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 COMARK HOLDINGS INC., BOOTLEGGER CLOTHING INC., CLEO FASHIONS INC. AND RICKI'S FASHIONS INC.

APPLICANTS

FACTUM OF THE APPLICANTS

June 2, 2020

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TO: SERVICE LIST

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PART I - NATURE OF THIS APPLICATION

1. This factum is filed in support of an Application by Comark Holdings Inc. ("**Comark**"), Ricki's Fashions Inc. ("**Ricki's**"), cleo fashions Inc. ("**cleo**") and Bootlegger Clothing Inc. ("**Bootlegger**") (together, the "**Applicants**" or the "**Comark Group**") for relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"). The Applicants seek CCAA protection to provide the "breathing space" necessary to right-size their operations and achieve a going-concern restructuring transaction in the immediate term.

2. The Applicants, a group of specialty apparel retailers, are experiencing a severe liquidity crisis brought on by a worsening retail environment and compounded by the COVID-19 pandemic. Prior to March 2020, planning was already underway to streamline the Applicants' business operations. These plans were upended by the response to COVID-19, which forced the Applicants to cease operations at all their brick and mortar stores across Canada and lay off the vast majority of their employees. While the Applicants have recently begun re-opening certain of their stores (as permitted by different provinces), approximately half of their stores remain closed and those stores that are open are operating in a highly constrained retail environment.

3. The closure of their stores for over two months has choked off the Applicants' already-impaired cash flows and rendered a more gradual streamlining unfeasible. Due to store closures in March through May of 2020, the Applicants have lost approximately $50 million in sales.

4. The Applicants are experiencing a severe liquidity crisis, and without the urgent relief sought in this Application, their business will not be able to continue as a going concern. The Applicants cannot make any additional borrowings under their lending facility and are in breach of certain financial covenants under it. Moreover, the Applicants have not paid rent for any of their retail stores for the months of April, May, and June, and have received notices of default for 56 of these stores. The Applicants' parent corporation supports this restructuring but will not advance further funds.

5. The Applicants seek CCAA protection to maximize enterprise value and preserve going-concern operations for the benefit of all stakeholders, including the Applicants' 2,500 employees, their landlords, and product suppliers located across Asia and North America who rely on the continued operation of the Applicants' stores to sell their goods.

6. The Applicants need a significant show of support from their landlords to successfully restructure their business. As such, the Applicants require the benefit of a stay of proceedings under the CCAA to undertake immediate, realistic discussions regarding the future of their business. Given the severity of the Applicants' liquidity constraints and the need to purchase inventory as soon as possible if the business is to go forward, a workable solution with the landlords must be reached by June 19, 2020 to determine the future viability of the business and implement a restructuring transaction by the end of June. Concurrently, the Applicants will take measures to reduce operating costs, close certain stores, and implement headcount reductions to right-size the Applicants' business.

7. Granting the requested relief will give the Applicants a window of opportunity to secure a going-concern restructuring transaction for the benefit of all stakeholders. If the Initial Order is granted, the Applicants intend promptly to serve a motion seeking this Court's approval of a sale and/or investment solicitation process ("**SISP**") on extremely expedited timelines, and currently anticipate seeking approval of a transaction on June 30, 2020.

PART II - FACTS

8. The facts regarding this Application are fully set out in the Affidavit of Gerald Bachynski.[1] Capitalized terms not otherwise defined have the same meanings as in the Bachynski Affidavit.

9. The Applicants are leading Canadian specialty apparel retailers with a nationally recognized portfolio of brands. Comark, a privately-held corporation, operates its three retail businesses through its three direct subsidiaries, Ricki's, cleo, and Bootlegger (together, the "**Retail Applicants**"). All the Applicants are corporations continued under the *Canada Business Corporations Act*,[2] with their registered head office in Vancouver, British Columbia.[3]

10. The Applicants currently operate a total of 310 stores across Canada: Ricki's has 129 stores; cleo has 99 stores; and Bootlegger has 82 stores. As of May 2020, the Applicants had approximately 2,500 employees across Canada.[4]

11. Although the Retail Applicants have stores across Canada, the Applicants' business is concentrated in Ontario. Comark's corporate headquarters (the "**Corporate Headquarters**") is in Mississauga, Ontario, from which it provides management, oversight, and corporate support functions to all the Retail Applicants. The divisional operation office for cleo is in Ontario. A

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1 Affidavit of Gerald Bachynski, sworn June 2, 2020 [Bachynski Affidavit].
2 RSC 1985, c C-44 [CBCA].
3 Bachynski Affidavit at paras 4 and 16.
4 Bachynski Affidavit at paras 4 and 60.

plurality of the Applicant's stores (131 out of 310) are located in Ontario, employing 40% of the Applicants' employees and generating the largest proportion of the Applicants' sales.[5]

12. Comark's direct parent is 9383921 Canada Inc. ("**ParentCo**"), which is not an Applicant. The Comark business was acquired in 2015 following prior CCAA proceedings.[6]

A. THE BUSINESS OF THE APPLICANTS

(a) Retail locations and leases

13. The Applicants' stores sell predominantly exclusive private-label merchandise of work attire and casual clothing for Canadians aged 20 to 60.[7] The Applicants operate different brands through Ricki's, cleo, and Bootlegger, each of which has a distinctive brand identity, target market, and customer base. All three Retail Applicants have both retail and e-commerce presences.[8]

14. The Applicants conduct business through their 310 leased retail locations in eight provinces across Canada.[9] The Applicants do not own any real property.[10]

15. Typical of the retail store leases, many of the Applicants' leases contain provisions impacting the Applicants' operations, including going-out-of-business sale restrictions and operating covenants. Fifteen large third-party landlord groups account for 233 of the Applicants' 310 leases; the remaining 77 stores are leased from 37 different landlords.[11]

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[5] Bachynski Affidavit at para 20.
[6] Bachynski Affidavit at para 2.
[7] Bachynski Affidavit at para 24.
[8] Bachynski Affidavit at paras 24-25.
[9] Bachynski Affidavit at para 28.
[10] Bachynski Affidavit at para 29.
[11] Bachynski Affidavit at para 32.

16. Due to the shutdown of all retail stores as a result of the COVID-19 pandemic, the Applicants have not paid rent on any of their retail leases for April or May, 2020, totalling $9 million.[12] The Applicants have also not yet paid June rent.[13] The Applicants have received notices of default for 56 stores from eight landlords (including three of the fifteen major landlord groups).[14] The Applicants do not have sufficient funds to pay the defaulted amounts owing for April and May rent, and anticipate that landlord default notices will accelerate due to non-payment of June rent.[15]

17. As of May 19, 2020, the Applicants have gradually commenced reopening their stores as different provinces began to relax restrictions.[16] It is anticipated that 210 of the Applicants' 310 stores will re-open by June 10th. Those stores that have reopened are conducting business in a changed and highly-constrained retail environment.

18. However, the Applicants' remaining 100 stores – 92 in Ontario and 8 in Newfoundland – are currently not lawfully permitted to re-open due to the COVID-19 pandemic (the "**Closed Stores**").[17] The legal restrictions in Newfoundland are anticipated to lift as of June 8, 2020; however, all of the Closed Stores in Ontario are located in shopping malls, and the Applicants do not anticipate such stores will legally be permitted to re-open before July 1, 2020.[18]

19. The Applicants are making best efforts to re-open stores as quickly as possible; however, there are many challenges associated with re-opening safely.[19] It takes one to two weeks to determine whether store employees can return, additional time to find replacement employees if

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12 Bachynski Affidavit at para 34.
13 Bachynski Affidavit at para 34.
14 Bachynski Affidavit at para 34.
15 Bachynski Affidavit at para 36.
16 Bachynski Affidavit at para 35.
17 Bachynski Affidavit at para 36.
18 Bachynski Affidavit at para 36.
19 Bachynski Affidavit at para 37.

needed, and at least two days to sanitize a re-opening store, plus any time required to purchase personal protective equipment for employees.[20]

20. The Applicants, in consultation with the Proposed Monitor, have determined that 9 of the Applicants' stores must be closed immediately upon commencement of these CCAA proceedings, and the inventory liquidated to improve cash flows.[21] The Applicants, with the guidance of the Proposed Monitor, anticipate disclaiming certain additional leases of stores that have negative cash flows or for which acceptable lease amendments cannot be achieved by June 19, 2020.[22]

21. The Applicants have implemented processes to enable payment of June rent for stores lawfully entitled to be open as of the date of the proposed Initial Order. Given that the Applicants are not lawfully entitled to operate certain stores, the proposed Initial Order does not require that rent be paid with respect to these stores until such time as the Applicants are lawfully entitled to open such stores (discussed further below).[23]

(b) Merchandising and distribution

22. The flow of inventory from the Applicants' manufacturers to stock their stores and fulfill online orders depends entirely on services provided by Parian Logistics Inc. ("**Parian**"). Parian is fully owned by ParentCo and provides warehousing, distribution, and e-commerce fulfillment services to the Retail Applicants. The Retail Applicants together account for two-thirds to three-quarters of Parian's business, with the remaining portion due to only one other customer. The amounts paid to Parian are consistent with or more favourable than prevailing market prices.[24]

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[20] Bachynski Affidavit at para 37.
[21] Bachynski Affidavit at para 38.
[22] Bachynski Affidavit at para 39.
[23] Bachynski Affidavit at para 40.
[24] Bachynski Affidavit at paras 47 and 50.

23. The Applicants rely on two primary third-party transporters to transport the vast majority of their products to their stores or direct to customers: Purolator and Canada Post.[25]

24. The Applicants rely on timely and frequent delivery of critical inventory items in conducting their business in the ordinary course. Any interruption in this supply, however brief, would be highly disruptive to the Applicants' operations.[26]

(c) Loyalty programs, gift cards and return policies

25. Each of the Retail Applicants offers a unique loyalty program to customers (the "**Loyalty Programs**"). The Loyalty Programs drive a significant portion of sales and assist in the collection of customer data. Similarly, the Applicants' Gift Cards and existing return policies increase sales and improve the customer experience. The Applicants seek authorization to continue and to honour their obligations to customers under the Loyalty Programs to continue providing and to honour Gift Cards and return policies during these proceedings.[27]

(d) Employees

26. As of May 2020, the Applicants had approximately 2,500 employees across Canada.[28] Most of the Applicants' workforce consists of short-tenure, non-union retail employees.[29] The vast majority of the Applicants' employees – including all store-based employees – were laid off on or about March 20, 2020 as a result of the COVID-19 retail store closures. Many of the Applicants' store-based employees have now begun to work again as the Applicants' stores reopen.

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25 Bachynski Affidavit at para 52.
26 Bachynski Affidavit at para 53.
27 Bachynski Affidavit at paras 66, 67 and 70.
28 Bachynski Affidavit at para 60.
29 Bachynski Affidavit at para 60.

27. The Applicants, in consultation with the Proposed Monitor, are evaluating their staffing requirements.[30] The Applicants anticipate that as part their restructuring efforts, certain headcount reductions will take place shortly after the commencement of these proceedings, including in respect of the retail stores that will be immediately closed.[31]

(e) Cash management system

28. The Applicants maintain a centralized cash management system, administered from the Corporate Headquarters, to deal with cash management, collections, disbursements and intercompany payments for all three Retail Applicants. This allows Comark to facilitate cash forecasting and reporting and to monitor the collection and disbursement of funds.[32]

29. The Applicants have bank accounts with all the major Canadian banks, with CIBC acting as the main collection and disbursement bank.[33]

B. FINANCIAL POSITION OF THE APPLICANTS

30. As at May 2, the assets of the Applicants had a book value of approximately $66.9 million and liabilities of a book value of approximately $82.3 million.[34]

31. The Applicants have incurred significant losses and experienced negative operating cash flows for the past five quarters.[35] In the fiscal year ended February 29, 2020 ("**FY2020**"), the Applicants experienced declining same store sales of negative 6.5% (as compared to 0% for fiscal

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30 Bachynski Affidavit at para 65.
31 Bachynski Affidavit at para 65.
32 Bachynski Affidavit at para 70.
33 Bachynski Affidavit at paras 71 and 72.
34 Bachynski Affidavit at paras 78-19.
35 Bachynski Affidavit at para 80.

year 2019) and a decline in store level cash flow of $15.6 million (-28%) and experienced a net loss of approximately $7.6 million.[36]

32. Ricki's has historically been the most profitable of the three retail stores and makes up the majority of Comark's net earnings.[37] In past years, Ricki's profits have been used to support cleo and Bootlegger's losses by way of unsecured intercompany loans (described below).[38] However, all three of the Retail Applicants experienced a general decline in sales beginning in April 2019, which decline has affected much of the retail industry.[39] Following the closure of retail stores beginning on March 17, 2020, all the Retail Applicants experienced significant operating losses.[40]

33. Given that the Applicants have not paid April or May rent on their retail stores, the Applicants have approximately $5.3 million in available liquidity as at the end of May 2020. The Applicants anticipate experiencing a negative cash flow of approximately $6.5 million in June 2020, including $3.2 million in June rent payments for stores that are or will be legally permitted to be re-opened during the month of June.

(a) CIBC credit facility

34. CIBC is the main operating lender to the Applicants pursuant to a credit agreement with Comark, as borrower, dated as of August 20, 2015 (as amended, the "**CIBC Credit Facility**"). The CIBC Credit Facility encompasses a term loan facility in the principal amount of $6.4 million (the "**Term Loan Facility**") and a revolving loan facility in the current outstanding amount of $20 million (the "**Revolving Loan Facility**").[41] The maximum amount available under the Revolving

36 Bachynski Affidavit at para 81.
37 Bachynski Affidavit at para 81.
38 Bachynski Affidavit at para 81.
39 Bachynski Affidavit at para 81.
40 Bachynski Affidavit at para 82.
41 Bachynski Affidavit at paras 87 and 94.

Loan Facility is subject to a borrowing base formula linked to Comark's inventory and accounts receivable and is capped at $30 million.[42]

35. The obligations under the CIBC Credit Facility are secured by all present and after-acquired property of Comark and is guaranteed on a secured basis by the Retail Applicants. ParentCo has guaranteed the obligations under the CIBC Credit Facility, limited in recourse solely to and secured by the shares of Comark held by ParentCo.[43]

36. Comark is currently in breach of its requirement to maintain a Fixed Charge Coverage Ratio of 1.10, which constitutes an Event of Default under the CIBC Credit Facility.[44]

37. CIBC has confirmed to the Applicants that it supports the Applicants' efforts to restructure and is prepared to provide debtor-in-position financing to assist in this regard on terms satisfactory to CIBC.[45] The Applicants are currently in discussions with CIBC to finalize the terms and conditions of a debtor-in-possession loan facility (the "**DIP Facility**"). If the Initial Order is granted, the Applicants anticipate seeking approval of the DIP Facility at the comeback hearing.[46]

(b) Secured and unsecured intercompany debt

38. ParentCo is the lender under a Sponsor Loan Agreement with Comark's predecessor company dated as of August 20, 2015 (the "**ParentCo Facility**"). As of June 2, 2020, $25.4 million is outstanding under the ParentCo Facility. The ParentCo Facility is secured by Comark's assets and guaranteed on a secured basis by the Retail Applicants. ParentCo subordinated and postponed

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42 Bachynski Affidavit at para 89.
43 Bachynski Affidavit at paras 91-92.
44 Bachynski Affidavit at para 93.
45 Bachynski Affidavit at para 14.
46 Bachynski Affidavit at para 14.

its interests in favour of CIBC under an agreement dated as of August 20, 2015. Comark has never made any payments of cash interest or principal on the Parentco Facility.[47]

39. Comark, as lender, is also party to individual multi-facility secured loan agreements with each of the Retail Applicants (each a "**Comark Facility**"). Comark agreed to subordinate and postpone its interests in favour of CIBC pursuant to an agreement dated as of August 20, 2015.[48]

40. At February 29, 2020, the Applicants' unsecured intercompany obligations were loans in the following amounts: principal amount of $44 million from Comark to Ricki's, principal amount of $7.7 million from Comark to cleo, and principal amount of $9.1 million from Ricki's to cleo.[49]

(c) Trade creditors

41. As at May 22, 2020, the Applicants had approximately $5.3 million in outstanding accounts payable and amounts due to trade creditors. When COVID-19 closures began, the Applicants took immediate steps to reduce expenditures, including pausing or cancelling orders for future inventory. As the Applicants' stores re-open, it is essential that the Applicants' key suppliers recommence supplying the Applicants with product. To ensure continuity of the Applicants' supply chain, the Applicants propose to pay amounts owing to certain critical trade vendors and suppliers in the ordinary course before and after filing, with the Proposed Monitor's consent.[50]

C. URGENT NEED FOR RELIEF UNDER THE CCAA

42. The Applicants were hit very hard by the closure of their stores for over two months due to the COVID-19 pandemic. The re-opening of brick-and-mortar stores will be of little assistance

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[47] Bachynski Affidavit at paras 95, 96 and 97.
[48] Bachynski Affidavit at paras 98-99.
[49] Bachynski Affidavit at para 102.
[50] Bachynski Affidavit at paras 103-104.

to the Applicants' cash flow requirements in the short term, as consumers are slow to return to in-store shopping. For the week of May 24th, comparable stores sales for open stores are 52% lower than the previous year's sales.[51] After considering all options, and consulting with the Proposed Monitor, Comark's directors determined it is in the interest of the Applicants' business to file for CCAA protection.[52]

43. The Applicants are experiencing a liquidity crisis. They cannot make further draws under the CIBC Credit Facility, they have continuing and mounting operating losses, and they owe approximately $9 million in unpaid rent. Parentco is not prepared to advance further funding. The Applicants are therefore insolvent and cannot meet their obligations as they come due.[53]

44. The Applicants view their landlords as critical economic partners in any go-forward business, particularly in light of the current uncertain brick-and-mortar retail environment. The tight timeline for the conclusion of negotiations with the landlords is driven by the severity of the Applicants' liquidity constraints, such that negotiations must be concluded by June 19, 2020 for a going-concern restructuring to be possible.[54] The Applicants have prepared standardized letter agreements to be immediately distributed to their landlords setting out the concessions needed by the Applicants. The effectiveness of these agreements will be conditional on a critical mass of landlords signing such agreements on or before June 19, 2020.[55]

45. The Applicants also require an urgent injection of working capital to continue going-concern operations. As stores begin to re-open after the significant disruption of the COVID-19 pandemic, and due to the ordering cycle of retail sales, the Applicants must promptly place orders

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51 Bachynski Affidavit at para 105.
52 Bachynski Affidavit at para 111.
53 Bachynski Affidavit at paras 10 and 112.
54 Bachynski Affidavit at para 111.
55 Bachynski Affidavit at para 108.

with their vendors for next season's inventory. Placing orders for additional inventory is contingent on securing sufficient landlord support to proceed with a going-concern restructuring.[56]

46. If the Initial Order is granted, the Applicants anticipate returning to this Court to seek approval of a DIP Facility and a SISP. The proposed SISP will be structured on a highly expedited timeline. It is anticipated that ParentCo will participate in the SISP, contingent on negotiations with the Applicants' landlords.

PART III - ISSUES AND THE LAW

47. The principal issues on this Application are whether:

(a) the Applicants meet the criteria for CCAA protection and this Honourable Court should grant the Initial Order;

(b) the Applicants should be authorized to pay certain pre-filing amounts owing to suppliers critical to the Applicants' ongoing operations;

(c) this Honourable Court should exercise its discretion to provide relief in respect of stores closed due to the COVID-19 pandemic; and

(d) this Honourable Court should grant the Applicants' Administration and Directors' Charges (both as defined below).

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56 Bachynski Affidavit at para 112.

A. THE CCAA APPLIES TO THE APPLICANTS

(a) The Applicants are insolvent

48. The CCAA applies to a "debtor company" or affiliated debtor companies where the total of claims against the debtor or its affiliates exceeds five million dollars. Pursuant to section 2 of the CCAA, a "debtor company" means, *inter alia*, a company that is insolvent.[57]

49. There is no definition of "insolvent" in the CCAA itself. Accordingly, whether a company is insolvent for the purposes of the CCAA is evaluated by reference to three disjunctive tests for insolvency in the definition of "insolvent person" in section 2 of the *Bankruptcy and Insolvency Act*.[58] Under the BIA, an "insolvent person" is a person

(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;

50. In *Re Stelco Inc*.[59], Farley J. held that the test for "insolvency" is given an expanded meaning in CCAA proceedings to give effect to the remedial purposes of the CCAA. A CCAA applicant is insolvent if, at the time of filing, a looming liquidity crisis will cause the applicant to run out of money to pay its debts as they come due without the benefit of a stay of proceedings. [60]

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57 CCAA, sections 2 and 3(1).
58 RSC 1985, c B-3, as amended [the BIA].
59 2004 CanLII 24933 (ONSC), leave to appeal to ONCA refused 2004 CarswellOnt 2936 (ONCA), leave to appeal to SCC refused 2004 CarswellOnt 5200 (SCC) [*Stelco*].
60 *Stelco* at para 26.

51. The Applicants are affiliated debtor companies with claims against them exceeding $5 million. Moreover, the Applicants are insolvent. The Applicants together owe $9 million in unpaid rent for April and May 2020 alone. By contrast, the Applicants have only $5.3 million of available liquidity on hand.[61] The Applicants' liquidity position continues to rapidly deteriorate and they do not have adequate funds to maintain going concern operations outside a CCAA proceeding.[62]

(b) Ontario court has jurisdiction over the Applicants

52. Subsection 9(1) of the CCAA provides that an application for a stay of proceedings under the CCAA may be made to the court that has jurisdiction in (a) the province in which the head office or chief place of business of the company in Canada is situated; or (b) any province in which the company's assets are situated, if there is no place of business in Canada.[63]

53. CCAA courts have viewed an applicant's chief place of business holistically, considering multiple factors including location of "head office" functions, geographical allocation of employees, location of operating assets, and allocation of revenue.[64] In the case of retail insolvencies, this Court has often assumed jurisdiction over applicants with corporate head offices in other provinces whose retail operations and business activities were concentrated in Ontario.[65]

54. This Honourable Court has jurisdiction to grant the proposed Initial Order because the Applicants' chief place of business is in Ontario. The bulk of the Applicants' "head office" functions are directed from Comark's Corporate Headquarters in Mississauga, Ontario.[66] The

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61 Bachynski Affidavit at para 13.
62 Bachynski Affidavit at para 112.
63 CCAA, section 9(1).
64 *Royal Bank v Perfection Foods Ltd*, 1991 CarswellPEI 116 (SCTD) at para. 41
65 *Target Canada Co, Re,* 2015 ONSC 303 [*Target*] at para 30; *Forever XXII ULC Inc, Re*, Factum of the Applicants (Initial Order) dated September 29, 2019 at paras 39-40; *Cash Store Financial Services, Re*, 2014 ONSC 2372 at paras 11 and 23; *Hoop Canada Inc, Re,* 2008 CarswellOnt 9518 (Ont SCJ [Comm List]) at para 7.
66 Bachynski Affidavit at para 4.

headquarters of cleo is also located in Ontario.[67] Furthermore, the Applicants' business operations are concentrated in Ontario: 131 of the Applicants' 310 stores are located in Ontario, employing 40% of the Applicants' employees, and Ontario generates 38.1% of all the Applicants' revenues, a greater proportion than any other province.[68]

B. POST-FILING SUPPLY RELATIONSHIPS

55. To ensure uninterrupted business operations during the initial stay period, the Applicants seek authorization, with the consent of the Monitor, to make payments including payments of pre-filing amounts to certain critical third parties. These third parties fall into three categories: (i) service-providers, such as logistics providers, e-commerce platform provider, and credit and debit services providers; (ii) Parian, in respect of essential logistics services; and (iii) certain overseas and domestic suppliers of the Applicants' merchandise.[69]

56. There is ample authority supporting a CCAA court's general jurisdiction under section 11 to authorize payment of pre-filing obligations to persons whose services are critical to the ongoing operations of a CCAA debtor.[70] This discretion is frequently exercised to permit payment of pre-filing amounts owed to key suppliers, particularly when overseen by the Monitor.[71] A supplier is critical where the uninterrupted supply of goods and/or services is sufficiently integral to the debtor's business that it would be prejudicial to the debtor's restructuring efforts for supply to be

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67 Bachynski Affidavit at para 20.
68 Bachynski Affidavit at para 20.
69 Bachynski Affidavit at paras 125-127.
70 *Performance Sports Group Ltd, Re*, 2016 ONSC 6800 at para 24.
71 *Cinram International Inc, Re*, 2012 ONSC 3767 [*Cinram*] at para 67; *Index Energy Mills Road Corporation, Re*, 2017 ONSC 4944 at paras 26-32.

interrupted.[72] Courts may authorize payment of pre-filing amounts to such suppliers even without a "critical supplier" order under section 11.4[73]

57. In *Cinram*, this Court outlined the factors a CCAA judge will consider when determining whether to authorize payment of pre-filing amounts, even where the Applicants were not seeking a charge in respect of critical suppliers.[74] The *Cinram* factors support authorizing such payments:

(a) The goods and services provided by these third-party suppliers are integral to the business of the Applicants.

(b) The Applicants' operations depend on the uninterrupted delivery of these goods and services. Without the critical logistical and commercial services provided by the service providers and Parian, the Applicants cannot continue serving customers. Moreover, Parian's continued operation relies on payment for services provided to the Applicants, which account for the majority of Parian's business.[75]

(c) No payments would be made without the prior consent of the Monitor.

(d) If the Applicants are unable to make the pre-filing payments to these suppliers of goods and services during the initial stay period, the Applicants face both a potential interruption in supply, and the disruption of key supplier and service-provider relationships. Preserving these relationships is integral to any successful restructuring of the Applicants' business.

58. Recent amendments to the CCAA provide that on an application for an initial order, this Court may grant appropriate relief under section 11 of the CCAA provided that such relief is "reasonably necessary for the continued operations of the debtor company in the ordinary course of business" during the initial stay period.[76] As outlined above, payment of certain pre-filing

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72 *Prizm Income Fund, Re,* 2011 ONSC 2061 at para 31.
73 *Canwest Global Communications Corp, Re*, 2009 CanLII 55114 (ONSC) at para 43.
74 *Cinram* at para 68.
75 Bachynski Affidavit at para 50.
76 CCAA section 11.001.

amounts is necessary to ensure the Applicants' uninterrupted operations during the initial stay period and to preserve key supplier and service-provider relationships. The proposed Monitor supports authorization for such pre-filing payments during the initial stay period.

C. SUSPENSION OF RENT PAYMENTS IN RESPECT OF CLOSED STORES

59. Store closures due to COVID-19 have already cost the Applicants $50 million in lost revenues. 210 of the Applicants' stores will likely re-open by June 10th, 2020. However, COVID-19 public health measures prohibit both landlords and tenants from opening the remaining 100 stores (the "**Closed Stores**") in Ontario and Newfoundland. The Applicants understand that the Closed Stores in Newfoundland will be permitted to re-open on June 8, 2020, and Ontario announced plans to extend the prohibition on operating the Ontario Closed Stores through June 30, 2020.

60. June rent for all the Applicants' stores has not yet been paid. The Initial Order provides that the Applicants will pay rent for all stores lawfully entitled to be open as of the date of the proposed Initial Order – i.e., all stores except the Ontario and Newfoundland Closed Stores. The Initial Order does not require that June rent be paid with respect to the Closed Stores until the Applicants are lawfully entitled to open them (the "**Rent Relief**"). If the Newfoundland Closed Stores are permitted to re-open as of June 8, 2020 (as currently anticipated), June rent for those store will be paid on a pro-rated basis from that date onward.

61. The Applicants' hands are tied. They are legally not permitted to re-open the Closed Stores as a result of public health and emergency orders. If the Applicants were required to pay June rent in respect of these Closed Stores while the Applicants are legally unable to operate them, this would drain approximately $1.5 million of the Applicants' extremely limited funds with no prospect of generating revenue or going-concern operations at those stores.

62. This relief is appropriate and justified in these extraordinary circumstances. The CCAA should not be interpreted to require an insolvent debtor company to pay for the "use" of leased property it cannot lawfully use. If the Rent Relief is not granted, the Applicants' little remaining liquidity will disproportionately be routed to a single creditor group, with no concomitant generation of value for stakeholders or benefit to the Applicants' prospects of restructuring.

(a) COVID-19 regulations

63. The Applicants' 100 Closed Stores are located in shopping malls in Ontario and Newfoundland. The bulk of the Closed Stores are located in Ontario. As a result of government responses to the COVID-19 pandemic, the Applicants have been unable to use the Closed Stores.

64. In Ontario, the Applicants have been unable to use their 92 Ontario Closed Stores since March 24, 2020, when the Closure of Places of Non-Essential Business Regulation required all non-essential businesses to immediately cease operations.[77] Moreover, the Regulation only authorizes temporary entry to the premises of closed businesses in exceptional circumstances: [78]

> (a) performing work at the place of business in order to comply with any applicable law;
> (a.1) preparing the place of business to be reopened;
> (b) allowing for inspections, maintenance and repairs to be carried out at the place of business;
> (c) allowing for security services to be provided at the place of business; and
> (d) attending at the place of business temporarily,
>> (i) to deal with other critical matters relating to the closure of the place of business, if the critical matters cannot be attended to remotely; or
>> (ii) to access materials, goods or supplies that may be necessary for the business to be operated remotely.

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77 O Reg 82/20 [the Regulation], s. 1(1) (as it then was). The Closure of Business Regulation ordered all businesses in Ontario to cease operating on May 24, 2020, unless they fell within one of the few, specified categories of "essential businesses". The Applicants are not "essential businesses".

78 Section 1(2)(a.1) was recently added to the Regulation on May 8, 2020. However, no date has been set for the reopening of non-essential businesses located in the interior of shopping malls. Accordingly, the conditions for section 1(2)(a.1) to apply have not yet occurred in respect of the Ontario Closed Stores.

None of these circumstances apply to the Applicants. The Applicants are prohibited from operating the Ontario Closed Stores, or even from accessing the leased premises to retrieve their property.

65. While Ontario restrictions on business operations have begun to relax, the Regulation still bars the re-opening of retail stores with no exterior entrances in indoor shopping malls, such as the Ontario Closed Stores.[79] It is anticipated that this prohibition will be extended through June 30, 2020.

66. In Newfoundland, a similar COVID-19 directive currently prohibits the Applicants from operating the 8 Closed Stores located there.[80] The Special Measures Order contains no exceptions permitting the Applicants to access the premises of Closed Stores.

67. In sum, the Applicants have been legally unable to use the Closed Stores since the end of March. The Applicants will likely be able to re-open the Newfoundland Closed Stores on June 8, 2020, but do not anticipate being permitted to re-open the Ontario Closed Stores before July 1, 2020.

(b) Court's jurisdiction to grant relief

68. This Honourable Court has jurisdiction to order the Rent Relief pursuant to its broad discretion under section 11. Since the Applicants are seeking the Rent Relief on an Application for an Initial Order, it must be "reasonably necessary for the [Applicants'] continued operations" during the initial stay period, as required by section 11.001.[81]

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[79] O. Reg 223/20, s. 4: "Schedule 2 to the Regulation is amended by adding the following paragraph: 2.5 Businesses that engage in the retail sale, or rental, of items to the public, that have a public entrance that opens onto a street or exterior sidewalk and that are in compliance with section 2 of Schedule 3."

[80] Special Measures Order (General), section 1(vii).

[81] CCAA, section 11.001

69. In these extraordinary times, the Applicants' "ordinary course of business" is anything but ordinary; what would have been "reasonably necessary" six months ago may be insufficient now. The Rent Relief is appropriate in the circumstances of this Application, where the Applicants face a severe liquidity crisis as a result of externally imposed store closures and continue to be unable to use or access their Closed Stores to generate revenue in order to pay rent for these locations. This Honourable Court should grant the Rent Relief.

70. The Rent Relief is not barred by section 11.01 of the CCAA. Section 11.01 sets out a limited exception to the CCAA court's broad discretion under section 11. It provides that no order made under section 11 may have the effect of

> (a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or
>
> (b) requiring the further advance of money or credit.

71. It is important to note that section 11.01 operates to bar relief that the Court would otherwise deem appropriate in the circumstances (if the relief is not appropriate, the court will not exercise its discretion under section 11 and section 11.01 need never be considered). For this reason, section 11.01 is generally given a narrow construction. As the Ontario Court of Appeal concluded, "section 11.3 [the predecessor to section 11.01] is an exception to the general stay provision authorized by section 11… As such… section 11.3 should be narrowly construed."[82]

72. CCAA courts will read the words of section 11.01 carefully, interpreting them in line with the remedial policy objectives of the CCAA. For example, in the seminal case of *Smith Brothers*, the CCAA court had to determine whether a creditor could demand ongoing payment from the debtor for "use of leased… property" within the meaning of section 11.01(a) (then section 11.3(a))

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[82] *Nortel Networks Corp, Re*, 2009 ONCA 833 at para 17, leave to appeal to SCC refused 2010 CarswellOnt 1760 (SCC). See also *Smith Brothers Contracting Ltd, Re*, 1998 CanLII 3844 (BCSC) [*Smith Brothers*] at para 41.

regarding certain financing leases for Ford trucks. If the financing leases fell within section 11.01(a), the creditor could demand post-filing payment from the debtor or exercise remedies on non-payment. However, if section 11.01 was not engaged, the creditor could not demand payment or seize the vehicles without leave of the court.[83]

73. The court in *Smith Brothers* concluded that the agreements did not fall within the scope of section 11.01(a) because this section was only intended to protect creditors who provided value to the debtor during the post-filing period. Looking beyond the plain words of the section, the court concluded that Parliament did not intend "leased property" to mean <u>all</u> leased property; instead, Parliament intended section 11.01(a) to protect only "true" leases and to exclude financing leases.[84] Since financing leases are essentially security arrangements, the value under such leases was provided to the debtor at the time the lease was signed and not during the post-filing period.

74. *Smith Brothers* affirms that section 11.01 protects only payments for the provision of a good, service, or utility to the debtor company during the post-filing period, highlighting the importance of "use" to section 11.01(a): "By instead wording the section as it has, Parliament, to my mind, is saying that it is the provision of the *use* of leased property, not the making of the lease itself, after the stay order, which is within the purview of s. 11.3(a)."[85]

75. While an agreement may say that a creditor provides post-filing services to a CCAA debtor, the actual practice may be very different. Courts will look beyond the plain text of an agreement and consider the factual circumstances between the parties to decide if section 11.01 is actually engaged. This was the case in the Algoma CCAA proceedings, where four separate court decisions concluded that payments under an agreement for post-filing services were not protected by section

83 *Smith Brothers* at paras 10-11.
84 *Smith Brothers* at para 61.
85 *Smith Brothers* at para 19.

11.01(a).[86] Notwithstanding the words of the agreement, Newbould J. concluded that section 11.01(a) was not engaged because the counterparty was not actually providing services to the debtor.[87] In so concluding, Newbould J. looked beyond the words of the agreement and considered the full factual context of the relationship between the parties.[88] The facts of how the agreement was carried out during the post-filing period determined whether section 11.01(a) was engaged.

76. Algoma establishes that a CCAA court may suspend payments due under a contract for services in the post-filing period where no services are actually being rendered to the CCAA debtor. The Ontario Court of Appeal concurred, holding that "[w]hether s. 11.01(a) is available to benefit the moving parties, thereby giving them an advantage over other stakeholders… depends upon the interpretation and application of the <u>particular agreements… and upon how they are being carried out in practice</u>."[89]

77. Applying the reasoning in Algoma and *Smith Brothers*, courts considering whether section 11.01(a) applies to an agreement will first construe the words of the section purposively, and then look behind the contract to examine the immediate factual context between the parties. Section 11.01(a) depends on the factual question of whether there is, in reality, a "use" or "supply" of property or services in the post-filing period. Only then will section 11.01(a) apply to limit the general power of this Honourable Court.

78. Section 11.01(a) should therefore not mandate the payment of June post-filing rent for the Closed Stores during the period in which they were not legally permitted to operate, since this

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[86] *Essar Steel Algoma Inc. et al, Re*, 2016 ONSC 4256 [*Algoma I*]; *Essar Steel Algoma Inc. et al, Re*, 2016 ONSC 6459 [*Algoma II*]; *Essar Steel Algoma Inc. et al, Re*, 2017 ONSC 2585 [*Algoma III*], aff'd 2017 ONCA 478 [*Algoma ONCA*].

[87] *Algoma I* at para 20; *Algoma III* at para 28.

[88] See for example *Algoma I* at paras 15-20; *Algoma II* at paras 12-13 and 18-20; *Algoma III* at paras 3, 10, 11-12, and 28.

[89] *Algoma ONCA* at para 31.

section applies only in respect of the "use of leased or licensed property... provided after the [initial] order is made." Where a CCAA debtor cannot in fact use the leased property due to compliance with applicable laws – which apply to both the landlord and the tenant – there can be no "use" within the meaning of section 11.01(a).

79. Pursuant to COVID-19 regulations, the Applicants have been legally unable to use the leased premises of the Closed Stores. This is not the circumstance section 11.01 was enacted to address. In these exceptional circumstances, it is just and appropriate for this Honourable Court to grant the Rent Relief in respect of June rent.

D. DIRECTORS' CHARGE AND ADMINISTRATION CHARGE SHOULD BE AUTHORIZED

(a) Directors' Charge

80. A successful restructuring of the Applicants will only be possible with the continued participation of its directors (the "**Directors**"), management, and employees. However, in insolvency proceedings, directors and officers of a debtor may be held liable for certain of the debtor's obligations. The Directors currently have no coverage against such potential liability.[90]

81. The Applicants propose to grant a charge in favour of the Directors of $1.5 million on the Property (the "**Directors' Charge**"), subordinate to the proposed Administration Charge. Pursuant to s. 11.51 of the CCAA, the Court is authorized to grant a "super priority" charge to the directors and officers of a company as security in respect of certain statutory obligations.[91] The Directors' involvement in these proceedings is conditional upon the granting of the Directors' Charge.[92]

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[90] Bachynski Affidavit at paras 120-122.
[91] CCAA, section 11.51.
[92] Bachynski Affidavit at para 123.

(b) Administration Charge

82. The proposed Initial Order creates a first-ranking Administration Charge up to a maximum of $450,000 over the Property of the Applicants to secure the fees and disbursements of the Proposed Monitor, its counsel, and the Applicants' counsel.[93] 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.[94] The Proposed Monitor, its counsel, and the Applicants' counsel are essential to these CCAA proceedings; without their assistance, the Applicants cannot restructure and their only alternative is liquidation. It is unlikely that these advisors will participate in the CCAA proceedings without the Administration Charge.

83. Both the Directors' Charge and the Administration Charge are appropriately sized to reflect the Applicants' needs during the initial stay period. If the Initial Order is granted, the Applicants anticipate seeking increases in both charges at the comeback hearing.

PART IV - NATURE OF THE ORDER SOUGHT

84. The Applicants therefore request an Order substantially in the form of the draft Order attached as Schedule "A" to the Notice of Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2nd day of June, 2020.

Tracy C. Sandler

Tracy C. Sandler

John MacDonald

Karin Sachar

[93] Bachynski Affidavit at para 118.
[94] CCAA, section 11.52.

Schedule "A"

LIST OF AUTHORITIES

Case Law

1. *Re Essar Steel Algoma Inc et al*, 2016 ONSC 4256
2. *Re Essar Steel Algoma Inc et al*, 2016 ONSC 6459
3. *Re Essar Steel Algoma Inc et al*, 2017 ONSC 2585, affirmed 2017 ONCA 478
4. *Re Canwest Global Communications Corp*, 2009 CanLII 55114 (ONSC)
5. *Re Cash Store Financial Services*, 2014 ONSC 2372
6. *Re Cinram International Inc*, 2012 ONSC 3767
7. *Re Hoop Canada Inc,* 2008 CarswellOnt 9518 (Ont SCJ [Comm List])
8. *Re Index Energy Mills Road Corporation*, 2017 ONSC 4944
9. *Re Nortel Networks Corp*, 2009 ONCA 833, leave to appeal to SCC refused 2010 CarswellOnt 1760 (SCC)
10. *Re Performance Sports Group Ltd*, 2016 ONSC 6800
11. *Re Prizm Income Fund*, 2011 ONSC 2061
12. *Re Smith Brothers Contracting Ltd*, 1998 CanLII 3844 (BCSC)
13. *Re Stelco (2004)*, 48 C.B.R. (4^{th}) 299, 2004 CanLII 24933 (ONSC), leave to appeal to ONCA refused 2004 CarswellOnt 2936 (ONCA), leave to appeal to SCC refused 2004 CarswellOnt 5200 (SCC)
14. *Re Target Canada Co*, 2015 ONSC 303
15. *Royal Bank v Perfection Foods Ltd*, 1991 CarswellPEI 116 (SCTD)

Secondary Sources

16. *Re Forever XXII ULC Inc*, Factum of the Applicants (Initial Order) dated September 29, 2019

Schedule "B"

BANKRUPTCY AND INSOLVENCY ACT

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

2. [...]

"insolvent person"
« personne insolvable »

"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;

COMPANIES' CREDITORS ARRANGEMENT ACT

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

2.(1) [...]

"debtor company"
« compagnie débitrice »

"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;

[...]

Application

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.

[...]

Jurisdiction of court to receive applications

9 (1) Any application under this Act may be made to the court that has jurisdiction in the province within which the head office or chief place of business of the company in Canada is situated, or, if the company has no place of business in Canada, in any province within which any assets of the company are situated.

[...]

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.

Relief reasonably necessary

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.

Rights of suppliers

11.01 No order made under section 11 or 11.02 has the effect of

(a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or

(b) requiring the further advance of money or credit.

[...]

Interim financing

11.2 (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, a court may make an order declaring that all or part of the company'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 company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

Priority — secured creditors

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

Priority — other orders

(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

Factors to be considered

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

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

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

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

(*d*) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

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

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

(*g*) the monitor's report referred to in paragraph 23(1)(*b*), if any.

Additional factor — initial application

(5) When an application is made under subsection (1) at the same time as an initial application referred to in subsection 11.02(1) or during the period referred to in an order made under that subsection, no order shall be made under subsection (1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

[...]

Critical supplier

11.4 (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 a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operation.

Obligation to supply

(2) If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.

Security or charge in favour of critical supplier

(3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.

Priority

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

[...]

Security or charge relating to director's indemnification

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.

Priority

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

Restriction — indemnification insurance

(3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

Negligence, misconduct or fault

(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

Court may order security or charge to cover certain costs

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.

Priority

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

CLOSURE OF PLACES OF NON-ESSENTIAL BUSINESS REGULATION

O. Reg 82/20: Order under subsection 7.0.2(4) of the *Emergency Management and Civil Protection Act,* R.S.O. 1990, c. E9

Closures

1. (1) Beginning at 11:59 p.m. on Tuesday, March 24, 2020, each person responsible for a place of business that is not listed in Schedule 2 shall ensure that the place of business is closed.

(2) Despite subsection (1), temporary access to a closed place of business that is not listed in Schedule 2 is authorized, unless otherwise prohibited by any applicable law, for the purposes of,

(a) performing work at the place of business in order to comply with any applicable law;

(a.1) preparing the place of business to be reopened;

(b) allowing for inspections, maintenance and repairs to be carried out at the place of business;

(c) allowing for security services to be provided at the place of business; and

(d) attending at the place of business temporarily,

(i) to deal with other critical matters relating to the closure of the place of business, if the critical matters cannot be attended to remotely; or

(ii) to access materials, goods or supplies that may be necessary for the business to be operated remotely.

CLOSURE OF PLACES OF NON-ESSENTIAL BUSINESS REGULATION AMENDMENT

O. Reg 223/20: Order under subsection 7.0.2(4) of the *Emergency Management and Civil Protection Act*, R.S.O. 1990, c E9

4. Schedule 2 to the Regulation is amended by adding the following paragraph:

2.5 Businesses that engage in the retail sale, or rental, of items to the public, that have a public entrance that opens onto a street or exterior sidewalk and that are in compliance with section 2 of Schedule 3.

SPECIAL MEASURES ORDER (GENERAL)

pursuant to section 28 of the *Public Health Protection and Promotion Act*, R.S.N.L. ch P-37.3

1. The following businesses are ordered to close immediately: **[…]**

(vii) Retail stores, unless those stores provide services essential to the life, health or personal safety of individuals and animals including:

i. food;
ii. pharmaceutical products, medicine and medical devices;
iii. personal hygiene products;
iv. cleaning products;
v. baby and child products;
vi. gas stations;
vii. computer and cellphone service and repair;
viii. electronic and office supplies;
ix. hardware supplies; and
x. pet and animal supplies.

IN THE MATTER OF the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36, as amended

Court File No:

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF COMARK HOLDINGS INC., BOOTLEGGER CLOTHING INC., CLEO FASHIONS INC. AND RICKI'S FASHIONS INC.

Applicants

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST
Proceeding commenced at: TORONTO

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