section 11.51(4) of the CCAA provides that any Directors' Charge cannot apply to liabilities arising from gross negligence or wilful misconduct. This caveat is reflected in the template Initial CCAA Order (which was not modified in the Applicants proposed form of Initial Order).⁹⁰

⁸⁵ Daerden Affidavit, at para. 201.

⁸⁶ Darden Affidavit, at para. 200.

⁸⁷ Daerden Affidavit, at para. 190.

⁸⁸ CCAA, section 11.51, at **TAB 1**.

⁸⁹ CCAA, section 11.51, at **TAB 1**.

⁹⁰ CCAA, section 11.51(4), at **TAB 1**.

89. The purpose of a Directors' Charge is *"to keep the directors and officers in place during the restructuring by providing them with protection against liabilities they could incur during the restructuring"* in order to avoid destabilization and assist with the restructuring.⁹¹

90. In this case, a successful restructuring of the Applicants' affairs requires the continued participation of its directors and officers. The directors and officers of the Applicants have significant institutional knowledge and expertise that cannot be replicated, and they have a history of building and maintaining key stakeholder and employee relationships. In addition, the Applicants' directors and officers have expressed the need for certainty with respect to potential personal liability if they continue in their current capacities during the CCAA proceedings.⁹²

91. The Alberta Template CCAA Initial Order contemplates a directors and officers charge that does not duplicate coverage already provided by directors and officers insurance. This has not changed in the Initial Order being sought by the Companies.⁹³

92. The Applicants currently have a directors and officers insurance policy in place in the amount of \$3,000,000.00.⁹⁴ However, there remains the possibility that the Applicants' present insurance policy may not provide sufficient coverage due. The Directors' Charge is necessary to ensure the directors and officers of the Applicant maintain their current roles and functions within the Applicants' business.

93. The proposed quantum of the Directors' Charge, in the amount of \$400,000 is reasonable in the circumstances given the size and complexity of the Business.

94. The amount of the Directors' Charge has been calculated based on the estimated exposure of the directors and officers and has been reviewed with the proposed Monitor who is supportive of the Charge.⁹⁵

⁹¹ *Re Canwest Global Communications Corp*, [2009] OJ No 4286, 181 ACWS (3d) 853 (Ont SCJ) ("**Canwest**") at para. 48, at **TAB 11**.

⁹² Daerden Affidavit, at para. 176.

⁹³ Daerden Affidavit, at para. 209.

⁹⁴ Daerden Affidavit, at para. 175.

⁹⁵ Daerden Affidavit, at para. 208.

E. The SISP Should be Approved

95. In determining whether the SISP is fair and reasonable, the Court must assess not whether a sales process is perfect, but only whether it is reasonable.⁹⁶ Courts typically rely on the following factors set out by the Ontario Court of Appeal in *Royal Bank v Soundair* (“**Soundair**”), to determine if a sale process is fair and reasonable (collectively, the “**Soundair Criteria**”):

- (a) whether the monitor has made a sufficient effort to get the best price and has not acted improvidently;
- (b) whether the interests of all parties have been considered;
- (c) the efficacy and integrity of the process by which offers are obtained; and
- (d) whether there has been an unfairness in the working out of the process.⁹⁷

96. As further explained by Justice Brown (as he then was) in *CCM Master*, the approval of a particular form of SISP must keep the *Soundair* Criteria in mind and also assess the following criteria (collectively, the “**CCM Criteria**”):

- (a) the fairness, transparency and integrity of the proposed process;
- (b) the commercial efficacy of the proposed process in light of the specific circumstances facing the monitor; and
- (c) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.⁹⁸

97. All of the *CCM* Criteria support the approval of the SISP for the reasons set out below.

⁹⁶ *Sanjel Corporation (Re)*, 2016 ABQB 257 (“**Sanjel**”) at para 80, at **TAB 12**.

⁹⁷ *Royal Bank v Soundair Corp*, 1991 CarswellOnt 205 (Ont CA) (“**Soundair**”), at para. 16 at **TAB 13**.

⁹⁸ *Choice Properties Limited Partnership*, 2020 ONSC 3517, at paras. 15-16 (“**Choice Properties**”), at **TAB 14**, citing *Soundair*, at **TAB 13**, and *CCM Master Qualified Fund Ltd. v. Blutip Power Technologies Ltd.*, 2012 ONSC 1750 (“**CCM Master**”), at **TAB 15**.

(i) The Sale Procedure is Fair and Transparent

98. The proposed SISP is a fair and transparent marketing process designed to identify the highest and best offers for the Applicants' Business and the Property and to maximize recoveries, by seeking offers superior to the Stalking Horse Bid.

99. The SISP will allow the Monitor to maximize value for the Applicants' assets by seeking offers superior to the Stalking Horse Bid and bids for the remaining assets.

100. Further, the SISP is fair and reasonable given the liquidity issues experienced by the Applicants and the need to create stability for the Applicants' employees. The SISP strikes a balance between providing sufficient time for interested parties to complete thorough due diligence, while also maintain a high degree of efficiency.

101. In the circumstances, the marketing and advertisement contemplated in the SISP will ensure the Applicants' assets are adequately exposed to the market. Further, the timelines in the SISP provide sufficient time to: establish the virtual data room; issue the Teaser; assess the various bids and the viability of each bid; and provide for a sufficient due diligence period, all of which will enable potential bidders to make well informed offers. Further, the timelines of the SISP provide a reasonable opportunity for all interested parties to submit bids and potentially subsequent bids, to allow for a fair and transparent process to solicit the best offer for the Applicants' assets.

102. Notwithstanding the timelines in the Initial Order, the Applicants may extend the timelines dictated by the SISP, in consultation with the Monitor, if the Monitor determines it is reasonably necessary.

(ii) The Sale Procedure is Commercially Efficient

103. The proposed SISP requires interested parties to submit Binding Bids within one month of the SISP being published and contemplates a closing date of March 29, 2024. While there is sufficient time for the parties to complete their necessary due diligence, they do need to move quickly given the limited funds available to run a sale process.

104. In *CCM*, the Court noted that:

...a timetable for the sale of a business in distress is a fast track ride that requires interested parties to move quickly or miss the opportunity. The court has to balance

*the need to move quickly, to address the real or perceived deterioration of value of business during a sale process or the limited availability of restructuring financing, with a realistic timetable that encourages and does not chill the auction process.*⁹⁹

105. As set out above, the SISP strikes a balance between providing sufficient time for interested parties to complete thorough due diligence, while also maintaining a high degree of efficiency.

106. The SISP is the best currently available restructuring option available to the Applicants in the context of these CCAA proceedings. It allows the Applicants to test the market to determine if a more competitive bid for the Vendors' assets than the Stalking Horse Bid offers can be sourced, while still guaranteeing a transaction for those assets at the conclusion of the SISP if no other Qualified Bids are received. The SISP further provides for an auction process to encourage more competitive bidding from designated Qualified Bidders.

107. Further, the SISP permits for minimal bid protections to the Stalking Horse Bidder and the Break Fee is in line with market terms and is commercially reasonable in the circumstances.

108. In these circumstances, the SISP provides an appropriate framework to obtain the best offer for the Applicants' assets.

(iii) The SISP Optimizes the Chances of Securing the Best Possible for the Business and the Property

109. In *Re Danier Leather* ("**Danier Leather**"), one of the reasons the Court cited in support of its finding that a sales process was appropriate was the fact that the debtor was unable to achieve alternative financing or otherwise regain solvency. As a result, the Court-supervised sale process was held to be the most viable alternative.¹⁰⁰

110. The Applicants have similarly attempted to restructure their operations but have been unable to do so.¹⁰¹ Accordingly, it will be difficult for the Applicants to achieve alternative financing or regain status as a solvent corporation.

⁹⁹ *CCM Master*, at para. 8 at **TAB 15**.

¹⁰⁰ *Danier Leather Inc., Re*, 2016 ONSC 1044 ("**Danier**"), at para. 27-28 at **TAB 16**.

¹⁰¹ Darden Affidavit, at paras. 149-158.

111. Further, the Stalking Horse Bid, as discussed in detail below, will establish a floor price for the certain of the Vendor's Property and the Business, thereby guaranteeing some recovery of the Applicants' stakeholders, and the SISP will permit higher and better offers to supersede the Stalking Horse Bid. The SISP, backed through the Stalking Horse Bid, optimizes the chances of securing the best possible price.

112. Lastly, the Court has stated that a monitor is accorded a high level of deference for their decisions and opinions.¹⁰² As similar holding has been reached for receivers that carry out sales processes.¹⁰³ The Court has noted that second-guessing a receiver's actions would make their actions "*futile and duplicative*" and would result in the negotiation of every sale being argued at the motion for approval.¹⁰⁴ The Monitor is supportive of the SISP and its opinion should be provided deference.

113. The above analysis demonstrates the support of the CCM Criteria to the within Application, and the Applicants respectfully request that this Honourable Court approve the SISP.

F. The Form of the Stalking Horse Bid Should be Approved

114. At the Initial Order Application on February 7, 2024, the Applicants are seeking approval of the form of the Stalking Horse Bid in the Initial Order, and not approval of the transaction proposed in the Stalking Horse Bid, which will be sought at the Comeback Hearing on February 14, 2024.¹⁰⁵ At the present stage, the Court must determine whether the inclusions of the Stalking Horse Bid in the SISP improves the sale process and is in the interest of the stakeholders.¹⁰⁶

115. The Stalking Horse Bid facilitates the sale of the Business and the Property by establishing a baseline price and deal structure for superior bids from interested parties, maximizing the value of a business for the benefit of its stakeholders, and enhancing the fairness of the sales process.

116. In the present case, including the Stalking Horse Bid will improve the SISP and is in the interest of stakeholders. The Stalking Horse Bid will stimulate market interest and competition by confirming that there is a committed buyer. Further, it will allow the Monitor to widely canvas the market and ascertain whether there are more competitive bids providing a more favourable

¹⁰² *Lutheran Church-Canada, Re*, 2016 ABQB 419 at paras. 49 and 174 at **TAB 17**.

¹⁰³ *Bank of Montreal v Dedicated National Pharmacies Inc*, 2011 ONSC 4634, at para. 43 at **TAB 18** and *Skyepharm PLC v Hyal Pharmaceutical Corp*, 1999 CarswellOnt 3641 (Ont SC) ("*Hyal*"), at para. 7 at **TAB 19**.

¹⁰⁴ *Hyal*, at para. 7 at **TAB 19**.

¹⁰⁵ Daerden Affidavit, at para. 7(b).

¹⁰⁶ *Fire & Flower Holdings Corp, et al*, 2023 ONSC 4048 ("*Fire*"), at paras. 28-29 **TAB 20**.

outcome to stakeholders while still ensuring the stability of the continuing operations of the Business. Lastly, the Stalking Horse Bid also provides a potential path out of the CCAA proceedings.

117. The Court in considering the purchase price of the Stalking Horse bid considers whether the bid “represents a fair and reasonable benchmark for all of the other bids in the sale process”.¹⁰⁷

118. The Court in *Danier Leather*, approved a stalking horse bid that provided a two-phase process and held that,

*[the] process is designed to test the market to ascertain whether a higher or better offer can be obtained from other parties. While the stalking horse agreement contemplates liquidating Danier's inventory, it also establishes a floor price that is intended to encourage bidders to participate in the SISP... [The] use of a sale process that includes a stalking horse agreement maximizes value of a business for the benefit of its stakeholders and enhances the fairness of the sale process.*¹⁰⁸

119. Similarly, in *CCM Master*, the Court considered the approval of a sales and investment solicitation processes in the insolvency context, including those containing stalking horse bids, and provided the following support for stalking horse bids:

*The use of stalking horse bids to set a baseline for the bidding process, including credit bid stalking horses, has been recognized by Canadian courts as a reasonable and useful element of a sales process. Stalking horse bids have been approved for use in other receivership proceedings, BIA proposals, and CCAA proceedings.*¹⁰⁹

120. Accordingly, stalking horse bids are used in restructuring proceedings to facilitate sales of businesses and assets. Stalking horse bids are used to establish a baseline price and transactional structure for any superior bids from interested parties and are a well-established approach in insolvency proceedings.¹¹⁰

121. The Stalking Horse Bid contains a break fee which is common to such bids.¹¹¹ As the Court in *Danier Leather* noted, a break fee in a stalking horse bid “do[es] not merely reflect the

¹⁰⁷ *Danier*, at para. 40, at **TAB 16**.

¹⁰⁸ *Danier*, at para. 13, at **TAB 16**.

¹⁰⁹ *CCM Master*, at paras. 6-7, at **TAB 15**.

¹¹⁰ *Danier*, at para. 13 and 20 at **TAB 16**, citing *CCM Master*, at **TAB 15**; see also *Cannapiece Group Inc v Carmela Marzilli*, 2022 ONSC 6379 at para 8, at **TAB 121**; *Fire* at para 28 at **TAB 20**.

¹¹¹ *Danier*, at para. 41 at **TAB 16**.

*cost to the purchaser of putting together the stalking horse bid. A break fee may be the price of stability, and thus some premium over simply providing for out-of-pocket expenses may be expected.*¹¹²

122. The premise of a break fee for the Stalking Horse Bid arises from the consideration that the Stalking Horse Bidder submitting the Stalking Horse Bid has undertaken considerable due diligence to ascertain the value of the assets and engaged in negotiations with the Applicants which provide a baseline for any subsequent bids.¹¹³

123. In the present case, the Stalking Horse Bid arose from extensive negotiations between the Collision Kings Group and the Lift and, like the stalking horse bid approved in *Danier Leather*, provides a purchase price that establishes a valuable baseline price that is intended to improve the bids received under the SISP.

124. While the Stalking Horse Bid provides for the Break Fee, this fee is not substantial and should not dissuade other interested parties from bidding on the Business and the Property, as there is no requirement that other parties bid higher than the estimated purchase price plus the Break Fee. The Monitor will assess all Binding Bids against a number of factors to determine competitiveness.

125. Courts have recognized the value of break fees and the benefit provided to the process noting that “*a break fee may be the price of stability*” and break fees in the range of 2%-4% have been approved previously and have been found to fall within the range of reasonableness.¹¹⁴

126. Further, the Monitor and TD Bank, are supportive of the Stalking Horse Bid if it is selected as the successful bid.¹¹⁵

127. As a result, the Applicants submit that the Stalking Horse Bid and its related Break Fee, are all fair and reasonable in the circumstances and should be approved.

¹¹² *Danier*, at para. 41 at **TAB 16**.

¹¹³ *Leslie & Irene Dube Foundation Inc v P218 Enterprises Ltd*, 2014 BCSC 1855 at para. 15 at **TAB 22**.

¹¹⁴ *Danier*, at para. 41-43, at **TAB 16**.

¹¹⁵ *Daerden Affidavit*, at para. 230.

G. The Confidential Affidavit Should be Sealed

128. The Applicants are seeking a direction in the Initial Order that the Confidential Affidavit be sealed on the court record. Specifically, the Applicants are seeking to seal Exhibits “1” and “2” of the Confidential Affidavit, being two appraisals (the “**Appraisals**”), until the conclusion of the within CCAA proceedings, and to seal Exhibits “3” to “22” indefinitely, pending further Order of this Court. The documents in Exhibits “3” to “22” include:

- (a) the Paint Supply Agreements, which are subject to confidentiality provisions;
- (b) the Carstar Franchise Agreements, which are subject to confidentiality provisions;
and
- (c) a list of the Vendors’ current employees and their personal information in a schedule to the Stalking Horse Bid (the “**Employee List**”).

129. The Court has authority to seal materials on the court record pursuant to Rule 6.28 and Division 4 of Part 6 of the *Alberta Rules of Court*.¹¹⁶

130. In *Sherman Estate v Donovan* (“**Sherman Estate**”), the Supreme Court of Canada modified the test for a sealing order articulated in *Sierra Club of Canada v Canada* (“**Sierra Club**”), reframing the previously two-step inquiry into three steps. For the Court to grant a sealing order, it must be established that:

- (a) court openness poses a serious risk to an important public interest;
- (b) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and
- (c) as a matter of proportionality, the benefits of the order outweigh its negative effects.

131. The Applicants submits that all three requirements of the *Sherman Estate* test have been met in the circumstances.

(i) Court openness poses a serious risk to an important public interest

¹¹⁶ Alberta Rules of Court, Alta Reg 124/2010, r 6.28 at **TAB 23**.

132. Respecting the Appraisals, the important public interest is the commercial interests of the Monitor, bidders, creditors, and stakeholders in maintaining the integrity of the sale process.

133. Respecting the Paint Supply Agreements, these are subject to strict confidentiality requirements that prohibit the Applicants from publishing the terms of such agreements. The Paint Supply Agreements contain details about amounts of pre-bates, discounts, pricing and product details that could be used by competitors to compromise Axalta and Rondex's commercial interests.

134. Likewise, the Franchise Agreements are also subject to confidentiality requirements that prohibit the Applicants from publishing the terms of such agreements. The Franchise Agreements include details about Carstar's formula for calculating its franchise fee, among other things, that could be used by competitors to compromise Carstar's commercial interests.

135. Lastly, the Employee List contains personal, identifiable information of individuals who have not consented to the release of this information. Making the Employee List available on the public record without the employees' consent would be contrary to applicable privacy legislation,¹¹⁷ and further risks that competitors poach the Applicants' employees and compromise the value of a going concern sale.

(ii) Order sought is necessary to prevent serious risk and reasonable alternatives will not prevent the risk

136. Public disclosure of the commercially sensitive and personal information within the Confidential Affidavit may be detrimental to this important public interest and a sealing order is the best means to protect this information.

137. In the event that SISP is not completed in accordance with its terms, the Business and the Property could be subject to further marketing. In such a situation, the Monitor and the Applicants' ability to obtain the highest and best price could be severely compromised by the commercial information within the Appraisals entering the public domain.

¹¹⁷ *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5, s 7(3), at TAB 24; *Personal Information Protection Act*, SA 2003, c P-6.5, s 20, at TAB 25.

138. It is necessary to provide the Court with the Paint Supply Agreements, as the Applicants are seeking to designate Axalta as a critical supplier. It is further necessary to provide the Court with the Franchise Agreements as they will be affected by the Stalking Horse Bid or potentially assumed by an alternative bidder. Given the necessity to disclose these documents, sealing them on the public record is the most reasonable option to protect the commercially sensitive information therein.

139. The Employee List is a schedule to the Stalking Horse Bid, which is under close scrutiny by this Court. The Court must be able to review the Stalking Horse Bid in its entirety, but a sealing order is the best means to ensure the personal information therein remains off the public record.

(iii) Benefits of sealing order outweigh the deleterious effects

140. As a matter of proportionality, the benefit of sealing the Confidential Affidavit to protect the integrity of the sales and marketing process outweighs any deleterious effect that may be caused from the Court granting the sealing order. The Applicants has been careful to only seal those materials that contains confidential information to ensure as much information as possible remains accessible to the public. The Appraisals will also be available on the public record following the conclusion of the CCAA proceedings, which is in line with an open court process.

141. Justice K.G. Nielsen of this Honourable Court has acknowledged that it is common practice in the insolvency context for information related to the sale of the assets be kept confidential until after the sale is completed pursuant to a Court Order.¹¹⁸

142. Sealing the Appraisals in the Appraisals until the conclusion of the CCAA proceedings protects the integrity and fairness of the SISF by ensuring that potential bidders do not obtain an unfair advantage by obtaining commercially sensitive information about the assets while others have to rely on their own resources in preparing their bids.¹¹⁹

143. With respect to the Paint Supply Agreements and Franchise Agreements, disclosure of these documents at any time, regardless of the sale process, will seriously compromise the commercial interests of Axalta, Rondex or Carstar.

¹¹⁸ *Alberta Treasury Branches v Elaborate Homes Ltd*, 2014 ABQB 350, at para. 54 at TAB 26.

¹¹⁹ *GE Canada Real Estate Financing Business Property Co. v. 1262354 Ontario Inc*, 2014 ONSC 1173 at para 33 at TAB 27.

144. Likewise, the Employee List needs to be sealed indefinitely, as it contains private, personal information protected from non-consensual disclosure under *PIPEDA*.

145. Accordingly, the Applicants requests that the Confidential Affidavit be sealed and provided only to this Honourable Court.

H. The Comeback Relief Should be Approved

(i) The Stay of Proceedings Should Be Extended

146. Pursuant to section 11.02(2) of the CCAA, the Court is permitted to extend the stay period “for any period that the court considers necessary”.¹²⁰ An applicant seeking an extension under this section must satisfy the Court that the circumstance are appropriate for an extended stay and that the applicant “has acted, and is acting, in good faith and with due diligence.”¹²¹

147. It is well established that Courts have jurisdiction to extend the protection of the stay of proceedings to ensure that the purposes of the CCAA can be achieved.¹²²

148. This Honourable Court has held that an applicant applying for an extension, must provide evidence of at least a “kernel of a plan” which will advance the CCAA objectives.¹²³

149. The extension of the Stay Period is necessary and appropriate in order to assist in facilitating and completing the SISP for the benefit of the stakeholders.

150. No creditors will suffer material prejudice as a result of the extension of the Stay Period, and the Monitor is supportive of the extension of the Stay Period.¹²⁴

151. The Applicants therefore submit it is appropriate, reasonable, and necessary to extend the Stay Period, which will permit the Applicants to continue its good faith efforts towards a completion of the SISP to maximize value for its stakeholders and is consistent with the objective of the CCAA.

¹²⁰ CCAA, s. 11.02(2)(a), at **TAB 1**.

¹²¹ CCAA, s. 11.02(3)(b), at **TAB 1**.

¹²² *Target Canada Co., Re*, 2015 ONSC 303 at para 42 at TAB 28.

¹²³ *Re Canada North Group*, 2017 ABQB 508 at para 34 at TAB 29.

¹²⁴ Daerden Affidavit at para 185.

(ii) The Increased Interim Lender's Charge Should be Approved

152. In the event that this Honourable Court grants the Initial Order, it is expected that after the initial 10-day Stay Period under the CCAA that there will need to be an increase in the Interim Lender's Charge to ensure that the Business continues as a going concern.

153. The increase in this in the Interim Lender's Charge will further assist in ensuring that the Business and the Property remain viable and marketable during the course of the SISP.

154. The increase in the Interim Lender's Charge will assisting in providing value to the stakeholders in ensuring that a maximum potential value is received from the SISP from the Business operating at its regular capacity.

(iii) The RIP Charge Should be Approved

155. The Applicants seek approve of a RIP Charge in the amount of \$425,000 as security for a potential bonus payment to be earned during the CCAA proceedings.

156. The RIP Charge was developed by the Applicants in consultation with the Monitor and TD Bank and is designed to encourage the essential persons to continue with the Applicants through to the end of the SISP, to create stability and to incentivize those individuals to achieve the best possible result for stakeholders.

157. Key terms of the RIP provide:

- (a) Shane Daerden and Mark Jones will share a bonus payment of \$425,000 if the Stalking Horse Bid transaction closes;
- (b) if the SISP produces a Qualified Bid that provides for a purchase price of more than \$10 million after all adjustments, then Shane Daerden and Mark Jones will receive 4% of any amounts over \$10 million.¹²⁵

158. The CCAA is silent with respect to granting a RIP charge (or other similar incentive charges) and it is the Court's discretion to grant this type of charge pursuant to section 11 of the CCAA when it is appropriate in the circumstances.¹²⁶ The Courts have approved RIP charges, in

¹²⁵ Daerden Affidavit, at para. 210.

¹²⁶ *Re Cinram International Inc*, 2012 ONSC 3767 at para 91 at TAB 30.

the form of KEIP/KERP charges, in many CCAA proceedings where the retention of certain employees has been found to be critical to a successful restructuring.¹²⁷

159. Other CCAA cases have commented that a success fee is appropriate and necessary where the debtor lacks the financial means to pay advisory fees on any other basis, and the success fee is only payable in the event of a successful outcome of the SISP.¹²⁸

160. In *Re Cinram International Inc*, the Court provided the list of factors to consider in granting a RIP charge, including:

- (a) whether the Monitor supports the RIP charge (to which great weight was attributed);
- (b) whether the individuals to which the RIP charge applies would consider other options if the RIP agreement were not secured by the RIP charge;
- (c) whether the continued involvement of the individuals to which the RIP applies are important for the stability of the business and to enhance the effectiveness of the marketing process;
- (d) the individuals' history with and knowledge of the debtor;
- (e) the difficulty in finding a replacement to fulfill the responsibilities of the individuals to which the RIP charge applies;
- (f) whether the RIP charge were approved by the board of directors, including the independent directors, as the business judgment of the board should not be ignored;
- (g) whether the RIP charge is supported or consented to by secured creditors of the debtor; and
- (h) whether the payments under the RIP charge are payable upon the completion of the restructuring process.

¹²⁷ *Re US Steel Canada Inc*, 2014 ONSC 6145 at para 27, at TAB 31; *Timminco* at para 75 at **TAB 10**; *Canwest* at para 50, at **TAB 9**.

¹²⁸ *Colossus Minerals Inc., Re*, 2014 ONSC 514, at paras 30 and 35, at TAB 32.

161. The Monitor and TD support the RIP Charge.

162. It is necessary and critical to a going concern sale that the critical individuals, identified as Mark Jones and Shane Daerden, continue with the Applicants throughout the CCAA proceedings. Mr. Jones and Mr. Daerden have significant knowledge of the Business and are integral to ensuring the Applicants' operations continue uninterrupted during these proceedings. Mr. Jones and Mr. Daerden have further worked to retain dozens of employees throughout the CCAA proceedings, largely on the strength of their personal relationships with such employees.

163. The RIP charge will assist in retention and in turn, promoting stability of the Business and maintaining the going concern value of the Business during the CCAA proceedings.

164. The quantum of the RIP charge is also designed to align with incentives in achieving success with other stakeholders and maximize the chances of a successful plan being implemented within the time frames contemplated in the SISP.

165. The Monitor has been involved in the preparation of the RIP Charge and views the RIP Charge as necessary to the continued operations of the Business.

166. The SISP process does not involve or engage a selling agent which has contributed to a reduction of its overall costs.¹²⁹ Further, the individuals subject to the RIP have been involved in attempting to market the business for nearly a year's time, have, among other things, engaged in:

- (a) negotiations with creditors to reduce payment plans and payments pauses;
- (b) worked towards listing and marketing portions of the Business;
- (c) sourcing and negotiating the IOI and Lift LOI;
- (d) negotiated the Stalking Horse Bid; and
- (e) assisted in developing the SISP.¹³⁰

¹²⁹ Daerden Affidavit, at para. 214.

¹³⁰ Daerden Affidavit, at para 213.

167. The Key Employees have also taken on reduced salaries and payouts leading up to the CCAA proceedings. Mr. Shane Daerden has had a reduction of his salary by 50%, and Mr. Mark Jones has taken a 75% reduction to his hourly rate.¹³¹

168. The Applicants therefore respectfully request that the RIP Charge be approved in the amount of \$425,000.

(iv) Granting the SAVO

169. Section 36 of the CCAA allows for Court approval of the sale of substantially all of a company's assets and provides the following criteria to consider:

(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.¹³²

170. Prior to the enactment of section 36(3) of the CCAA, the Courts would consider the *Soundair* Criteria outlined above.

¹³¹ Daerden Affidavit, at para. 214.

¹³² CCAA, section 36(3) at **TAB 1**.

171. Further, this Court has held that two additional factors:

- (a) The business rule, in that the Court will not lightly interfere with the exercise of the commercial and business judgment of a debtor company and the monitor in the context of an asset sale where the marketing and sale process was fair, reasonable, transparent, and efficient; and
- (b) The weight to given to the recommendation of the monitor.¹³³

172. In these circumstances, the Applicants are seeking the approval of the transaction within the Stalking Horse Bid before the conclusion of the SISP. The SAVO provides that it will only be effective and come into force upon the Monitor filing a certificate confirming that the Stalking Horse Bid was selected as a Successful Bid pursuant to the SISP. The Monitor will only select the Stalking Horse Bid as a Successful Bid if it is of the opinion that no other bids were more competitive than the Stalking Horse Bid. If the SISP proceeds to the Auction stage, the parties will be required to bring a further application for a new sale approval and vesting order for the Successful Bid.

173. There are several instances where courts have approved stalking horse transactions in advance of a sales process,¹³⁴ including in the *Balanced Energy (Re) CCAA* ("**Balanced Energy**").¹³⁵ In *Balanced Energy*, the Court considered the following factors:

- (a) approving the proposed stalking horse bid concurrently with the SISP would avoid delays and expenses prejudicial to the debtors' stakeholders;
- (b) the receiver would be able to ensure the sale process would be conducted in compliance with the proposed SISP and that no superior bids were received;
- (c) if a superior bid was received, the conditions for closing the stalking horse transaction would not be met and the receiver would be required to bring an application before the Court; and

¹³³ *Sanjel*, at para 59 at **TAB 12**.

¹³⁴ See the *US Oil Sands Inc. and US Oil Sands (Utah) Inc., Re*, ABQB Court File No. 1701-12253, Order granted February 16, 2018 at TAB 33; *Traverse Energy Ltd., et al (Re)*, ABQB Court File No. 1901-16844, Order granted February 14, 2020 at TAB 34; *Ladacor AMS Ltd., et al (Re)*, ABQB Court File No. 1803-09581, Order granted October 24, 2018 at TAB 35.

¹³⁵ *Balanced Energy (Re)*, ABQB Court File No. 2201-02699, Order of Justice Neilson granted March 30, 2022, at TAB 36.

- (d) concurrent approval would simplify the proceedings and preserve judicial resources.

174. In *Institutional Mortgage Capital Canada Inc. v 0876242 BC Ltd.*, the Court was satisfied that a vesting order in favour of the stalking horse bidder before the sale process was appropriate, noting that the only unknowns were whether the bid process generated a better bid and the identity of the purchaser.¹³⁶ The Court was further satisfied that the stalking horse bid was only being granted on the condition that a better bid was not received, which would be determined by the receiver.¹³⁷

175. The SISP will result in a thorough canvassing and marketing of the Business and the Property to potential bidders, to ensure it is reasonable and effective in the circumstances.

176. Both the Monitor and TD Bank support the approval of the Stalking Horse Bid. As set out above, the Monitor and the largest secured creditor of the Applicants have expressed support for the Stalking Horse Bid, and this Honourable Court has noted the increased weight that should be given to the Monitor along with deference owed under the business judgment rule.

177. Further, the Stalking Horse Bid provides certainty to stakeholders of the preservation of the Business as a going concern entity.

V. RELIEF REQUESTED

178. The Applicants respectfully requests this Honourable Court grant an Initial CCAA Order substantially in the form attached to the within Application.


¹³⁶ *Institutional Mortgage Capital Canada Inc. v 0876242 BC Ltd.*, 2022 BCSC 1520 (“*Institutional Mortgage*”), at para 5, at TAB 37.

¹³⁷ *Institutional Mortgage*, at paras 61 and 63, at **TAB 36**.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2nd day of February, 2024.

MLT AIKINS LLP



 JJ Burnell/Kaitlin Ward

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