

**ONTARIO
SUPERIOR COURT OF JUSTICE
IN BANKRUPTCY AND INSOLVENCY
COMMERCIAL LIST**

Court File No. 31-2436097

**IN THE MATTER OF THE NOTICE OF INTENTION
TO MAKE A PROPOSAL OF
FLUID BRANDS INC.**

Court File No. 31-2436108

**IN THE MATTER OF THE NOTICE OF INTENTION
TO MAKE A PROPOSAL OF
11041037 CANADA INC.**

Court File No. 31-2436109

**IN THE MATTER OF THE NOTICE OF INTENTION
TO MAKE A PROPOSAL
OF 11041045 CANADA INC.**

FACTUM OF THE DEBTORS
(Motion Returnable November 2, 2018)

November 1, 2018

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TO: **THE SERVICE LIST**

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**IN THE MATTER OF THE NOTICE OF INTENTION
TO MAKE A PROPOSAL OF
FLUID BRANDS INC.**

FACTUM OF THE DEBTORS

PART I - INTRODUCTION

1. The Moving parties on this Motion are:

- (a) 11041037 Canada Inc. ("**Bombay**"). Bombay operates 52 retail stores in seven provinces, including 11 in Quebec and 29 in Ontario, under the name "The Bombay Store". It has approximately 660 employees;
- (b) 11041045 Canada Inc. ("**Bowring**"). Bowring currently operates 53 retail stores in eight provinces, including 10 in Quebec and 33 in Ontario under the name "Bowring". It has approximately 530 employees; and
- (c) Fluid Brands Inc. is a holding company that owns 100 per cent of the shares of Bombay and Bowring.

(collectively, the "**Debtors**")

2. On October 25, 2018, each of the Debtors filed a Notice of Intention to Make a Proposal ("**NOI**") pursuant to the *Bankruptcy and Insolvency Act*. Richter Advisory Group Inc. ("**Richter**" or the "**Proposal Trustee**") is the Proposal Trustee of the Debtors.

3. The intention of the Debtors is to liquidate the assets of the Debtors in an orderly fashion with a view to maximizing benefit and minimizing harm to the various stakeholders of the Debtors.

4. On this Motion, the Debtors seek an array of relief in connection with their respective proposal proceedings. As set out more particularly below and in the Notice of Motion filed, the Debtors seek:

- (a) consolidation of their respective proposal proceedings;
- (b) approval of interim financing necessary in order to conduct the proposed liquidation process and approval of the sales guidelines by which the liquidation process is to be carried out;
- (c) granting various priority charges on the property of the Debtors, as set out more particularly below, which are each necessary in order for the Debtors to be able to conduct the liquidation process; and
- (d) extending the time for filing a proposal in order to allow the liquidation process to be carried out.

PART II - SUMMARY OF FACTS

5. The material facts are set out in the Affidavit of Fred Benitah sworn November 1, 2018 (the “**Affidavit**”) and in the First Report of the Proposal Trustee. Capitalized terms herein have the same meaning as that assigned to them in the Affidavit.

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

6. The issues on this motion are whether Court should:
- (a) approve the Consulting Agreement and the liquidation to be carried out pursuant to the Sale Guidelines;
 - (b) approve the interim financing as requested by the Debtors;
 - (c) approve the KEIP Charge;
 - (d) approve the D&O Charge and the Administration Charge;
 - (e) approve the consolidation of the Proposal Proceedings;
 - (f) extend the Proposal Period to November 26, 2019; and
 - (g) approve the request for permission to pay certain pre-filing creditors of the Debtors.

(A) THE PROPOSED LIQUIDATION, CONSULTING AGREEMENT AND SALE GUIDELINES AND NECESSARY CHARGES ON PROPERTY SHOULD BE APPROVED

(i) Proposed Liquidation Should be Approved

7. The Debtors' have suffered significant financial losses over the past year, and its operating lender, CIBC has issued written demand for repayment. A second secured creditor, IBSA, has also issued demand for repayment and NITES. In these circumstances, an orderly liquidation of inventory is the best option for maximizing value for the Debtors' stakeholders.

8. As debtors in possession, the Debtors will carry out the orderly wind-down of their business, under the oversight of the Court and the Proposal Trustee, with a view to maximizing recoveries for all their stakeholders. The Sale Guidelines contemplate a short liquidation period in order to minimize costs and the impact of the process on landlords. The Debtors, together with their advisors, have considered the potential value of seeking to market the Debtors' real estate leases and are of the view that pursuing a potential sale of the Debtors' locations is not warranted.

9. The Debtors and the Proposal Trustee believe that engaging a professional liquidator to undertake a sale of the inventory and FF&E in the closing retail locations will produce better results for the Debtors and their stakeholders than an attempt to sell such inventory and FF&E without professional assistance.

10. As recognized by this Court, liquidation processes carried out by debtors in the context of insolvency proceedings work to the benefit of all stakeholders by permitting the controlled, fair and orderly wind-down of operations. In the *Target Canada Co.* insolvency proceeding, this Court approved a debtor-controlled liquidation process, noting that the use of a restructuring process to downsize or wind-down a debtor company's business is entirely appropriate.

***Target Canada Co, (Re)*, 2015 ONSC 303 [*Target Canada Co.*] at pages 31-35, Debtors' Book of Authorities ("BOA"), Tab 1.**

11. In the recent Proposal proceedings of *Jones Canada Inc.*, and *Nine West Canada LP*, this Honourable Court approved a substantially similar liquidation plan, in similar circumstances to the case at bar.

***Re: Jones Canada Inc. and Re: Nine West Canada LP,
Liquidation Order of the Hon, Mr. Justice Hainey, issued April
11, 2018, BOA, Tab 2.***

12. Pursuant to section 65.13 of the B1A, which is analogous to section 36 of the CCAA relied upon by Justice Morawetz in the *Target Canada Co.* insolvency proceeding, the Court is authorized to approve a sale of assets in a proposal proceeding. Subsection 65.13(4) of the BIA sets out a list of non-exhaustive factors for the Court to consider in determining whether to approve a sale of the debtor's assets outside the ordinary course of business:

Factors to be considered

(4) 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 trustee approved the process leading to the proposed sale or disposition;

(c) whether the trustee 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.

Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3, s. 65.13(4) [BIA].

13. In the case at bar, the proposed liquidation:

- (a) is the only viable option, as a result of the Debtors' poor financial performance over the recent past and the liquidity crisis arising from both IBSA and CIBC having demanded repayment; and
- (b) will maximize realization on inventory and FF&E. The expected payments to creditors under the liquidation are likely to exceed recoveries under a sale of assets in a bankruptcy; and
- (c) is consistent with the strategy and provisions employed in other recent retail insolvencies.

***Target Canada Co. (Re)*, 2015 ONSC 846 [*Target Canada*], BOA, Tab 3.**

***Danier Leather Inc. (Re)*, 2016 ONSC 1044 [*Danier*], BOA, Tab 4.**

(ii) The Proposed Consulting Agreement Should be Approved

14. Orders approving agreements with liquidation consultants are frequently made in insolvency proceedings, including under the BIA. In determining whether to approve such an agreement Courts have considered the following factors, among others:

- (a) Whether the debtor and the court officer overseeing the proceedings believe that the quantum and nature of the remuneration are fair and reasonable;
- (b) Whether the consultant has industry experience and/or familiarity with the business of the debtor; and

- (c) Whether the fee arrangement with the consultant is reasonable in the circumstances.

Target Canada, BOA, Tab 3.

15. In the case at bar, the following factors militate in favour of the approval of the Consulting Agreement:

- (a) The Consultant's services are integral to the effective and efficient sale of the Debtors' inventory and FF&E and the maximization of value for all of the Debtors' stakeholders;
 - (b) The Consultant has extensive experience conducting retail liquidations, including inventory dispositions for a wide variety of former retailers and is experienced in dealing with the type of landlord and customer concerns that may arise in the type of process contemplated on this Motion; and
 - (c) The Proposal Trustee has reviewed and approved the proposed Consultation Agreement;
16. CIBC has also reviewed and approved the Consultation Agreement.

17. The Consultant was chosen by the Applicants in consultation with their legal and financial advisors, both of which are experienced with agreements similar in nature to the Consulting Agreement. This Court has previously supported sales processes where the evidence shows that the sale transaction being presented to the Court is the best available option in the circumstances and a further sales process would likely result in a greater erosion of value.

In the Matter of an Intention to Make a Proposal of- Karrys Bros., Limited, Karrys Software Limited and Karbro Transport Inc., Court File No. 32-1942339/1942340/1942341, Order and Endorsement of Justice Penny, dated December 24, 2014, [Karrys] BOA, Tab 5.

18. The fee under the Consulting Agreement is reasonable in the circumstances. Proper incentives are a factor in considering whether a fee arrangement is appropriate. The fee for the Consultant is commission based on actual results achieved by the Consultant. Such a fee arrangement properly incentivizes the Consultant and aligns the interest of the Consultant with the Debtors' creditors.

Danier at paras 50, 52, BOA, Tab 4.

(iii) The Sale Guidelines Should be Approved

19. The Debtors are also seeking approval of the Sale Guidelines with respect to the conduct of the proposed liquidation process. The Sale Guidelines were drafted with the assistance of the Proposal Trustee and the Consultant, both of whom have significant experience in the area of retail liquidations. Substantially similar sale guidelines have been approved by this Court in other Canadian retail insolvencies such as Grafton-Fraser Inc., HVM Canada Inc. and Streilmax.

In the Matter of a Plan of Compromise or Arrangement of Grafton-Fraser Inc., Court File No. CV-1711677-00C1, Order of Justice Wilton-Siegel dated January 30, 2017, BOA, Tab 6.

HUK 10 Limited v. HVM Canada Inc., Court File No. CV-17-11674-00CL, Order of Regional Senior Justice Morawetz dated January 27, 2017, BOA, Tab 7.

Strellson AG v. Strellmax Ltd., Court File No. CV-17-11864-00CL, Order of Justice Conway dated July 7, 2017, BOA, Tab 8.

(iv) The Interim Financing Should be Approved

20. As a result of the issuance of demands and NITES by CIBC and IBSA, and as shown on the Debtors' cashflow statements, the Debtors will not have sufficient cash to operate through the proposed restructuring period. An external source of funding for the Debtors' operations will be required in order to fund the liquidation process and maximize value for the various Debtors' stakeholders.

21. The BIA specifically provides for Court approval of interim financing, secured by a charge on the assets of the debtor.

BIA, s. 50.6(1).

22. The factors to be considered by the Court in determining whether to authorize interim financing are:

- (a) the period during which the debtor is expected to be subject to proceedings under the Act;
- (b) how the debtor's business and financial affairs are to be managed during the proceedings;
- (c) whether the debtor's management has the confidence of its major creditors;

- (d) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;
- (e) the nature and value of the debtor's property;
- (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
- (g) the trustee's report referred to in paragraph 50(6)(b) or 50.4(2)(b), as the case may be.

BIA, s. 50.6(5).

23. It is respectfully submitted that, applying the above factors to the case at bar, interim financing should be approved. The period in which the financing will be required is relatively short (approximately 60 days), the Debtors' affairs will be managed by current management, under the auspices of the Proposal Trustee and the Forbearance Agreement, the Debtor has the confidence of CIBC, its first-ranking secured creditor and DIP Lender, and a viable proposal will not be possible if interim financing is not granted. In these circumstances, it is submitted that the proposed interim financing should be approved by the Court.

(v) *The KEIP Charge Should be Approved*

24. In an attempt to ensure the continued participation of employees identified as key employees during the Proposal Proceedings, the Applicants are seeking approval of the KEIP in the amount of up to \$200,000. The KEIP uses retention bonuses to incentivize certain key employees to continue working during the wind-down of the Debtors' operations and the completion of the liquidation process.

25. In order to secure their obligations under the KEIP, the Applicants are seeking the KEIP Charge on the Property in the amount of up to \$200,000.

26. Courts in both BIA and CCAA proceedings have regularly recognized the importance of retaining employees in the context of insolvency proceedings. In proposal proceedings under the BIA, courts have approved key employee retention plans and granted charges in favour of the beneficiaries of those plans.

***Re Grant Forest Products Inc.*, [2009] 0.1. No. 3344 [*Grant Forest*], BOA, Tab 9.**

In the matter of the Notice of Intention to Make a Proposal of XS Cargo Limited Partnership, Court File No. 32-189v275, Endorsement of Justice Penny, dated August 6, 2014, BOA, Tab 10.

27. In *Grant Forest*, the Court outlined the factors to be considered in approved retention plans as follows: (i) whether the Monitor supports the key employee retention agreement and charge, (ii) whether the beneficiaries of the key employee retention agreement are likely to consider other employment opportunities if the key employee retention agreement is not approved, (iii) whether the employees subject to the key employee retention agreement are considered important to the management and operations of the debtor company and whether replacements could be found in a timely manner should they choose to terminate their employment, and (iv) the business judgment of the debtor's board of directors. This Court has applied similar factors to approve employee retention plans in BIA proposal proceedings.

***Grant Forest*, BOA, Tab 9.**

In the Matter of the Notice of Intention of Make a Proposal of Shop.ca Network Inc., Court File No. 312131992, Order and

Endorsement of Justice Penny dated June 9, 2016, BOA, Tab 11.

28. The factors set out in *Grant Forest* are met in the circumstances of this case: the Proposal Trustee supports the KEIP Charge, there is significant concern that employees would leave without the additional comfort of the KEIP Charge, the employees are critical to the successful wind-down of operations and liquidation process, and it would be difficult to replace them in the circumstances of the Debtors' Proposal Proceedings.

(vi) The D&O Charge Should be Approved

29. To ensure that the liquidation is carried out successfully and value is maximized for the Debtors' creditors, the Debtors require the continued participation of their respective directors and officers. As a group, the Debtors' directors and officers have specialized expertise or relationships with the Debtors' suppliers, employees and other stakeholders that cannot be replicated or replaced.

30. The Applicants' directors and officers are concerned about the possibility of incurring personal liability in the context of the Proposal Proceedings. The directors and officers have indicated that, due to the potentially significant personal exposure going forward, they cannot continue their service with the Applicants unless they obtain the D&O Charge in the amount of \$500,000.

31. The granting of directors' charges on a priority basis has been codified in section 64.1 of the BIA. In *Colossus Minerals Inc. (Re)*, Justice H.J. Wilton-Siegel approved the request for a directors' and officers' charge pursuant to section 64.1 of the BIA, and in so doing, highlighted the fact that the continued involvement of the remaining directors and officers was critical to the operations of the company during its BIA proposal proceedings.

BIA, s. 64.1.

***Colossus Minerals Inc. (Re)*, 2014 ONSC 514 [*Colossus*], paras 16 -21, I30A, Tab 12.**

***Danier* at para 65, 130A, Tab 4.**

32. In the present case, in order to continue to carry out the liquidation successfully and to complete the wind-down of operations, the Debtors require the committed involvement and continued participation of their directors and/or officers. Further, the proposed Order provides that the benefit of the D&O Charge will be available only to the extent that the directors and officers do not have coverage under such insurance or such coverage is insufficient to pay the amounts indemnified. Lastly, the amount of the D&O Charge takes into account a number of statutory obligations for which the directors and officers are liable if the Applicants fail to meet those obligations. However, it is expected that all of those amounts will be paid in the ordinary course and it is unlikely that the D&O Charge will be called upon.

33. The Proposal Trustee supports the granting of the D&O Charge.

(vii) The Administration Charge Should be Approved

34. The Applicants seek the Administrative Charge in the maximum amount of \$500,000 over the Property to secure the fees and disbursements of counsel to the Applicants, the Proposal Trustee and counsel to the Proposal Trustee. Pursuant to section 64.2 of the BIA, the Court is

authorized to grant a charge on property of a debtor in proposal proceedings to secure professional fees.

BIA, s, 64.2.

35. Administrative charges are routinely granted in a number of proceedings under the BIA. In this case, the granting of the Administration Charge is necessary in order to complete the liquidation and successful wind-down of the Applicants' operations.

Danier at para 47, BOA, Tab 4.

36. The Proposal Trustee supports the granting of the Administration Charge and is of the view that the quantum of the charge is reasonable.

***(viii) Administrative and Substantive Consolidation of the Proposal Proceedings
Should be Approved***

37. In order to maximize efficiency and effectiveness of the Proposal Proceedings, the Debtors are seeking an order approving the administrative, or procedural, consolidation of their Proposal Proceedings.

38. Bankruptcy proceedings operate subject to the general principle that the litigation process should secure the just, most expeditious and least expensive determination of every proceeding on its merits. The Court has jurisdiction under section 183 of the BIA to substantively consolidate bankrupt estates and proposal proceedings. As stated by this Court, closely-related bankruptcy proceedings ought to be consolidated.

BIA, s. 183.

Electro Sonic Inc, (Re), 2014 ONSC 942 [*Electro Sonic*] at para 1, BOA, Tab 13.

Re Wasaya Airways Limited Partnership, 2016 ONSC 5600 [*Re Wasaya Airways*] at paras 35-36, BOA, Tab 14,

Re Ornge Global GP Inc., 2013 ONSC 4518 [*Re Ornge*] at paras 13-14, BOA, Tab 15.

39. In this case: (a) The operations of the Applicants are closely intertwined such that it would be difficult to disentangle their affairs; (b) The Debtors share common management and administrative support; (c) The Debtors have common secured and unsecured creditors; and (d) Much of the indebtedness of the Debtors is common as a result of guarantees granted by the Debtors.

40. The procedural consolidation of the Debtors' proposal proceedings is appropriate, as it would allow the Proposal Trustee to avoid performing separate administrative actions in respect of each of the Debtors, thereby reducing certain administrative expenses:

41. CIBC has no objections to the proposed consolidation. The proposed consolidation will not result in any prejudice to the creditors of the Debtors.

42. Consolidation of the Proposal Proceedings avoids duplication of efforts to file and maintain multiple separate sets of motion materials over the course of the proposal, which will reduce costs in the proceedings and benefit the Debtors' creditors.

(B) THE EXTENSION OF THE PROPOSAL PERIOD SHOULD BE GRANTED

43. The initial Proposal Period expires on November 26, 2018. The liquidation process is scheduled to commence immediately, and to be completed by December 31, 2018. Accordingly,

the Debtors seek this opportunity to extend the Proposal Period by 45 days to permit them to move forward with the liquidation.

BIA, s. 50.4(8), (9), 69.1.

44. This Court has authority to grant the requested extension under section 50.4(9) of the BIA, which states that such an extension may be granted where the Court is satisfied that the insolvent person has acted, and is acting, in good faith and with due diligence, the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted, and no creditor would be materially prejudiced if the extension were granted.

BIA, s. 50.4(9).

45. In this instance, each of these factors has been met: the Debtors have acted, and continue to act in good faith in pursuing the liquidation and wind-down of operations, the extension will permit the Debtors to make progress towards completing the liquidation and putting together a proposal to present to their creditors, and no creditors will be prejudiced by the requested extension.

***Colossus* at paras 38-43, BOA, Tab 12.**

***Karrys* at paras 26-28, BOA, Tab 5.**

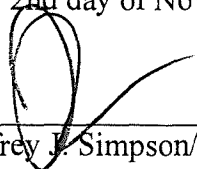
46. Further, the cash flow statement prepared by the Debtors with the assistance of the Proposal Trustee indicates that the Debtors have sufficient cash flow to fund their post-filing obligations while the liquidation and wind-down of operations continues through to the proposed

extension. The Proposal Trustee supports the relief requested and reports that the section 50.4(9) factors appear to be met in this instance.

PART IV - ORDER REQUESTED

47. The Debtors respectfully request that this Honouable Court grant the relief requested above, and approve the two forms of Order, being the Administration Order and the Liquidation Process Order, attached as Schedules "A" and "B" to the Notice of Motion in this matter.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2nd day of November, 2018.



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TAB A

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Target Canada Co, (Re)*, 2015 ONSC 303.
2. *Re: Jones Canada Inc. and Re: Nine West Canada LP*, Liquidation Order of the Hon, Mr. Justice Hainey, issued April 11, 2018.
3. *Target Canada Co. (Re)*, 2015 ONSC 846.
4. *Danier Leather Inc. (Re)*, 2016 ONSC 1044.
5. *In the Matter of an Intention to Make a Proposal of Karrys Bros., Limited, Karrys Software Limited and Karbro Transport Inc.*, Court File No. 321942339/1942340/1942341, Order and Endorsement of Justice Penny, dated December 24, 2014.
6. *In the Matter of a Plan of Compromise or Arrangement of Grafton-Fraser Inc.*, Court File No. CV-1711677-00C1, Order of Justice Wilton-Siegel dated January 30, 2017.
7. *HUK 10 Limited v. HMV Canada Inc.*, Court File No. CV-17-11674-00CL, Order of Regional Senior Justice Morawetz dated January 27, 2017.
8. *Strellson AG v. Strellmax Ltd.*, Court File No. CV-17-11864-00CL, Order of Justice Conway dated July 7, 2017.
9. *Re Grant Forest Products Inc.*, [2009] O.1. No. 3344.
10. *In the matter of the Notice of Intention to Make a Proposal of XS Cargo Limited Partnership*, Court File No. 32-1896275, Endorsement of Justice Penny, dated August 6, 2014.
11. *In the Matter of the Notice of Intention of Make a Proposal of Shop.ca Network Inc.*, Court File No. 312131992, Order and Endorsement of Justice Penny dated June 9, 2016.
12. *Colossus Minerals Inc. (Re)*, 2014 ONSC 514.
13. *Electro Sonic Inc, (Re)*, 2014 ONSC 942.
14. *Re Wasaya Airways Limited Partnership*, 2016 ONSC 5600.
15. *Re Ornge Global GP Inc.*, 2013 ONSC 4518.

TAB B

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3, s. 65.13(4).

Factors to be considered

- (4) 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 trustee approved the process leading to the proposed sale or disposition;
 - (c) whether the trustee 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.

Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3, s.50.6(1).

Order — interim financing

50.6 (1) On application by a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the debtor's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the debtor an amount approved by the court as being required by the debtor, having regard to the debtor's cash-flow statement referred to in paragraph 50(6)(a) or 50.4(2)(a), as the case may be. The security or charge may not secure an obligation that exists before the order is made.

Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3, s.50.6(5).

Factors to be considered

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

(a) the period during which the debtor is expected to be subject to proceedings under this Act;

(b) how the debtor's business and financial affairs are to be managed during the proceedings;

(c) whether the debtor's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;

(e) the nature and value of the debtor's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the trustee's report referred to in paragraph 50(6)(b) or 50.4(2)(b), as the case may be.

Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3, s.64.1.

Security or charge relating to director's indemnification

64.1 (1) On application by a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the property of the person is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the person to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer after the filing of the notice of intention or the proposal, as the case may be.

Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3, s.64.2.

Priority

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

Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3, s.183.

Courts vested with jurisdiction

183 (1) The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers:

- (a) in the Province of Ontario, the Superior Court of Justice;
- (b) [Repealed, 2001, c. 4, s. 33]
- (c) in the Provinces of Nova Scotia and British Columbia, the Supreme Court;
- (d) in the Provinces of New Brunswick and Alberta, the Court of Queen's Bench;
- (e) in the Province of Prince Edward Island, the Supreme Court of the Province;
- (f) in the Provinces of Manitoba and Saskatchewan, the Court of Queen's Bench;
- (g) in the Province of Newfoundland and Labrador, the Trial Division of the Supreme Court; and
- (h) in Yukon, the Supreme Court of Yukon, in the Northwest Territories, the Supreme Court of the Northwest Territories, and in Nunavut, the Nunavut Court of Justice.

Superior Court jurisdiction in the Province of Quebec

(1.1) In the Province of Quebec, the Superior Court is invested with the jurisdiction that will enable it to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during its term, as it is now, or may be hereafter, held, and in vacation and in chambers.

Courts of appeal — common law provinces

(2) Subject to subsection (2.1), the courts of appeal throughout Canada, within their respective jurisdictions, are invested with power and jurisdiction at law and in equity, according to their ordinary procedures, except as varied by this Act or the General Rules, to hear and determine appeals from the courts vested with original jurisdiction under this Act.

Court of Appeal of the Province of Quebec

(2.1) In the Province of Quebec, the Court of Appeal, within its jurisdiction, is invested with power and jurisdiction, according to its ordinary procedures, except

as varied by this Act or the General Rules, to hear and determine appeals from the Superior Court.

Supreme Court of Canada

(3) The Supreme Court of Canada has jurisdiction to hear and to decide according to its ordinary procedure any appeal so permitted and to award costs.

Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3, s.50.4(8), (9), 69.1.

Where assignment deemed to have been made

(8) Where an insolvent person fails to comply with subsection (2), or where the trustee fails to file a proposal with the official receiver under subsection 62(1) within a period of thirty days after the day the notice of intention was filed under subsection (1), or within any extension of that period granted under subsection (9),

(a) the insolvent person is, on the expiration of that period or that extension, as the case may be, deemed to have thereupon made an assignment;

(b) the trustee shall, without delay, file with the official receiver, in the prescribed form, a report of the deemed assignment;

(b.1) the official receiver shall issue a certificate of assignment, in the prescribed form, which has the same effect for the purposes of this Act as an assignment filed under section 49; and

(c) the trustee shall, within five days after the day the certificate mentioned in paragraph (b.1) is issued, send notice of the meeting of creditors under section 102, at which meeting the creditors may by ordinary resolution, notwithstanding section 14, affirm the appointment of the trustee or appoint another licensed trustee in lieu of that trustee.

Extension of time for filing proposal

(9) The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that

(a) the insolvent person has acted, and is acting, in good faith and with due diligence;

(b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and

(c) no creditor would be materially prejudiced if the extension being applied for were granted.

Stay of proceedings — notice of intention

69 (1) Subject to subsections (2) and (3) and sections 69.4, 69.5 and 69.6, on the filing of a notice of intention under section 50.4 by an insolvent person,

(a) no creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy,

(b) no provision of a security agreement between the insolvent person and a secured creditor that provides, in substance, that on

(i) the insolvent person's insolvency,

(ii) the default by the insolvent person of an obligation under the security agreement, or

(iii) the filing by the insolvent person of a notice of intention under section 50.4, the insolvent person ceases to have such rights to use or deal with assets secured under the agreement as he would otherwise have, has any force or effect,

(c) Her Majesty in right of Canada may not exercise Her rights under

(i) subsection 224(1.2) of the *Income Tax Act*, or

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that

(A) refers to subsection 224(1.2) of the *Income Tax Act*, and

(B) provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts, in respect of the insolvent person where the insolvent person is a tax debtor under that subsection or provision, and

(d) Her Majesty in right of a province may not exercise her rights under any provision of provincial legislation in respect of the insolvent person where the insolvent person is a debtor under the provincial legislation and the provision has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a *province providing a comprehensive pension plan* as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a *provincial pension plan* as defined in that subsection, until the filing of a proposal under subsection 62(1) in respect of the insolvent person or the bankruptcy of the insolvent person.

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF FLUID BRANDS INC.
IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF 11041037 CANADA INC.
IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF 11041045 CANADA INC.

Court File Nos.: 31-2436097, 31-2436108 & 31-2436109

**ONTARIO
SUPERIOR COURT OF JUSTICE
IN BANKRUPTCY AND INSOLVENCY
COMMERCIAL LIST**

PROCEEDING COMMENCED AT TORONTO

**FACTUM OF THE DEBTORS
(Motion Returnable November 2, 2018)**

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