

**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 PRISZM INCOME FUND, PRISZM CANADIAN OPERATING TRUST,  
PRISZM INC. AND KIT FINANCE INC.

(the "Applicants")

**FACTUM OF THE APPLICANTS  
(Motion Returnable May 30, 2011 Re:  
Approval of the Soul Agreement, Approval of the Sales Process and Canaccord  
Genuity Engagement Letter, and Amendment of the KERPs)**

Dated: May 26, 2011

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TO: **ATTACHED SERVICE LIST**

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**PART I - INTRODUCTION**

1. On March 31, 2011, PriszM Income Fund ("**PriszM Fund**"), PriszM Canadian Operating Trust ("**PriszM Trust**"), PriszM Inc. ("**PriszM GP**"), and KIT Finance Inc. ("**KIT Finance**") were granted protection from their creditors pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") by order of the Honourable Mr. Justice Morawetz, as amended and restated by order of the Honourable Madam Justice Mesbur on April 29, 2011 (the "**Initial Order**"). The stay of proceedings and other benefits of the Initial Order were extended to PriszM LP. PriszM Fund, PriszM Trust, PriszM GP, PriszM LP and Kit Finance will be referred to collectively herein as the "**PriszM Entities**".

2. The Prizm Entities seek orders, *inter alia*, for the following relief:
- (a) Approving the Amended and Restated Asset Purchase Agreement (the "**Soul Agreement**") between Prizm LP (the "**Vendor**"), Prizm GP and Soul Restaurants Canada Inc. (formerly 7716443 Canada Inc.) (the "**Purchaser**") for the sale of 204 operating restaurants of the Prizm Entities dated May 17, 2011;
  - (b) Approving the Transition Services Agreement (as defined below);
  - (c) Approving the Occupation Agreement (as defined below);
  - (d) Authorizing the Prizm Entities and FTI Consulting Canada Inc., in its capacity as Court-appointed monitor of the Prizm Entities (the "**Monitor**"), to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the transaction contemplated by the Soul Agreement (the "**Soul Transaction**");
  - (e) Vesting all of the Purchased Assets (as defined in the Soul Agreement) in the Purchaser free and clear of any encumbrances other than the Permitted Encumbrances (as defined in the Soul Agreement);
  - (f) Authorizing the Prizm Entities to pay certain pre-filing amounts to Yum! Restaurants International (Canada) Company (the "**Franchisor**");

- (g) Approving, *nunc pro tunc*, and authorizing the sales process undertaken by the Prizm Entities with respect to the Remaining Restaurants (as defined below);
- (h) Approving, *nunc pro tunc*, the Canaccord Genuity Corp. (“**Canaccord Genuity**”) engagement letter (the “**Genuity Engagement Letter**”);
- (i) Approving an amendment of the KERPs (as defined below) to reallocate funds forfeited by certain KERP participants to other KERP participants; and
- (j) Authorizing the Prizm Entities to reallocate any additional funds that may be forfeited by KERP participants with the prior consent of the Monitor.

## PART II - THE FACTS

3. The facts with respect to this Motion are more fully set out in the Affidavit of Deborah Papernick sworn May 24, 2011 re: Approval of Soul Transaction (the “**Soul Affidavit**”), the Affidavit of Deborah Papernick sworn May 24, 2011 re: Approval of Sales Process (the “**Sales Process Affidavit**”) and the Affidavit of Deborah Papernick sworn May 24, 2011 re: Further KERP Amendments (the “**KERP Affidavit**”).

Soul Affidavit, Motion Record of the Applicants (the “**Motion Record**”), Tab 2; Sales Process Affidavit, Motion Record, Tab 3; KERP Affidavit, Motion Record, Tab 4.

4. All capitalized terms used but not defined herein shall have the meaning ascribed to them in the Soul Affidavit.

5. Prizm LP is a franchisee of the Franchisor and is Canada's largest independent quick service restaurant operator, operating approximately 425 KFC, Taco Bell and Pizza Hut restaurants.

Soul Affidavit, Motion Record, Tab 2 at paras. 3 and 6.

6. As a result of same store sales declines and correspondingly poor financial performance in 2009 and 2010, Prizm Fund breached a covenant under its senior secured indebtedness with Prudential Investment Management, Inc. (and certain affiliates) (collectively, "**Prudential**") and remains in non-compliance today.

Soul Affidavit, Motion Record, Tab 2 at paras. 6 and 7.

7. Prizm Fund also failed to make an interest payment of \$0.975 million due on December 31, 2010 with respect to its subordinated debentures due June 30, 2012 and remains in default of its interest payment obligation.

Soul Affidavit, Motion Record, Tab 2 at para. 8.

8. The Prizm Entities also ceased paying certain obligations to the Franchisor as they became due, including continuing fees payments pursuant to the Franchise Agreement since December 2010.

Soul Affidavit, Motion Record, Tab 2 at para. 9.

9. The Prizm Entities were ultimately granted protection from their creditors under the CCAA, pursuant to the Initial Order.

Soul Affidavit, Motion Record, Tab 2 at para. 4.

*The Soul Agreement*

10. Following various unsuccessful attempts to reorganize or refinance their debt obligations, in September 2010, the Prizm Entities commenced a sales process to explore the potential sale of some of their assets. The Prizm Entities engaged PricewaterhouseCoopers Corporate Finance Inc. ("PWC") to assist in identifying additional potential buyers and requested that the Franchisor provide a list of potential purchasers from their existing franchise network.

Soul Affidavit, Motion Record, Tab 2 at para. 14.

11. Following the sales process and negotiations more fully described at paragraphs 12 to 29 of the Soul Affidavit, the Prizm Entities entered into exclusive negotiations with the Purchaser and on December 11, 2010, the Vendor and the Purchaser entered into an agreement of purchase and sale with respect to the sale of 232 (subsequently reduced to 231 with no corresponding reduction in the purchase price) operating restaurants in Ontario, British Columbia and Quebec (the "**Original APA**").

Soul Affidavit, Motion Record, Tab 2 at paras 12-29.

12. By letter dated March 30, 2011, the Purchaser raised concerns with the Prizm Entities regarding alleged changes in the operations, affairs and condition of the Purchased Assets and requested that the purchase price under the Original APA be

reduced by approximately \$6.5 million. The Prizm Entities strongly disagree with the assertions set out in the March 30, 2011 letter and advised the Purchaser of same in a letter dated March 31, 2011. The Prizm Entities and the Purchaser subsequently engaged in protracted negotiations with respect to the purchase price and certain other provisions of the Original APA.

Soul Affidavit, Motion Record, Tab 2 at paras. 25 and 26.

13. Following extensive and intensive negotiations of the terms of the proposed transaction and related agreements, on May 17, 2011, the Vendor and the Purchaser agreed to amend the Original APA by, among other things, reducing the purchase price by approximately \$2.3 million, removing or amending certain conditions precedent in order to reduce the degree of closing risk and reducing the number of stores involved in the transaction from 231 to 204, and executed the Soul Agreement.

Soul Affidavit, Motion Record, Tab 2 at paras. 27-29.

14. The terms of the Soul agreement are detailed in, *inter alia*, paragraphs 30 to 52 of the Soul Affidavit.

Soul Affidavit, Motion Record, Tab 2 at paras. 27-29.

### ***Occupation Agreement***

15. It is a term of the Soul Agreement that where the Purchaser has not been able to obtain a landlord's consent to the assignment of the applicable Lease to the Purchaser (each, a "Landlord Consent") or an order assigning the Lease for any of the Outlets at the time of the Closing, the Vendor will be obligated to, among other things, hold the

Outstanding Lease in trust for the Purchaser for up to six months. During that six month period the Vendor is required to continue to use commercially reasonable efforts to obtain the outstanding consents or to apply to Court for an Order assigning the leases.

16. Accordingly, the Prizm Entities are seeking the Court's approval of the Occupation Agreement dated May 17, 2011 (the "**Occupation Agreement**") pursuant to which the Vendor will grant to the Purchaser a license to occupy each of the Outlets for which a Landlord Consent or an order has not been obtained for a period (the "**License Period**") commencing, in respect of each of the Outlets, on the Closing Date and ending, in respect of each of the Outlets, on the earlier of: (a) 6 months after the Closing Date; (b) the time the relevant landlord's consent to the assignment of the applicable lease is obtained or the assignment has been ordered by the Court and such lease has been assigned to the Purchaser; (c) the time the applicable lease is lawfully terminated or expires; and (d) the time the license is terminated in respect of any given lease in accordance with Section 9 of the Occupation Agreement.

Soul Affidavit, Motion Record, Tab 2 at paras. 58-63.

***Transition Services Agreement***

17. The Vendor also agreed to provide, or cause to be provided, certain information technology and other services to the Purchaser for a certain time following the closing date to allow the Purchaser to obtain alternate providers of such services pursuant to



the terms of a Transition Services Agreement dated May 17, 2011 (the “**Transition Services Agreement**”).

Soul Affidavit, Motion Record, Tab 2 at paras. 53-57

*Third Party Releases*

18. The Soul Agreement is conditional on a number of conditions in favour of the Vendor and the Purchaser including, among others, the Franchisor having provided its consent to an agreement assigning the Master Franchise Agreement as it relates to the Outlets and the Franchise Agreements for each of the Outlets to the Purchaser.

Soul Affidavit, Motion Record, Tab 2 at para. 51

19. The Franchisor, the Purchaser and the Prizm Entities have entered into a Consent Agreement subject to certain conditions. One of the conditions precedent is that the Sale Approval Order contain a release from the Prizm Entities from any and all actions, liabilities, claims and demands arising out of, related to, or in connection with the Franchise Agreement for each Outlet and the Master Franchise Agreement as it relates to the Outlets, save and except for the obligation to pay \$163,319.09 owing by the Franchisor to the Prizm Entities. In consideration of the grant of such release, the Franchisor is granting a similar release in favour of the Prizm Entities.

*The Sales Process with Respect to the Remaining Restaurants of the Prizm Entities*

20. If the Soul Agreement is approved by the Court and successfully closes, the Prizm Entities will have 223 restaurant outlets remaining (the “**Remaining Restaurants**”).

Sales Process Affidavit, Motion Record, Tab 3 at para. 15

21. On January 14, 2011, representatives of the Prizm Entities met with Prudential and the Franchisor to propose a long term plan for a residual business comprised of the remaining assets not included in the Original APA. The Franchisor and Prudential did not accept the proposal made by the Prizm Entities and advised the Prizm Entities that the Franchisor and Prudential would not provide any further forbearances or extensions unless the Prizm Entities proceeded towards a closing of the Soul Transaction by January 31, 2011 and expeditiously conducted a sales process for the remaining restaurants and assets of the Prizm Entities.

Sales Process Affidavit, Motion Record, Tab 3 at para. 14.

22. On February 1, 2011, Prizm LP, Prizm GP, Kit Finance Inc., and Prudential entered into an agreement dated February 1, 2011 pursuant to which the Prizm Entities agreed to conduct a sales process for the outlets not covered by the Original APA, and to use their best commercial efforts to comply with the sale process described in the agreement. Prizm Fund retained Canaccord Genuity to assist with the sales process pursuant to the Genuity Engagement Letter.

Sales Process Affidavit, Motion Record, Tab 3 at para. 16.

23. Starting in February 2011, Canaccord Genuity contacted 91 prospective purchasers that had been identified by the Prizm Entities, the Franchisor, Canaccord Genuity, and the Monitor, 29 of whom executed a non-disclosure and received copies of a Confidential Information Memorandum (“CIM”) and access to an on-line data room. Interested parties were required to submit non-binding expressions of interest by March 22, 2011.

Sales Process Affidavit, Motion Record, Tab 3 at paras. 20 and 21.

24. A number of expressions of interest were received by the Prizm Entities on or about March 22, 2011. These expressions of interest in the aggregate encompass all of the outlets which did not form part of the Original APA.

Sales Process Affidavit, Motion Record, Tab 3 at para. 22.

25. Since the Prizm Entities’ CCAA filing on March 31, 2011, 23 parties have requested and were sent a copy of a teaser and a Non-Disclosure Agreement (the “NDA”) and 13 of these parties signed the NDA. Two parties submitted expressions of interest. A number of other parties that have not submitted expressions of interest continue their due diligence efforts.

Sales Process Affidavit, Motion Record, Tab 3 at para. 23.

26. The Prizm Entities and Canaccord Genuity, after discussions with Prudential and the Monitor, extended the deadline for submission of formal bids until May 25, 2011. Following receipt of formal bids, the Prizm Entities will, with the assistance of

Canaccord Genuity and the Monitor and in consultation with Prudential, review the bids, negotiate binding agreements of purchase and sale and return to Court for approval of one or more transactions.

Sales Process Affidavit, Motion Record, Tab 3 at paras. 24 and 25.

27. The Genuity Engagement Letter provides for a non-refundable engagement fee on execution (which has been paid) and transaction fees payable on completion of any Transaction (as defined in the Genuity Engagement Letter) other than the Soul Transaction, with the amount of the Transaction Fee (as defined in the Genuity Engagement Letter) dependent on the gross proceeds generated from the transactions. The engagement fee is to be credited against any Transaction Fee. The Transaction Fee is payable to Canaccord Genuity only if a sale transaction is completed and the quantum of those fees is dependent on the amount of the gross proceeds of such transaction.

Sales Process Affidavit, Motion Record, Tab 3 at para. 28.

*Amendment of KERPs*

28. Prior to the commencement of the CCAA proceedings and in order to ensure retention of key personnel during the Prizm Entities' restructuring efforts, 41 key personnel were offered retention bonuses (the "KERPs").

KERP Affidavit, Motion Record, Tab 4 at para. 4.

29. Under the terms of the KERPs, in order to receive the retention bonuses the KERP participants cannot have resigned, been terminated with cause or have failed to perform their duties and responsibilities diligently, faithfully or honestly.

KERP Affidavit, Motion Record, Tab 4 at para. 9.

30. On April 29, 2011, the Prizm Entities obtained an Order reallocating the funds which had been forfeited by three of the KERP participants who resigned since March 31, 2011 to certain of the remaining KERP participants and one other employee who was not a KERP participant (none of whom were members of senior management) as an additional incentive to continue their employment with the Prizm Entities.

KERP Affidavit, Motion Record, Tab 4 at para. 10.

31. Since April 29, 2011, two additional KERP participants have resigned from the Prizm Entities notwithstanding the existence of the KERPs. In an attempt to minimize future departures, the Prizm Entities wish to reallocate the funds forfeited by the KERP participants who have resigned to certain of the remaining KERP participants as additional incentives to continue their employment with the Prizm Entities.

KERP Affidavit, Motion Record, Tab 4 at para. 11.

32. Further resignations by some of the remaining KERP participants before the conclusion of the CCAA proceedings are possible. In order to avoid returning to Court each time funds are forfeited as a result of a resignation by a KERP participant, the Prizm Entities seek authority to reallocate any funds that may be forfeited by any

future resignations of the KERP participants to the remaining KERP participants with the prior consent of the Monitor.

KERP Affidavit, Motion Record, Tab 4 at para. 14.

### **PART III - ISSUES AND THE LAW**

33. The issues on this motion are:

- a) Should the Court grant the Sale Approval Order approving the Soul Agreement and the related agreements and vesting the Purchased Assets in the Purchaser?
- b) Should the Court approve the sales process undertaken by the Prizm Entities with respect to the Remaining Restaurants and the Genuity Engagement Letter, *nunc pro tunc*?
- c) Should the Court authorize the reallocation of funds forfeited by certain KERP participants to other KERP participants and authorize the Prizm Entities to reallocate any additional forfeited funds with the prior consent of the Monitor?

## A. The Sale Approval Order Should be Granted

### *Disposition of Assets by the Debtor in CCAA Proceedings*

34. Courts have long recognized that the remedial nature of the CCAA confers on them broad powers to carry out the purpose of the CCAA, which is to facilitate the restructuring of insolvent companies.

*Re Nortel Networks Corp.* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J.)  
[*Nortel 2009*], Applicants' Book of Authorities, Tab 1 at para. 30.

CCAA, s. 11

35. In *Nortel 2009*, Justice Morawetz reviewed the jurisdiction of the Court to approve a sales process in the absence of a plan under the CCAA. In finding that CCAA Courts have such jurisdiction, Justice Morawetz focused on the continuation of the business as a going concern, holding that:

... the CCAA should be given a broad and liberal interpretation to facilitate its underlying purpose... it should not matter whether the business continues as a going concern under the debtor's stewardship or under new ownership, for as long as the business continues as a going concern, a primary goal of the CCAA will be met. [emphasis added]

*Nortel 2009*, Applicants' Book of Authorities, Tab 1 at paras. 34, 40 and 47.

36. Justice Morawetz also noted that courts have repeatedly exercised such discretion in asset sales, including in *Re Consumers Packaging Inc.*, where the Ontario Court of Appeal held that:

[the approval of an asset sale] is consistent with previous decisions in Ontario and elsewhere that have emphasized the board remedial purpose of flexibility of the CCAA and have approved the sale and

disposition of assets during CCAA proceedings prior to a formal plan being tendered.

*Re Consumers Packaging Inc.* (2001), 27 C.B.R. (4th) 197 (Ont. C.A.), Applicants' Book of Authorities, Tab 2 at para 9.

37. The CCAA Courts' power to approve a sale of assets prior to the formulation of a plan of compromise or arrangement was codified in amendments to the CCAA proclaimed into force in September 2009. Section 36 of the CCAA now sets out the following list of non-exhaustive factors for the Court to consider in determining whether to approve a debtor's sale of assets outside the ordinary course of business:

- (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.

CCAA, s. 36(3)

38. Section 36 of the CCAA has been considered in *Re Canwest Publishing Inc.* where Justice Pepall approved the proposed sale and held, among other things, that:

- (a) the monitor's support of the transaction spoke to the reasonableness of the process;



- (b) the creditors were sufficiently consulted as they had input or were otherwise involved at various stages in the process; and
- (c) the sale would result in a going concern outcome and earn significant recovery for secured and unsecured creditors and therefore the sale had a positive effect.

*Re Canwest Publishing Inc.* (2010), 68 C.B.R. (5th) 233 (Ont. S.C.J.) [*Canwest Publishing*], Applicants' Book of Authorities, Tab 3 at para. 13.

39. In making her decision, Justice Pepall also noted that the criteria set out in section 36(3) of the CCAA "largely overlap" with the criteria established in *Royal Bank v. Soundair Corp.*, which had been used by Courts to review the reasonableness of proposed sales in CCAA proceedings prior to the enactment of section 36 and which provides that the Courts should consider:

- 1) whether sufficient effort has been made to obtain the best price and that the debtor has not acted improvidently;
- 2) the interests of all parties;
- 3) the efficacy and integrity of the process by which offers have been obtained; and
- 4) whether there has been unfairness in the working out of the process.

CCAA, s. 36(3)

*Canwest Publishing*, Applicants' Book of Authorities, Tab 3 at para. 13.

*Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.) [*Soundair*], Commercial List Authorities Book at para. 24.

40. Section 36 was also considered in *Re White Birch Paper Holding Co.* where Justice Mongeon held that, although the sale under consideration provided insignificant

recovery for unsecured creditors, the monitor's support of its approval indicated that this was the best opportunity for the creditors as a whole and that it would not be in the best interest of any of the parties for him to decline the order.

*Re White Birch Paper Holding Co. 2010 QCCS 4915, Applicants' Book of Authorities, Tab 4 at paras. 48, 49, 51-52, 57.*

***The Prizm Entities Satisfy the Criteria for Approval of the Soul Transaction***

41. The Soul Transaction meets the criteria for approval of disposition of assets in CCAA proceedings for, *inter alia*, the following reasons:

- (a) the Prizm Entities employed PwC, an independent financial advisor, to assist in identifying potential buyers;
- (b) the Prizm Entities worked with the Franchisor to identify additional potential purchasers;
- (c) there was public disclosure at the time of the sales process which culminated in the Soul Agreement that the Prizm Entities were exploring the potential sale of some of their assets;
- (d) the sales process was conducted in a competitive manner, including the use of a teaser, the NDA, the CIM and three rounds of bids before the Original APA was negotiated with the Purchaser; and
- (e) the Monitor is of the view that the Purchase Price under the Soul Agreement is reasonable and supports approval of the Soul Transaction.

Soul Affidavit, Motion Record, Tab 2, at paras. 13-29.

Second Report of the Monitor dated May 26, 2011, para. 45.

42. The Soul Agreement provides for a going concern outcome for 204 restaurants, the vast majority of the Prizm Entities' restaurants in British Columbia and Ontario. It also provides for continued employment for approximately 3,100 of the Prizm Entities' approximately 6,500 employees, and preserves an ongoing customer for many of the Prizm Entities' suppliers and distributors.

Soul Affidavit, Motion Record, Tab 2, at para. 66.

43. Further, there is no certainty that submitting the Purchased Assets to a further sales process will result in a higher or better offer. However, it is certain that another sales process will result in additional expenses and uncertainty.

Soul Affidavit, Motion Record, Tab 2, at para. 67.

44. The Prizm Entities' major secured creditor, Prudential, and the Franchisor have consented to the Soul Transaction (subject to certain conditions).

Soul Affidavit, Motion Record, Tab 2, at para. 68.

45. The Prizm Entities have discussed the advantages and disadvantages of the Soul Transaction with the Monitor. The Monitor is supportive of the Soul Transaction and has provided the Court with a report in that regard.

Soul Affidavit, Motion Record, Tab 2, at para. 69.

46. Accordingly, the Prizm Entities respectfully submit that the criteria set out in section 36(3) of the CCAA are satisfied.

*Other Requirements of Section 36 of the CCAA*

47. In addition to the factors set out in subsection 36(3), subsection 36(7) of the CCAA sets out the following restrictions on disposition of assets within CCAA proceedings:

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

CCAA, s. 36(7)

Section 36(7) references paragraphs 6(4)(a) and (5)(a), which appears to be a drafting error. It is submitted that this section should read 6(5)(a) and (6)(a)

48. Justice Pepall considered section 36(7) of the CCAA in *Re Canwest Global Communications Corp.* where (although she held that section 36 was not applicable to the facts of that case) she was satisfied by confirmation by counsel for the debtors of compliance with section 36(7), and asked the monitor to report to the court on the status of those payments should a compromise or arrangement be made in future.

*Re Canwest Global Communications Corp.* [2009] O.J. No. 4788 (S.C.J.), Applicants' Book of Authorities, Tab 5 at para 42.

49. The Prizm Entities have been and intend to continue paying the wages, salaries, commissions or compensation to their employees contemplated by section 6(5)(a) in the regular course.

CCAA, s. 6(5)(a)

BIA, s. 136(1)(d), s. 81.3 and s. 81.4

Soul Affidavit, Motion Record, Tab 2, at para. 72

50. All contributions due and owing to the Pension Plan (as defined in the Soul Affidavit) in respect of both employer and employee contributions (as contemplated by subsections 6(6)(a)(i) and (iii)(B) of the CCAA) have been remitted to the Pension Plan fund. The Prizm Entities do not sponsor any other pension plan that is subject to section 6(6)(a)(ii) or 6(6)(a)(iii)(A) of the CCAA.

CCAA, s. 6(6)(a)

Soul Affidavit, Motion Record, Tab 2, at para. 73.

51. In addition, under the proposed Sale Approval Order, the Purchase Price will be paid by the Purchaser to the Monitor to be held pending further order of this Court (subject to the payment of certain amounts to the Franchisor, in respect of the transfer of the franchise agreements and unpaid post-filing royalties accrued with respect to the Purchased Assets). Accordingly, there will be funds available to make the payments required to be made under sections 6(5)(a) and 6(6)(a) of the CCAA should the Prizm Entities fail to make such payments in the ordinary course.

Soul Affidavit, Motion Record, Tab 2, at para. 74.

52. The additional factors and restrictions under section 36(4) and (5) of the CCAA are not applicable in this case as the Vendor and the Purchaser are not related persons within the meaning of the CCAA.

Soul Affidavit, Motion Record, Tab 2, at para. 70.

### *Third Party Releases*

53. Courts have also held that they have jurisdiction under the CCAA to release claims against third parties as part of approving a plan of arrangement and compromise or as part of approving settlement agreements, even over the objections of some dissenting creditors.

*Re Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 92 O.R. (3d) 513 (C.A.) [*Metcalfe*], Applicants' Book of Authorities, Tab 6 at paras. 61-63.

*Re Nortel Networks Corp.* (2010), 63 C.B.R. (5th) 44 (Ont. S.C.J.) [*Nortel 2010*], Applicants' Book of Authorities, Tab 7 at paras. 48, 49, 51-52, 57.

54. Courts considering whether to approve releases in favour of third parties have noted that some of the factors to be considered in such circumstances include:

- (a) Whether the parties to be released from claims are necessary and essential to the restructuring of the debtor;
- (b) Whether the claims to be released were rationally connected to the purpose of the restructuring;
- (c) In the context of a plan of arrangement, whether the parties being released were contributing to the plan;
- (d) Whether the release benefitted the debtor as well as the creditors generally; and
- (e) Whether the releases were fair and reasonable and not overly broad.

*Metcalf*, Applicants' Book of Authorities, Tab 6 at paras 69-71, 113.

*Nortel 2010*, Applicants' Book of Authorities, Tab 7 at paras. 77-82.

55. In the case at bar, the consent of the Franchisor to the assignment of the Franchise Agreement is a condition precedent under the Soul Agreement and the Franchisor requires a release as a condition of its consent. Accordingly, the release is required to complete the Soul Transaction which will benefit the Prizm Entities and its creditors and stakeholders generally. The claims proposed to be released are limited to those arising as a result of the operation of the Purchased Assets and are, therefore, rationally connected to the proposed sale to the Purchaser and are not overly broad. The Franchisor has agreed to grant a similar release to the Prizm Entities. For these reasons, it is respectfully submitted that the requested release of the Franchisor as outlined in the draft Sale Approval Order should be granted.

56. It is respectfully submitted that it is appropriate for this Court to approve the Soul Agreement and grant the Sale Approval Order in the form requested.

**B. The Sales Process Undertaken with respect to the Remaining Restaurants and the Genuity Engagement Letter Should be Approved**

*The Court has Broad Discretion Under the CCAA to Approve the Sales Process*

57. The remedial nature of the CCAA confers broad powers on courts in order to facilitate the restructuring of insolvent companies. Their jurisdiction stems, *inter alia*, from section 11 of the CCAA which provides that a court may, "subject to the restrictions set out in [the CCAA]... make any order it considers appropriate in the

circumstances” and from the courts’ inherent jurisdiction to fill in the gaps of the CCAA to give effect to its objects.

*Nortel 2009*, Applicants’ Book of Authorities, Tab 1 at para 30.

CCAA, s. 11

*Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div.), Applicants’ Book of Authorities, Tab 8 at para. 43.

58. In *Nortel*, Justice Morawetz articulated certain factors (the “*Nortel Criteria*”) the court should consider when determining whether to authorize a sales process in a CCAA proceeding:

- (a) Is a sale transaction warranted at this time?
- (b) Will the sale benefit the whole "economic community"?
- (c) Do any of the debtors' creditors have a bona fide reason to object to a sale of the business?
- (d) Is there a better viable alternative?

*Nortel 2009*, Applicants’ Book of Authorities, Tab 1 at paras. 48 & 49.

59. It has also been held that in approving a sales process under the CCAA, the courts should also consider that any proposed sales resulting from the sales process will be carefully scrutinized under section 36 of the CCAA.

CCAA, s. 36

*Re Brainhunter Inc.* (2009), 62 C.B.R. (5th) 41 (Ont. S.C.J.), Applicants’ Book of Authorities, Tab 9 at paras 16-17.



*The Sales Process Should be Approved*

60. In the case at bar, the Prizm Entities have been advised by the Franchisor and Prudential that they must expeditiously conduct a sales process for the remaining restaurants and assets of the Prizm Entities in order to benefit from continuing forbearance terms.

Sales Process Affidavit, Motion Record, Tab 3 at para. 14.

61. One or more sale transactions for the remaining restaurants of the Prizm Entities will benefit their whole economic community as they will ensure that the Prizm Entities' business will remain a going concern resulting in continued employment for their employees, uninterrupted service to customers, and continued business for suppliers.

Sales Process Affidavit, Motion Record, Tab 3 at para. 30.

62. The Prizm Entities' creditors are not prejudiced by the sales process and retain their rights to raise any concerns over or objections to a proposed sale, an opportunity which will be afforded them at any and all motions to approve an asset sale. No creditor has come forth to object to the sales process and Prudential supports the sale process.

CCAA, s. 36

Sales Process Affidavit, Motion Record, Tab 3 at para. 31.

63. The sales process is being conducted with the assistance of an experienced investment banker and the supervision of the Monitor. It is respectfully submitted that

there is no better alternative to the sales process and that it should be approved *nunc pro tunc*.

Sales Process Affidavit, Motion Record, Tab 3 at paras. 14, 16 and 25.

***The Genuity Engagement Letter Should be Approved***

64. Canaccord Genuity is a well-known and respected provider of investment banking services and has developed a working relationship with the Prizm Entities. Canaccord Genuity has greatly assisted the Prizm Entities in their refinancing efforts to date and has gained a thorough and intimate understanding of the business operated by the Prizm Entities. Since the sales process began, Canaccord Genuity has developed an understanding of the market that would be lost if the Prizm Entities were deprived of the benefit of Canaccord Genuity's continued advice and assistance now and were required to retain a new advisor. The loss of that information and expertise would be detrimental to the sales process and would hinder or delay the process such that it would not be completed in the currently contemplated time frame. The Prizm Entities believe that the continued involvement of Genuity is essential to the completion of the sales process in a timely manner.

Sales Process Affidavit, Motion Record, Tab 3 at para 27.

65. The fee structure contained in the Genuity Engagement Letter was the subject of significant negotiation between Canaccord Genuity, Prizm Fund and Prudential and was approved by the board of trustees of Prizm Fund and consented to by Prudential

prior to the commencement of the CCAA proceedings. The Genuity Engagement Letter provides for transaction fees payable on completion of any Transaction (as defined in the Genuity Engagement Letter), with the amount of the Transaction Fee dependant on the gross proceeds generated from the transactions. The Transaction Fee is payable to Canaccord Genuity only if a sale transaction is completed and the quantum of those fees is dependent on the amount of the gross proceeds of such transaction.

Sales Process Affidavit, Motion Record, Tab 3 at paras. 28 and 29.

66. The Monitor is of the view that the fees provided for in the Genuity Engagement Letter are consistent with market practice and are reasonable.

Second Report of the Monitor dated May 26, 2011, para. 85.

67. Accordingly, the Prizm Entities respectfully request approval of the Genuity Engagement Letter *nunc pro tunc*.

### **C. The KERP Amendments Should be Approved**

68. Notwithstanding the establishment of the KERPs in their favour, two KERP participants have resigned since Justice Mesbur's order of April 29, 2011.

69. As a result, the funds allocated to them have been forfeited. The Prizm Entities are concerned that losing additional KERP participants will complicate the daily operations of the Prizm Entities and jeopardize their ongoing efforts to complete the Soul Transaction and the sales process. Management believes that the amount of the funds forfeited by the resigned KERP participants is

significantly less than the cost which would result if the remaining KERP participants left and had to be replaced.

KERP Affidavit, Motion Record, Tab 4, at paras. 11 and 12.

70. The Monitor supports the proposed amendment to the KERPs.

KERP Affidavit, Motion Record, Tab 4, at para. 13.

71. The Prizm Entities hope that the additional incentives offered by reallocation of the forfeited funds will encourage the remaining KERP participants to continue their employment with the Prizm Entities. However, further resignations by some of the remaining KERP participants before the conclusion of the CCAA proceedings are possible. In order to avoid returning to Court each time funds are forfeited as a result of a resignation of a KERP participant, the Prizm Entities are seeking authority to reallocate any funds that may be forfeited by any future resignations of the KERP participants to the remaining KERP participants with the prior consent of the Monitor.

KERP Affidavit, Motion Record, Tab 4, at para. 14.

72. The Monitor supports the granting of the requested authority to the Prizm Entities, subject to its consent.

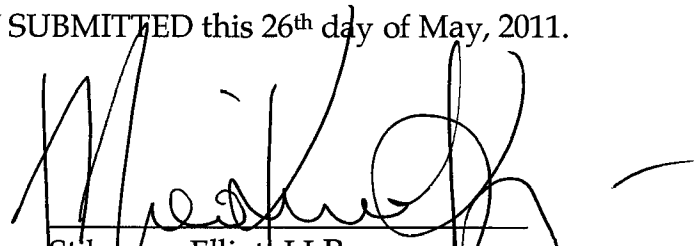
KERP Affidavit, Motion Record, Tab 4, at para. 15.

73. For the foregoing reasons, it is respectfully submitted that this Court should approve the proposed amendments to the KERPs and authorize the Prizm Entities to make further KERP amendments with the prior consent of the Monitor.

**PART IV - ORDER REQUESTED**

74. The Prizm Entities request Orders, *inter alia*:
- (a) Approving the Soul Agreement;
  - (b) Approving the Transition Services Agreement;
  - (c) Approving the Occupation Agreement;
  - (d) Granting a release in favour of the Franchisor;
  - (e) Approving, *nunc pro tunc*, and authorizing the sales process undertaken by the Prizm Entities with respect to the Remaining Restaurants;
  - (f) Approving, *nunc pro tunc*, the Genuity Engagement Letter;
  - (g) Authorizing the Prizm Entities to reallocate funds forfeited by certain KERP participants to other KERP participants; and
  - (h) Authorizing the Prizm Entities to reallocate any additional funds that may be forfeited by KERP participants to other KERP participants with the prior consent of the Monitor.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26<sup>th</sup> day of May, 2011.



Stikeman Elliott LLP  
Lawyers for the Applicants

**SCHEDULE "A"**  
**LIST OF AUTHORITIES**

1. *Re Nortel Networks Corp.* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J.)
2. *Re Consumers Packaging Inc.*, (2001), 27 C.B.R. (4th) 197 (Ont. C.A.)
3. *Re Canwest Publishing Inc.* (2010), 68 C.B.R. (5th) 233 (Ont. S.C.J.)
4. *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.)
5. *Re White Birch Paper Holding Co.* 2010 QCCS 4915
6. *Re Canwest Global Communications Corp.* [2009] O.J. No. 4788 (S.C.J.)
7. *Re Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 92 O.R. (3d) 513 (C.A.)
8. *Re Nortel Networks Corp.* (2010), 63 C.B.R. (5th) 44 (Ont. S.C.J.)
9. *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div.)
10. *Re Brainhunter Inc.* (2009), 62 C.B.R. (5th) 41 (Ont. S.C.J.)

**SCHEDULE "B"**  
**RELEVANT STATUTES**

*Bankruptcy and Insolvency Act*  
R.S.C. 1985, c. B-3

**Security for unpaid wages, etc. – bankruptcy**

81.3 (1) The claim of a clerk, servant, travelling salesperson, labourer or worker who is owed wages, salaries, commissions or compensation by a bankrupt for services rendered during the period beginning on the day that is six months before the date of the initial bankruptcy event and ending on the date of the bankruptcy is secured, as of the date of the bankruptcy, to the extent of \$2,000 – less any amount paid for those services by the trustee or by a receiver – by security on the bankrupt's current assets on the date of the bankruptcy.

**Commissions**

(2) For the purposes of subsection (1), commissions payable when goods are shipped, delivered or paid for, if shipped, delivered or paid for during the period referred to in that subsection, are deemed to have been earned in that period.

**Security for disbursements**

(3) The claim of a travelling salesperson who is owed money by a bankrupt for disbursements properly incurred in and about the bankrupt's business during the period referred to in subsection (1) is secured, as of the date of the bankruptcy, to the extent of \$1,000 – less any amount paid for those disbursements by the trustee or by a receiver – by security on the bankrupt's current assets on that date.

**Rank of security**

(4) A security under this section ranks above every other claim, right, charge or security against the bankrupt's current assets – regardless of when that other claim, right, charge or security arose – except rights under sections 81.1 and 81.2 and amounts referred to in subsection 67(3) that have been deemed to be held in trust.

**Liability of trustee**

(5) If the trustee disposes of current assets covered by the security, the trustee is liable for the claim of the clerk, servant, travelling salesperson, labourer or worker to the extent of the amount realized on the disposition of the current assets and is

subrogated in and to all rights of the clerk, servant, travelling salesperson, labourer or worker in respect of the amounts paid to that person by the trustee.

### **Claims of officers and directors**

(6) No officer or director of the bankrupt is entitled to have a claim secured under this section.

### **Non-arm's length**

(7) A person who, in respect of a transaction, was not dealing at arm's length with the bankrupt is not entitled to have a claim arising from that transaction secured by this section unless, in the opinion of the trustee, having regard to the circumstances – including the remuneration for, the terms and conditions of and the duration, nature and importance of the services rendered – it is reasonable to conclude that they would have entered into a substantially similar transaction if they had been dealing with each other at arm's length.

### **Proof by delivery**

(8) A claim referred to in this section is proved by delivering to the trustee a proof of claim in the prescribed form.

### **Definitions**

(9) The following definitions apply in this section.

“compensation”

“compensation” includes vacation pay but does not include termination or severance pay.

“receiver”

“receiver” means a receiver within the meaning of subsection 243(2) or an interim receiver appointed under subsection 46(1), 47(1) or 47.1(1).

### **Security for unpaid wages, etc. – receivership**

81.4 (1) The claim of a clerk, servant, travelling salesperson, labourer or worker who is owed wages, salaries, commissions or compensation by a person who is subject to a receivership for services rendered during the six months before the first day on which there was a receiver in relation to the person is secured, as of that day, to the extent of \$2,000 – less any amount paid for those services by a receiver or trustee – by security on the person's current assets that are in the possession or under the control of the receiver.



## **Commissions**

(2) For the purposes of subsection (1), commissions payable when goods are shipped, delivered or paid for, if shipped, delivered or paid for during the six-month period referred to in that subsection, are deemed to have been earned in those six months.

## **Security for disbursements**

(3) The claim of a travelling salesperson who is owed money by a person who is subject to a receivership for disbursements properly incurred in and about the person's business during the six months before the first day on which there was a receiver in relation to the person is secured, as of that day, to the extent of \$1,000 — less any amount paid for those disbursements by a receiver or trustee — by security on the person's current assets that are in the possession or under the control of the receiver.

## **Rank of security**

(4) A security under this section ranks above every other claim, right, charge or security against the person's current assets — regardless of when that other claim, right, charge or security arose — except rights under sections 81.1 and 81.2.

## **Liability of receiver**

(5) If the receiver takes possession or in any way disposes of current assets covered by the security, the receiver is liable for the claim of the clerk, servant, travelling salesperson, labourer or worker to the extent of the amount realized on the disposition of the current assets and is subrogated in and to all rights of the clerk, servant, travelling salesperson, labourer or worker in respect of the amounts paid to that person by the receiver.

## **Claims of officers and directors**

(6) No officer or director of the person who is subject to a receivership is entitled to have a claim secured under this section.

## **Non-arm's length**

(7) A person who, in respect of a transaction, was not dealing at arm's length with a person who is subject to a receivership is not entitled to have a claim arising from that transaction secured by this section unless, in the opinion of the receiver, having regard to the circumstances — including the remuneration for, the terms and conditions of and the duration, nature and importance of the services rendered — it is reasonable to conclude that they would have entered into a substantially similar transaction if they had been dealing with each other at arm's length.

## **Proof by delivery**

(8) A claim referred to in this section is proved by delivering to the receiver a proof of claim in the prescribed form.

## **Definitions**

(9) The following definitions apply in this section.

“compensation”

“compensation” includes vacation pay but does not include termination or severance pay.

“person who is subject to a receivership”

“person who is subject to a receivership” means a person any of whose property is in the possession or under the control of a receiver.

“receiver”

“receiver” means a receiver within the meaning of subsection 243(2) or an interim receiver appointed under subsection 46(1), 47(1) or 47.1(1).

## **Priority of claims**

136. (1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:

...

(d) the amount of any wages, salaries, commissions, compensation or disbursements referred to in sections 81.3 and 81.4 that was not paid

## *Companies' Creditors Arrangement Act* R.S.C. 1985, c. C-36

## **Restriction – employees, etc.**

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

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

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

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

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

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

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

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

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

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

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

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

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

## **General power of court**

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

## **Restriction on disposition of business assets**

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

## **Notice to creditors**

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

## **Factors to be considered**

(3) In deciding whether to grant the authorization, the court is to consider, among other things,

- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (b) whether the monitor approved the process leading to the proposed sale or disposition;
- (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
- (d) the extent to which the creditors were consulted;
- (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
- (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

## **Additional factors – related persons**

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

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

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

### **Related persons**

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

(a) a director or officer of the company;

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

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

### **Assets may be disposed of free and clear**

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

### **Restriction – employers**

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

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

Court File No: CV-11-9159-00CL

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT  
OF PRISZM INCOME FUND, PRISZM CANADIAN OPERATING TRUST, PRISZM INC. AND KIT FINANCE INC.

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

Proceeding commenced at Toronto

**FACTUM OF THE APPLICANTS  
(RETURNABLE MAY 30, 2011 RE SALE  
APPROVAL, APPROVAL OF SALE PROCESS  
AND KERPS AMENDMENTS)**

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