

Court File No.

**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 **SFP CANADA LTD.**

Applicant

**FACTUM OF THE APPLICANT
(Application for an Initial Order under the CCAA)**

January 23, 2020

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FACTUM OF THE APPLICANT

PART I -NATURE OF THIS APPLICATION

1. This factum is filed in support of an application by SFP Canada Ltd. (“**SFP Canada**”, or the “**Applicant**”) for an Initial Order and related relief under the *Companies’ Creditors Arrangement Act*.¹ SFP Canada seeks CCAA protection to implement a responsible, controlled, and orderly wind-down of its operations to maximize realizable value for stakeholders.

2. SFP Canada currently operates 76 retail stores across Canada under the *Papyrus*, *Carlton Cards / Cartes Carleton*, and *Paper Destiny* brand names, employing approximately 405 employees. SFP Canada is wholly owned by Schurman Fine Papers (“**SFP U.S.**”, and together with SFP Canada and SFP Franchise Corporation, the “**Schurman Group**”), the leading privately held specialty retailer of personal expression products in North America.

3. The Schurman Group is insolvent and cannot continue operating as a going concern. Under certain 2009 agreements, American Greetings Corporation (“**American Greetings**”) supplied a majority of the products sold by the Schurman Group and licensed certain trademarks under which the Schurman Group’s stores operate. After the Schurman Group fell behind on payments, American Greetings purported to terminate those agreements on December 5, 2019.

4. Due to American Greetings’ purported termination of the agreements, SFP U.S. and SFP Franchise Corporation (together, the “**U.S. Debtors**”) concluded they could not continue as a going concern. On January 22, 2020, the U.S. Debtors resolved to file voluntary petitions for relief under

¹ R.S.C. 1985, c. C-36, as amended [CCAA].

Chapter 11 of the U.S. Bankruptcy Code (the “**Chapter 11 Proceedings**”) to pursue an orderly liquidation.

5. Similarly, SFP Canada can no longer operate as a going concern. Without operational support from SFP U.S. or product from American Greetings, SFP Canada is unable to meet its liabilities as they come due and is therefore insolvent. SFP Canada cannot continue operating without the full support of its U.S. affiliates, on whom SFP Canada is entirely dependent. Moreover, SFP U.S.’s bankruptcy filing will result in events of default under certain of SFP Canada’s 76 retail leases, empowering landlords to terminate such leases – and accelerating SFP Canada’s need for relief.

6. SFP Canada urgently requires the flexibility of the CCAA, an immediate stay of proceedings, and breathing space from the unilateral exercise of creditor remedies as it prepares to wind down operations. If an Initial CCAA Order is granted, SFP Canada intends promptly to file a motion seeking an Order approving a proposed plan (the “**Realization Plan**”) to liquidate its remaining inventory for the benefit of stakeholders. The Realization Plan is currently contemplated to run till the end of February 2020. It must be commenced as soon as possible to limit costs, take advantage of seasonal sales increases around Valentine’s Day, and maximize recoveries.

7. All terms not defined herein have the meanings ascribed to them in the affidavit of Craig Boucher dated January 22, 2020 (the “**Boucher Affidavit**”). All references to monetary amounts are in U.S. dollars unless otherwise noted.

PART II -FACTS

A. The Business of the Applicant

8. The Schurman Group operates 254 retail stores across the United States and Canada with approximately 1,400 employees.² SFP Canada is the group's operating subsidiary in Canada, selling stationary, greeting cards, paper products, gift items, and other products.³

9. SFP Canada's chief place of business is in Ontario. 35 of SFP Canada's 76 stores are in Ontario, SFP Canada has more sales in Ontario than in any other province, and a plurality of SFP Canada's employees work in Ontario.⁴ All back-office support and overall corporate guidance functions for SFP Canada are provided by SFP U.S.⁵

10. SFP Canada owns no real property. All its retail operations are conducted in leased facilities.⁶ Typical of retail store leases in Canada, certain of SFP Canada's leases contain operating covenants and going-out-of-business sale restrictions.⁷

11. SFP U.S. has provided an indemnity to landlords under some of SFP Canada's leases. Under some such leases, it is an event of default for SFP U.S. to take the benefit of any insolvency statute.⁸ The Chapter 11 Proceedings therefore constitute events of default entitling some landlords to terminate their leases.⁹

² Boucher Affidavit at para 7.

³ Boucher Affidavit at paras 7 and 22.

⁴ Boucher Affidavit at para 24.

⁵ Boucher Affidavit at para 50.

⁶ Boucher Affidavit at para 35.

⁷ Boucher Affidavit at para 37.

⁸ Boucher Affidavit at para 38.

⁹ Boucher Affidavit at para 38.

12. As of January 20, 2020, SFP Canada employed approximately 82 full-time and 323 part-time employees.¹⁰ The vast majority of SFP Canada's employees are store-level employees. SFP Canada's employees are all non-unionized and there are no applicable collective agreements.¹¹

13. SFP Canada expects that all employees will be provided with working notice of termination on, or shortly after, commencement of these CCAA proceedings. SFP Canada anticipates it will continue to employ many employees through the Realization Process of SFP Canada's inventory, furniture, fixtures, and equipment (the "**Realization Assets**").¹²

(a) Relationship to American Greetings

14. American Greetings is the world's second-largest producer of greeting cards. In 2009, the Schurman Group entered into a transaction with American Greetings and its affiliates (the "**American Greetings Group**") that fundamentally transformed the Schurman Group's business.¹³

15. Under a Purchase and Sale Agreement dated March 17, 2009, the Schurman Group sold its wholesale business and the *Papyrus* brand and related trademarks to the American Greetings Group.¹⁴ As part of the transaction, the Schurman Group acquired the retail business operated by American Greetings in Canada and the United States.

16. The Schurman Group and the American Agreements Group entered into several ancillary agreements (the "**American Greetings Agreements**"), including:

¹⁰ Boucher Affidavit at para 46.

¹¹ Boucher Affidavit at para 54.

¹² Boucher Affidavit at para 48.

¹³ Boucher Affidavit at para 25.

¹⁴ Boucher Affidavit at para 26.

- (a) **The Supply Agreement:** American Greetings agreed to supply products sold by the Schurman Group in their retail stores;
- (b) **The Trademark Agreement:** American Greetings agreed to provide a royalty-free license to SFP U.S. and SFP Canada for use of the trademarks under which the Schurman Group's stores operate (the "**Trademarks**");
- (c) **The Services Agreements:** the Schurman Group agreed to collect and provide point-of-sale data to American Greetings, and provide certain marketing services to American Greetings, each in exchange for a monthly fee.

17. Due to the American Greetings Agreements, the Schurman Group became highly dependent upon American Greetings.¹⁵ The Schurman Group relied on American Greetings for the majority of the goods it sold and for the Trademarks required to operate its retail locations.¹⁶

(b) Merchandise and Services Provided by SFP U.S.

18. Products purchased by SFP Canada from American Greetings represent the majority of SFP Canada's gross sales.¹⁷ SFP Canada also sells products from other third-party vendors.¹⁸

19. Approximately 30% of all merchandise sold by SFP Canada is purchased by SFP U.S. and shipped to SFP Canada's retail stores directly from SFP U.S. distribution centres.¹⁹ The remaining 70% of merchandise is purchased directly by SFP Canada.²⁰ The cost of merchandise purchased

¹⁵ Boucher Affidavit at para 28.

¹⁶ Boucher Affidavit at para 28.

¹⁷ Boucher Affidavit at para 15.

¹⁸ Boucher Affidavit at para 39.

¹⁹ Boucher Affidavit at para 39.

²⁰ Boucher Affidavit at para 39.

by SFP U.S. on behalf of SFP Canada is recorded by SFP U.S. as an intercompany receivable and SFP Canada periodically transfers funds to SFP U.S. in payment for merchandise received.²¹

20. SFP Canada is also dependent on SFP U.S. for many administrative and business support services. These include management, strategic and marketing functions, logistics, and day-to-day operational needs such as executive, legal, accounting, finance, banking, cash-management, insurance, information technology support, and warehousing services (the “**Shared Services**”).²²

21. SFP U.S. charges SFP Canada approximately \$180,000 per month for provision of certain (but not all) of the Shared Services (excluding distribution centres merchandising, advertising, and customer service costs).²³ As part of this proposed CCAA filing, SFP Canada has prepaid SFP U.S. for provision of all Shared Services from January through March 2020 (described below).²⁴

22. SFP Canada cannot function without the Shared Services provided by SFP U.S. SFP Canada does not have any head office or senior management employees in Canada.²⁵ Without the Shared Services, SFP Canada would be forced to cease operations and abruptly shut down.²⁶

23. SFP U.S. will only continue supporting SFP Canada through the Shared Services (i) for the limited purpose of an orderly wind-down with SFP Canada in control of its assets and property; and (ii) provided the wind-down is supervised with this Court in accordance with the CCAA.²⁷

²¹ Boucher Affidavit at para 40.

²² Boucher Affidavit at para 41.

²³ Boucher Affidavit at para 44.

²⁴ Boucher Affidavit at para 44.

²⁵ Boucher Affidavit at para 43.

²⁶ Boucher Affidavit at para 15.

²⁷ Boucher Affidavit at para 89.

(c) Other Essential Services

24. SFP Canada does not have any distribution centres. It relies wholly on third-party logistics services providers that ship inventory from SFP U.S.'s distribution centre or directly from the manufacturers to SFP Canada's retail stores.²⁸ SFP Canada relies on timely and frequent delivery of critical inventory items. Any interruption in this supply, however brief, would disrupt SFP Canada's operations to the detriment of SFP Canada's Realization Process.²⁹

25. SFP Canada retail stores are supplied with essential utilities, at SFP Canada's expense but which are funded by SFP U.S.³⁰ The continuous provision of these utilities is essential to operations and the orderly wind-down of SFP Canada's business.

B. Financial Position of SFP Canada

26. SFP U.S. prepares unaudited financial reporting packages, including stand-alone balance sheets, for SFP Canada.³¹ As at November 30, 2019, the assets of SFP Canada had an unaudited book value of approximately \$9.6 million and liabilities of approximately \$11.8 million.³²

27. For the period from February to November 20, 2019, SFP Canada's net loss was \$2,375,000 and its EBITDA was negative \$1,672,000.^{28,33}

²⁸ Boucher Affidavit at para 57.

²⁹ Boucher Affidavit at para 58.

³⁰ Boucher Affidavit at para 59.

³¹ Boucher Affidavit at para 67.

³² Boucher Affidavit at paras 68-69.

³³ Boucher Affidavit at para 71.

(a) Intercompany Transactions

28. On January 17, 2020, SFP Canada paid \$3 million to SFP U.S. This amount, among other things, (i) reimbursed SFP U.S. for certain professional fees incurred in preparation for these CCAA proceedings, (ii) reimbursed SFP U.S. for SFP Canada's portion of certain prepetition costs paid by SFP U.S., including Shared Services for the month of December and January; (iii) prepaid \$700,000 worth of inventory that will be sent by SFP U.S. to SFP Canada to enhance sales during the Realization Process, (iv) prepaid the expected costs of the Shared Services during the Realization Process, and (v) replenished professional retainers for the CCAA proceedings.³⁴

29. The proposed Initial Order provides that SFP Canada will not make any payments to or on account of any related party until further Order of the Court.³⁵

(b) Secured Debt

(i) Wells Fargo Credit Agreement

30. SFP U.S., SFP Franchise (with SFP U.S., the "**U.S. Borrowers**") and SFP Canada are parties to an Amended and Restated Loan Agreement (as amended, the "**Wells Fargo Credit Agreement**").with Wells Fargo Bank ("**Wells Fargo**") and certain of its affiliates.³⁶

31. The Wells Fargo Credit Agreement permits the U.S. Borrowers to borrow funds in U.S. dollars (the "**U.S. Revolving Facility**") and SFP Canada may borrow funds under Canadian dollars (the "**Canadian Revolving Facility**") up to a collective potential maximum of \$35 million on a

³⁴ Boucher Affidavit at para 65.

³⁵ Boucher Affidavit at para 66.

³⁶ Boucher Affidavit at para 73.

revolving basis.³⁷ As at January 20, 2020, the U.S. Borrowers had drawn down approximately \$6.3 million under the U.S. Revolving Facility. SFP Canada has no current outstanding balance under the Canadian Revolving Facility.³⁸

32. Each borrower has granted a security interest in their present and after acquired property to secure all the obligations under the Wells Fargo Credit Agreement. The assets of SFP Canada also secure obligations under the Wells Fargo Credit Agreement pursuant to a Canadian Pledge and Security Agreement.³⁹ The U.S. Borrowers are jointly and severally liable for all of the obligations under the Wells Fargo Credit Agreement. However, SFP Canada is not jointly and severally liable for the obligations owed by the U.S. Borrowers.⁴⁰

33. American Greetings has provided a limited guarantee (as amended, the “**American Greetings Guarantee**”) guaranteeing the obligations owing by the Schurman Group under the Wells Fargo Credit Agreement up to \$10 million.⁴¹

34. The Schurman Group’s defaults under the American Greetings Agreements and the purported termination of those agreements by American Greetings constituted events of default under the Wells Fargo Credit Agreement.⁴² Wells Fargo has the right to cease further advances, demand immediate payment of all outstanding obligations, and exercise remedies including foreclosure upon security. While Wells Fargo has not chosen to exercise any of these rights or

³⁷ Boucher Affidavit at para 74.

³⁸ Boucher Affidavit at para 74.

³⁹ Boucher Affidavit at para 77.

⁴⁰ Boucher Affidavit at para 78.

⁴¹ Boucher Affidavit at para 79.

⁴² Boucher Affidavit at para 80.

remedies at this time, it has expressly reserved all rights and remedies under the Wells Fargo Credit Agreement.⁴³

(ii) American Greetings Security Agreement

35. On June 25, 2019, SFP U.S., SF Franchise, SFP Canada and American Greetings entered into a Security Agreement (the “**American Greetings Security Agreement**”), wherein SFP U.S., SFP Franchise, and SFP Canada granted American Greetings a continuing lien and security interest over their present and after-acquired property to secure all obligations owing under the American Greetings Agreements, the American Greetings Guarantee, and any other documents, purchase orders, or other agreements between the Schurman Group and American Greetings Group.⁴⁴ A Subordination and Intercreditor Agreement provides that Wells Fargo has first priority over American Greetings with respect to the Collateral (as defined in the agreement).⁴⁵

C. Events Leading to these CCAA Proceedings

36. In the past few years the Schurman Group has faced various challenges, resulting in growing liquidity pressures. Beyond the general downturn in the brick-and-mortar retail industry, the Schurman Group has suffered an erosion of profitability due to unique factors including:

- (a) the capital costs incurred in refurbishing or closing a large number of old and underperforming retail stores acquired from American Greetings in 2009;

⁴³ Boucher Affidavit at para 80.

⁴⁴ Boucher Affidavit at para 81.

⁴⁵ Boucher Affidavit at para 84.

- (b) the renegotiation of the Services Agreements, which reduced the fees payable to the Schurman Group;
- (c) the decline in value of the Canadian dollar since 2009, which significantly reduced the profitability of the Schurman Group's Canadian operations; and
- (d) various pricing decisions made by American Greetings, including a significant price increase in their products and imposing a uniform price for products in both the United States and Canada, causing a decline in revenues for SFP Canada.⁴⁶

37. These financial challenges caused the Schurman Group to fall behind on amounts owing to American Greetings under the Supply Agreement.⁴⁷ As of the date of this filing, SFP U.S. owed \$38,706,673 and SFP Canada owed \$9,141,437 to American Greetings.⁴⁸

38. Over the past year the Schurman Group has taken steps to address its operational and liquidity issues, including negotiating rent relief and rent holidays and negotiating with vendors to obtain credit on more favorable terms for the supply of services.⁴⁹ In addition, the Schurman Group aggressively pursued negotiations with a party that had expressed interest in acquiring equity in the Schurman Group, which would have provided additional liquidity to the Schurman Group.⁵⁰

39. On December 5, 2019, before the Schurman Group could consummate an equity transaction or otherwise identify a viable path forward, American Greetings abruptly notified SFP U.S. that it was immediately terminating the American Greetings Agreements, purportedly

⁴⁶ Boucher Affidavit at para 85.

⁴⁷ Boucher Affidavit at para 86.

⁴⁸ Boucher Affidavit at para 10.

⁴⁹ Boucher Affidavit at para 86.

⁵⁰ Boucher Affidavit at para 86.

because the Schurman Group was in default under those agreements.⁵¹ American Greetings ceased supplying any products to the Schurman Group at this time.

40. Since the purported termination of the American Greetings Agreements, the Schurman Group engaged in further discussions with American Greetings in an effort to agree on new terms by which the Schurman Group could continue using the Trademarks and purchasing products from American Greetings.⁵² The Schurman Group presented a term sheet to the American Greetings management team.⁵³ However, the term sheet was rejected by American Greetings' board.⁵⁴ American Greetings ultimately advised it was unwilling to engage in further negotiations.⁵⁵

(a) Urgent Need for Relief

41. Due to the purported termination of the American Greetings Agreements and other financial and operational pressures facing the Schurman Group, SFP U.S. concluded it can no longer continue going concern operations. The U.S. Debtors resolved to commence the Chapter 11 Proceedings to pursue an orderly liquidation of retail stores in the U.S.⁵⁶

42. Likewise, SFP Canada cannot continue going concern operations and requires CCAA protection. Without further operational support from SFP U.S. and products from American Greetings, SFP Canada is unable to meet its liabilities as they become due and is therefore

⁵¹ Boucher Affidavit at para 12.

⁵² Boucher Affidavit at para 13.

⁵³ Boucher Affidavit at para 87.

⁵⁴ Boucher Affidavit at para 87.

⁵⁵ Boucher Affidavit at para 87.

⁵⁶ Boucher Affidavit at para 14.

insolvent.⁵⁷ SFP Canada has no option but to cease operations and conduct an immediate wind-down for the benefit of its stakeholders.⁵⁸

43. SFP Canada's urgent need for CCAA protection is accelerated by the Chapter 11 Filing, which constitutes an event of default under certain of SFP Canada's leases. This would entitle some landlords to terminate their leases, further eroding realizable value.⁵⁹

44. SFP Canada therefore urgently requires a stay of proceedings and breathing space from the unilateral exercise of creditor remedies as provided by the CCAA to pursue an orderly wind-down of its operations.⁶⁰ SFP Canada requires the flexibility of the court-supervised CCAA process to implement the liquidation of its remaining inventory with the assistance of a third-party professional liquidator and maximize realizable value for stakeholders.⁶¹

(b) Proposed Realization Process and Advisors

45. Should the proposed Initial Order be granted, SFP Canada intends to an urgent motion immediately after the granting of the Initial Order seeking an Order (the "**Proposed Sale Approval Order**") approving proposed sale guidelines for the orderly liquidation of the Realization Assets, and approving a consulting agreement (the "**Consulting Agreement**") entered into on January 17, 2020 between the Schurman Group and a professional liquidation consultant (the "**Consultant**").⁶²

⁵⁷ Boucher Affidavit at para 91.

⁵⁸ Boucher Affidavit at para 88.

⁵⁹ Boucher Affidavit at para 90.

⁶⁰ Boucher Affidavit at para 92.

⁶¹ Boucher Affidavit at para 17.

⁶² Boucher Affidavit at para 108.

46. The Consultant was selected by the Schurman Group in consultation with its advisors prior to filing for creditor protection in the U.S. and Canada.⁶³ The Consultant has experience in the North American retail market and have worked on numerous other retail liquidations.⁶⁴ SFP Canada and its advisors are of the view that engaging the Consultant to assist with the sale of the Realization Assets will produce better outcomes for stakeholders than attempting to liquidate without professional assistance.⁶⁵ The Consultant is currently in the process of visiting store locations in Canada and the United States in anticipation of the formal Realization Process.⁶⁶

47. To assist in implementing the Realization Process, SFP Canada engaged Mackinac Partners to retain Craig Boucher and Michael Nowland as Chief Restructuring Officers (“**CROs**”) of SFP Canada. SFP now seeks this Court’s approval for that engagement in the Initial Order. Appointing the CROs would place management of the proposed Realization Process in the hands of experienced professionals familiar with retail insolvencies, enhancing the likelihood of maximizing value for stakeholders. The CROs were previously retained by the Schurman Group as Financial Advisors and CROs in anticipation of the Chapter 11 Proceedings.⁶⁷

PART III -ISSUES AND THE LAW

48. The issues to be considered on this Application are whether:

- (a) SFP Canada should be granted CCAA protection:
 - (i) SFP Canada is insolvent;
 - (ii) SFP Canada’s chief place of business is Ontario;

⁶³ Boucher Affidavit at paras 112-114.

⁶⁴ Boucher Affidavit at para 115-116.

⁶⁵ Boucher Affidavit at para 125.

⁶⁶ Boucher Affidavit at para 19.

⁶⁷ Boucher Affidavit at para 3.

- (iii) the Realization Process is appropriate for CCAA protection;
- (iv) it is appropriate to grant SFP Canada expedited relief;
- (b) the relief sought on this application is necessary and SFP has acted in good faith;
- (c) this Court should approve the appointment of the Monitor and the CROs; and
- (d) this Court should approve the Court-ordered charges:
 - (i) The Administration Charge;
 - (ii) The Directors' Charge.

A. SFP Canada should be granted CCAA protection

49. This Court is empowered to grant CCAA protection to a “debtor company” (a company having assets or doing business in Canada) where the total of claims against the debtor exceeds \$5 million. SFP Canada is a Canadian corporation with total claims against it exceeding \$5 million.

50. A “debtor company” means, *inter alia*, a company that is insolvent.⁶⁸ Whether a company is insolvent is determined by reference to the three disjunctive tests for an “insolvent person” in the *Bankruptcy and Insolvency Act*.⁶⁹ An insolvent debtor company is therefore one

- a) [which] is for any reason unable to meet [its] obligations as they generally become due,
- b) [which] has ceased paying [its] current obligations in the ordinary course of business as they generally become due, or
- c) 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 [its] obligations, due and accruing due;

51. SFP Canada is insolvent pursuant to sections (a) and (c) of this definition.

⁶⁸ CCAA sections 2 and 3(1).

⁶⁹ RSC 1985, c B-3, as amended [the BIA].

52. SFP Canada is insolvent within the meaning of section (a) because it cannot meet its obligations as they come due. In a CCAA proceeding, this Court in *Stelco* interpreted section (a) to mean a debtor “is insolvent if it is reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring.”⁷⁰

53. SFP Canada satisfies the *Stelco* test for insolvency under section (a) because it is “reasonably expected to run out of liquidity” imminently. Due to American Greetings’ refusal to supply further merchandise, SFP Canada will soon run out of inventory, and it is purportedly unable to use the Trademarks required to operate its business. Additionally, SFP Canada requires the operational support of SFP U.S., which will only provide such support during a wind-down under the CCAA. The prospect of a restructuring has been foreclosed. Since SFP Canada cannot operate as a going concern, SFP Canada is no longer able to meet its obligations.

54. SFP Canada is also insolvent under section (c) of the BIA definition. As this Court affirmed in *Stelco*, section (c) is given an expanded meaning in CCAA proceedings.⁷¹ According to *Stelco*, section (c) asks whether the total of *all* liabilities of the debtor exceeds either (i) a fair valuation of its assets, or (ii) the proceeds of a fairly-conducted asset sale. As a comparison of SFP Canada’s assets and liabilities illustrates, SFP Canada’s liabilities exceed the fair value of its assets, satisfying the standard for insolvency in section (c). Accordingly, SFP Canada is an insolvent debtor company to which the CCAA applies.

(a) This Court has jurisdiction over SFP Canada’s CCAA proceeding

⁷⁰ *Stelco* at para 26.

⁷¹ *Re Stelco Inc.*, 2004 CarswellOnt 1211 (ONSC), leave to appeal to ONCA ref’d, 2004 CarswellOnt 2936, leave to appeal to SCC ref’d, 2004 CarswellOnt 5200 [*Stelco*] at para 63.

55. Subsection 9(1) of the CCAA provides that an application for a stay of proceedings under the CCAA may be made to a court in the province in which the debtor company's head office or chief place of business in Canada is situated.

56. SFP Canada's chief place of business is in Ontario. Although SFP Canada's registered head office is in New Brunswick, the vast majority of SFP Canada's business is transacted in Ontario. 35 of SFP Canada's 76 stores are located in Ontario, more than in any other province in which SFP Canada operates. SFP Canada also generates more sales in Ontario than in any other province. Further, a plurality of SFP Canada's 405 employees are located in Ontario. CCAA courts in similar retail CCAA proceedings have found that these factors demonstrate that a debtor's chief place of business is in Ontario even if its registered head office is elsewhere, establishing that this Court has jurisdiction over the debtor's CCAA proceeding.⁷²

(b) The Realization Process is appropriate for the CCAA

57. SFP Canada intends to use these CCAA proceedings to implement a responsible, controlled, and orderly wind-down of its business to maximize realizable value for its stakeholders. Although there is no prospect that SFP Canada will effect a going-concern restructuring, the flexibility and protection of the CCAA will ensure an effective Realization Process.

58. It is well-established that a debtor company may seek CCAA protection to pursue a liquidation or wind-down. A CCAA proceeding "may involve a winding-up or liquidation of a company or simply a substantial downsizing of its business operations, provided the same is

⁷² For example, see *In the matter of a plan of compromise or arrangement of Forever XXI ULC* (September 21, 2019) Toronto Court File No. CV-19-00628233-00CL (ONSC), Hainey J. (Initial Order Endorsement) [*Forever 21* Initial Order Endorsement].

proposed in the best interests of the creditors generally.”⁷³ This Court has recognized that “the CCAA may be used to sell substantially all of the assets of a debtor company to preserve it as a going concern, or to wind-up or liquidate it.”⁷⁴

59. Significantly, this Court has recognized that it is appropriate to use CCAA proceedings to effect the wind-down of retail debtors on multiple occasions, including in the CCAA proceedings of Target Canada,⁷⁵ Express Fashion Apparel Canada,⁷⁶, and Forever 21 Canada.⁷⁷

60. An orderly wind-down of SFP Canada’s business will require the involvement of many stakeholders, including employees, landlords, critical suppliers – and, because SFP Canada cannot source all services required for its day-to-day operations, the support and cooperation of SFP U.S.

61. SFP U.S. will only agree to continue providing the Shared Services if: (i) such support is for the limited purpose of an orderly wind-down with SFP Canada remaining in control of its assets and property; and (ii) the wind-down is supervised this Court in accordance with the CCAA. SFP Canada is wholly dependent on the Shared Services to operate; without SFP U.S.’s agreement to continue providing the Shared Services, any Realization Process would be impeded and chaotic. Court supervision under the CCAA is thus essential to maximize recover for creditors.

(c) The circumstances facing SFP Canada warrant expedited relief

62. If the proposed Initial Order is granted, SFP Canada and its advisors will promptly seek this Court’s approval of the Proposed Sale Approval Order, with the goal of implementing the

⁷³ *Lehndorff General Partner Ltd, Re* (1993), 17 CBR (3d) 24 (Ont Gen Div), 1993 CarswellOnt 183 at para 7.

⁷⁴ *First Leaside Wealth Management Inc, Re*, 2012 ONSC 1299 at para 32.

⁷⁵ *Target Canada Co, Re*, 2015 ONSC 303 [*Target*] at para 31.

⁷⁶ *Express Fashion Apparel Canada Inc and Express Canada GC GP, Inc, Re* (May 4, 2017) Ont SCJ [Commercial List] (Initial Order) at para 10.

⁷⁷ *Forever 21* Initial Order Endorsement.

Realization Process starting Saturday, January 25. This Court is empowered to grant expedited supplementary relief before the expiry of the initial stay period in exceptional circumstances. SFP Canada submits that such expedited relief is warranted here.

63. The CCAA provides a flexible, pragmatic statutory scheme designed to address the reality of complex insolvency proceedings. A pillar of this statutory scheme is the Court's broad discretionary power to make "any order it considers appropriate in the circumstances".⁷⁸

64. Although section 11.001 of the CCAA cautions that courts should generally grant only relief "reasonably necessary for the continued operation of the debtor company" during the initial stay period, CCAA courts retain their longstanding discretion to grant supplemental relief in appropriate circumstances. As Morawetz J. recently noted in *Lydian*, consistent with CCAA courts' general power to make "any order it considers appropriate", "exceptional circumstances" may exist in which it is appropriate for this Court to grant expedited supplementary relief before the expiry of the initial 10-day stay period.⁷⁹

65. Whether there are "exceptional circumstances" facing a CCAA debtor is a fact-specific inquiry. SFP Canada submits that on the facts before this Court, exceptional circumstances exist to warrant expedited relief: a prompt hearing for approval of the Proposed Sale Approval Order to facilitate the scheduled implementation of the Realization Process.

66. The proposed Realization Process is currently contemplated to run till the end of February – 37 days after the filing of this Application. If SFP Canada is forced to delay seeking the Proposed

⁷⁸ CCAA, s. 11.

⁷⁹ *Lydian International Limited, Re*, 2019 ONSC 7473 [*Lydian*] at paras 26 and 59.

Sale Approval Order for 10 days following the initial filing, that period will be reduced to 27 days. SFP Canada will lose nearly one-third of the potential time for its Realization Process.

67. The Realization Process must be commenced as soon as possible to maximize recoveries and limit costs because:

- (a) The current schedule will minimize costs by allowing the Schurman Group to exit its retail stores by the end of February.
- (b) If the Proposed Sale Approval Order is granted immediately after the Initial Order, it will add an additional weekend on which sales can take place, which will likely result in greater recoveries.
- (c) Valentine's Day, a significant holiday for sale of the Schurman Group's products, occurs during the proposed Realization Process. The Consultant must begin advertising as soon as possible to maximize sales in the run up to that holiday.⁸⁰

68. In the circumstances, any delay in commencing the formal Realization Process may compromise the net recoveries generated from the sale of SFP Canada's Realization Assets.

69. Promptly implementing the Realization Process may support SFP Canada's going-concern operations through the initial stay period. Cash flow projections demonstrate that SFP Canada has sufficient liquidity to continue going-concern operations during the proposed stay period, provided that the Realization Process commences as forecast.⁸¹

⁸⁰ Boucher Affidavit at para 109.

⁸¹ Boucher Affidavit at para 104.

B. The relief sought is necessary and the Applicant has acted in good faith

70. As noted above, section 11 of the CCAA empowers this Court with broad discretion to “make any order that it considers appropriate in the circumstances”. Section 11.001 requires that any relief under section 11 sought during the initial stay period must be “reasonably necessary for the continued operation of the debtor company in the ordinary course of business” during the initial ten-day stay period.

71. SFP Canada has complied with section 11.001 by limiting the relief sought on this application to that which is “reasonably necessary” for SFP Canada’s continued operations. In compliance with section 18.6, SFP Canada has acted in good faith in bringing this Application.

C. The Monitor and the CROs should be appointed

72. Pursuant to s. 11.7 of the CCAA, when an Initial Order is made in respect of a CCAA debtor company the Court shall at the same time appoint a Monitor. In addition to the proposed Monitor, this Court should approve the engagement of the CROs. The CROs each have over 20 years’ experience as restructuring advisory professionals, including with retail insolvencies. Both previously served as chief restructuring officers for companies in Chapter 11 proceedings.⁸²

73. The appointment of the CROs places the management of the proposed Realization Process in the hands of experienced professionals and will enhance the likelihood that SFP Canada will be able to generate maximum value on an efficient timeline.⁸³

⁸² Boucher Affidavit at para 96.

⁸³ Boucher Affidavit at para 96.

D. The Administration Charge and the Directors' Charge should be authorised

(a) Administration Charge

74. As is typical in CCAA proceedings, the proposed Initial Order creates a first-ranking Administration Charge up to a maximum of CAD \$1,000,000 over the present and future assets, property, and undertakings of SFP Canada (the “**Property**”) to secure the fees and disbursements of the Proposed Monitor and its counsel, the Applicant’ counsel, and the CRO.⁸⁴ The services of these advisors are critical to ensuring an orderly Realization Process.

75. Section 11.52 of the CCAA gives this Court the jurisdiction to grant a priority charge for the fees and expenses of financial, legal and other advisors or experts.⁸⁵ In *Canwest Publishing*, Pappal J. provided a list of factors to be considered in approving an administration charge, including: (a) the size and complexity of the businesses under CCAA protection; (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 is fair and reasonable; (e) the position of secured creditors likely to be affected by the charge; and (f) the position of the Monitor.⁸⁶ These factors have been applied in numerous subsequent proceedings.⁸⁷

76. The Administration Charge satisfies the *Canwest* factors and should be granted. Further, the amount of the Administration Charge is limited to what is “reasonably necessary” for the initial

⁸⁴ Boucher Affidavit at para 100.

⁸⁵ CCAA, s. 11.52.

⁸⁶ *Canwest Publishing/Publications Canwest Inc, Re*, 2010 ONSC 222 at para 54.

⁸⁷ See for example *Target* at paras 74 and 75; *U.S. Steel Canada Inc, Re*, 2014 ONSC 6145 at paras 23 and 24; *Cinram International Inc, Re*, 2012 ONSC 3767 [Comm List] at para 84.

stay period. The Realization Process will require extensive input from advisors and there is an immediate need for such advice.⁸⁸ The proposed Monitor supports the Administration Charge.

(b) Directors' Charge

77. In winding down its business and implementing the Realization Process, SFP Canada will benefit from the guidance and experience of SFP Canada's director and officers. However, in insolvency proceedings the director may be held liable for certain of SFP Canada's obligations. Accordingly, SFP Canada proposes to grant a charge in favour of the Directors in the amount of CAD \$1.5 million (the "**Directors' Charge**") as security for the director's and officers' potential liabilities. The Directors' Charge would be subordinate to the proposed Administration Charge.⁸⁹

78. SFP Canada's director and its past and former officers are potential beneficiaries of director and officer liability insurance (the "**D&O Insurance**") with a \$5 million aggregate limit. These coverage limits are shared with the directors and officers of SFP U.S. and SFP Franchise. In light of the Schurman Group's insolvency, this policy does not provide sufficient coverage against the potential liability the directors and officers could incur in these CCAA proceedings.⁹⁰

79. The Directors' continued service and involvement in these proceedings is conditional upon the granting of the Directors' Charge.⁹¹

80. Pursuant to s. 11.51 of the CCAA, the Court has specific authority to grant a "super priority" charge to the directors and officers of a company as security for the indemnity provided by the company in respect of certain statutory obligations.⁹² Factors to be considered include: (a)

⁸⁸ *Lydian* at para 47.

⁸⁹ Boucher Affidavit at para 103.

⁹⁰ Boucher Affidavit at para 102.

⁹¹ Boucher Affidavit at para 103.

⁹² CCAA, s. 11.51.

whether notice has been given to secured creditors; (b) whether the amount is appropriate; (c) whether the Applicant could obtain adequate indemnification insurance for the Directors at a reasonable cost; and (d) whether the charge indemnifies gross negligence or willful misconduct.⁹³

81. The Directors' Charge is reasonably necessary for SFP Canada's continued operations during the initial stay period.⁹⁴ The amount of the Directors' Charge is limited to what is reasonably necessary to ensure the continued participation of the Directors in this CCAA proceeding, and SFP Canada has been unable to acquire sufficient indemnification insurance on a time-sensitive basis. Affected creditors will have the benefit of the ten-day initial stay period as notice of the charge.

PART IV – NATURE OF THE ORDER SOUGHT

82. For all of the reasons above, the Applicant submit that this Court should grant the relief requested and issue an Order substantially in the form of the draft Order attached as Schedule "B" to the Notice of Application.

83. ALL OF WHICH IS RESPECTFULLY SUBMITTED:



Osler, Hoskin & Harcourt LLP

⁹³ *Lydian* at para 53.

⁹⁴ Boucher Affidavit at para 103.

SCHEDULE “A”: LIST OF AUTHORITIES

Case law

1. *Canwest Publishing/Publications Canwest Inc, Re*, 2010 ONSC 222
2. *Cinram International Inc, Re*, 2012 ONSC 3767 [Comm List]
3. *Express Fashion Apparel Canada Inc and Express Canada GC GP, Inc, Re* (May 4, 2017) Ont SCJ [Commercial List] (Initial Order)
4. *First Leaside Wealth Management Inc, Re*, 2012 ONSC 1299
5. *Forever XXI ULC, Re*, (September 21, 2019) Toronto Court File No. CV-19-00628233-00CL (ONSC), Hainey J. (Initial Order Endorsement)
6. *Lehndorff General Partners Ltd, Re*, 1993 CarswellOnt 183 (Ont SCJ.)
7. *Lydian International Limited, Re*, 2019 ONSC 7473
8. *Stelco Inc, Re*, 2004 CarswellOnt 1211 (ONSC), leave to appeal to ONCA ref'd, 2004 CarswellOnt 2936, leave to appeal to SCC ref'd, 2004 CarswellOnt 5200
9. *Target Canada Co, Re*, 2015 ONSC 303
10. *U.S. Steel Canada Inc, Re*, 2014 ONSC 6145

SCHEDULE "B": STATUTORY REFERENCES

BANKRUPTCY AND INSOLVENCY ACT

R.S.C. 1985, c. B-3, as amended

2 In this Act, [...]

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

- (a) who is for any reason unable to meet his obligations as they generally become due,
- (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
- (c) 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; (personne insolvable)

COMPANIES' CREDITORS ARRANGEMENT ACT

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

2(1) In this act, [...]

“**debtor company**” means any company that

(a) is bankrupt or insolvent,

(b) has committed an act of bankruptcy within the meaning of the Bankruptcy and Insolvency Act or is deemed insolvent within the meaning of the Winding-up and Restructuring Act, whether or not proceedings in respect of the company have been taken under either of those Acts,

(c) has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act, or

(d) is in the course of being wound up under the Winding-up and Restructuring Act because the company is insolvent; (compagnie débitrice)

[...]

3 (1) This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than \$5,000,000 or any other amount that is prescribed.

[...]

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.

[...]

11.001 An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

[...]

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

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

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

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

(3) The court shall not make the order unless

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

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

[...]

11.51 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[...]

11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[...]

11.7 (1) When an order is made on the initial application in respect of a debtor company, the court shall at the same time appoint a person to monitor the business and financial affairs of the company. The person so appointed must be a trustee, within the meaning of subsection 2(1) of the *Bankruptcy and Insolvency Act*.

[...]

18.6 (1) Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.

(2) If the court is satisfied that an interested person fails to act in good faith, on application by an interested person, the court may make any order that it considers appropriate in the circumstances.

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
SFP CANADA LTD., Applicant

Court File No:

**ONTARIO
SUPERIOR COURT OF JUSTICE**

COMMERCIAL LIST

PROCEEDING COMMENCED AT TORONTO

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