

**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  
(the "CCAA")

AND IN THE MATTER OF A PLAN OF COMPROMISE OR  
ARRANGEMENT OF SPRINGER AEROSPACE HOLDINGS  
LIMITED AND 1138969 ONTARIO INC. (together, the  
"Company" or "Springer")

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**FACTUM OF THE APPLICANTS**

(extension of Stay Period and Phase II Bid Deadline; approval of increased DIP financing  
and DIP charge; approval of KERP and KERP charge)

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February 21, 2023

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**Lawyers for the Applicants**

## PART I – OVERVIEW

1. Springer brings this motion for an Order substantially in the form attached as Tab 3 of Springer’s Motion Record, among other things:

- a. amending the bid deadline for the submission of Phase II Bids (as defined herein) under the ongoing sale and investment solicitation process from March 7, 2023 to March 31, 2023;
- b. increasing the Applicants’ permitted borrowings under the existing interim financing facility from \$1,100,000 to \$1,300,000, corresponding to the Applicants’ projected interim financing needs until April 14, 2023 in accordance with the Updated Cashflow (the “**Increased DIP**”);
- c. approving a proposed key employee retention plan for certain employees of Springer (the “**KERP**”) and a corresponding charge securing the amounts payable under the KERP;
- d. extending the stay of proceedings granted pursuant to the Amended and Restated Initial Order dated December 2, 2022 (the “**ARIO**”) to and including April 14, 2023 (the “**Proposed Stay Period**”); and
- e. sealing the terms of the KERP.

## PART II – FACTS

### a. Background

2. Springer is one of the few full-service aircraft maintenance, repair and overhaul (“**MRO**”) businesses in Canada, and the only one located in Northern Ontario. Springer’s customers include

airlines, corporations, and private individuals. Springer is the largest source of employment in Echo Bay and the Macdonald, Meredith and Aberdeen Additional Township.<sup>1</sup>

3. Springer is critical to Northern Ontario's rural communities. Springer services fleets of aircraft providing air transport for individuals, delivery of food, fuel and medical supplies, as well as air ambulance services to the most remote areas of Northern Ontario, including most fly-in and Indigenous communities.

4. Springer is insolvent as a result of financial and operational challenges relating to, among other things, COVID-19 shutdowns on the travel and aerospace sectors internationally, high rates of employee turnover and operational inefficiencies resulting from a rapid expansion of the business that was undertaken just prior to the COVID-19 shutdowns.<sup>2</sup>

5. On November 23, 2022, Springer obtained an Initial Order under the CCAA. The primary objective of these CCAA proceedings was to provide the Company with sufficient breathing room to devise and implement operational and financial restructuring steps, with the assistance of and under the supervision of the Monitor. Fortunately, Springer's MRO services remain in high demand internationally. Springer is one of the few MRO "one-stop shops" in Canada, and the only one in Northern Ontario. Given sufficient time and resources to fix its operational and financial issues, Springer believes that it will be a profitable enterprise.<sup>3</sup>

6. On December 22, 2022, the Court granted the Company's motion for a sale and investment solicitation process (the "SISP"). The purpose of the SISP was to solicit offers, in the form of a

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<sup>1</sup> The Affidavit of Christopher Grant sworn February 20, 2023, tab 2 (page 14) of the motion record (the "Grant Affidavit"), para. 4.

<sup>2</sup> Grant Affidavit, para. 5.

<sup>3</sup> Grant Affidavit, paras. 5, 6, 9.

refinancing, sale or investment in the Company's business or assets, that would maximize value for all stakeholders. The SISP, which was not opposed by the Company's largest secured creditor, Caisse Desjardins Ontario Credit Union Inc. ("**Desjardins**"), was to be implemented on a going-concern basis, with Springer continuing to operate throughout.<sup>4</sup>

7. Phase I of the SISP is now complete. Springer seeks to advance the SISP to Phase II to permit interested bidders to finalize and submit binding bids. As part of its restructuring efforts, Springer now requires the relief sought on this motion to continue operations while the SISP is underway.

**b. Amendment to Phase II Bid Deadline to March 31, 2023 and extension of Stay Period to April 14, 2023**

8. The SISP approved by this Court on December 22, 2022 is comprised of two phases. Under Phase I, non-binding letters of intent ("**LOIs**") from interested bidders were required to be submitted to the Monitor on or before February 3, 2023. Any bidders having submitted LOIs would then be entitled, if selected by Springer and the Monitor, to enter into Phase II to conduct more extensive due diligence and to submit binding offers.<sup>5</sup>

9. Phase I of the SISP commenced on or around January 11, 2023 with the distribution of a teaser letter. Twelve parties executed non-disclosure agreements, and gained access to a virtual data room and confidential information memorandum.<sup>6</sup>

10. During Phase 1, bidders experienced difficulty in analyzing Springer's projected financial performance given certain shortcomings in Springer's historical financial data. The absence of

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<sup>4</sup> Grant Affidavit, paras. 7, 12.

<sup>5</sup> Grant Affidavit, paras. 13, 20.

<sup>6</sup> Grant Affidavit, paras. 14, 15, 19.

accurate financial information is due, in part, to the significant turnover Springer experienced in its finance department in 2021, including the departure of its Chief Financial Officer in 2022, and the insufficient liquidity to pay the significant outstanding amounts owing to Springer's accountants to finalize the 2022 financial statements. As a result, Springer's 2022 financial statements, generated from its books and records, are likely inaccurate and are not reliable. Springer and the Monitor communicated the apparent deficiencies in the 2022 financial statements to all potential bidders.<sup>7</sup>

11. Given the apparent lack of reliable financial data as well as the relatively short time frame of Phase I of the SISP, potential bidders have found it challenging to project Springer's performance and determine a suitable purchase price.<sup>8</sup>

12. Accordingly, Springer requires an extension of the Phase II bid deadline by approximately 3 weeks, from March 7, 2023 to March 31, 2023, in order to allow potential bidders sufficient time to perform due diligence and to finalize offers. Such a reasonable extension is intended to better achieve the purpose of the SISP, which is to solicit interest in and opportunities for a sale, restructuring or recapitalization of Springer's assets and business that would maximize the value of Springer for all stakeholders.<sup>9</sup>

13. Pursuant to the SISP, the Monitor is entitled to waive compliance with any of the Phase I bid criteria. Given the feedback by interested bidders who because of timing concerns were unable

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<sup>7</sup> Grant Affidavit, para. 16.

<sup>8</sup> Grant Affidavit, para. 17.

<sup>9</sup> Grant Affidavit, para. 22.

to submit LOIs by the Phase I deadline, it is possible that additional bids may be received by the Phase II deadline, especially if extended.<sup>10</sup>

14. Springer also moves for a corresponding extension of the Stay Period (as defined in the ARIO) from March 31, 2023 to April 14, 2023 inclusively (approximately 2 weeks). The two-week extension of the Stay Period is intended to allow a limited amount of additional time for the Monitor to negotiate and work with Phase II bidders with a view to improving and finalizing all binding bids received and to collect on customer receipts as projects are completed.<sup>11</sup>

**c. Need for increased interim financing**

15. Prior to the Initial Order, Springer entered into an interim financing facility with Hillmount Capital Inc. (the “**DIP Lender**”) pursuant to a commitment letter dated November 22, 2022 (the “**Commitment Letter**”). The Commitment Letter provides for a maximum borrowing amount of \$1,500,000, subject to approval of the Court. The Commitment Letter was approved in the Initial Order.

16. Notwithstanding the availability of up to \$1,500,000 in interim financing under the Commitment Letter, the Company, at the request of Desjardins, agreed to limit its borrowings to \$1,100,000 for the period from November 23, 2022 to March 31, 2022.<sup>12</sup> Accordingly, the ARIO provides for Springer’s ability to borrow up to \$1,100,000 under the Commitment Letter with the DIP Lender (the “**DIP Facility**”), and for a charge in favour of the DIP Lender’s charge in the maximum amount of \$1,100,000 (the “**DIP Lender’s Charge**”).

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<sup>10</sup> Grant Affidavit, paras. 22, 25.

<sup>11</sup> Grant Affidavit, paras. 47-51.

<sup>12</sup> Grant Affidavit, para. 28.

17. Springer requires an additional \$200,000 in interim financing to sustain operations through Phase II of the SISP and through to the expiry of the Proposed Stay Period, being April 15, 2023 (the “**Increased DIP**”). The increase in interim financing needs is due to, among other things, the unforeseeable loss of certain projects earlier in these CCAA proceedings.<sup>13</sup>

18. Notwithstanding the need for increased interim financing, the Updated Cashflow indicates that Springer’s financing needs will peak at \$1,300,000 the week ending April 1, 2023. From and after that time, Springer is projected to pay down the DIP Facility beginning the week ending April 1, 2023 as it completes projects and customers remit payment. Accordingly, the balance of the DIP Facility is projected to be reduced from \$1,300,00 to \$815,000 by the week ending April 15, 2023.<sup>14</sup>

**d. Need for KERP and KERP Charge, and sealing**

19. To address a recent loss of employees, Springer is proposing a KERP for key employees. The KERP contemplates paying key employees a bonus of 10% of their annual salary on the earlier of April 14, 2023 and the completion of the SISP.

20. Springer requests this Court’s approval of the KERP and the granting of the KERP Charge securing for payments under the KERP up to a maximum amount of \$70,000. Springer proposes that the new KERP Charge rank third among the Court-ordered charges, behind the Administration Charge and the DIP Lender’s Charge, but above the D&O Charge (as defined in the ARIO). The priority of the Charges would therefore be as follows:

FIRST – the Administration Charge up to a maximum of \$250,000 (unchanged);

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<sup>13</sup> Grant Affidavit, paras. 28, 30.

<sup>14</sup> Grant Affidavit, paras. 29, 30.

SECOND – the DIP Lender’s Charge up to a maximum of \$1,300,000 (from \$1,100,000);

THIRD – the KERP Charge to a maximum of \$70,000 (new); and

FOURTH – the Directors’ Charge up to a maximum of \$165,000 (unchanged).

21. Springer also moves for a sealing order, sealing the terms of the KERP until further order of this Court. Further facts with respect to the need for the KERP and sealing order as set out below alongside the discussion on the applicable law.

### **PART III – ISSUES**

22. The issues on this motion are:

- a. Should the Court extend the Phase II Bid Deadline to March 31, 2022?
- b. Should the Court extend the Stay Period to April 14, 2023?
- c. Should the Court increase the authorized borrowings under the DIP Facility and the maximum amount of the DIP Lender’s Charge to \$1,500,000?
- d. Should the Court approve the KERP and order the KERP Charge?
- e. Should the court make a temporary sealing order for the KERP terms?

### **PART IV – LAW AND ARGUMENT**

#### **a. The Court should extend the Phase II Bid Deadline**

23. Springer requires an extension of the Phase II bid deadline by approximately three weeks, from March 7, 2023 to March 31, 2023, to allow potential bidders more time to perform due diligence and finalize binding offers under the SISF. Springer also moves for a corresponding extension of the Stay Period from March 31, 2023 to April 14, 2023.



24. Section 11 of the CCAA grants the Court jurisdiction to “make any order that it considers appropriate in the circumstances.” Further, paragraphs 28 and 31 of the SISP expressly contemplate the Court’s extending deadlines and making amendments to the SISP.

25. There was significant activity and interest by potential bidders when the SISP was commenced. Twelve parties gained access to the data room to perform due diligence during Phase I. However, due to the shortcomings in Springer’s historical financial data and the expedited time frame of the Phase I SISP process, potential bidders had difficulty projecting Springer’s performance and deriving an appropriate purchase price before the Phase I bid deadline.<sup>15</sup>

26. Springer is proposing to extend the Phase II bid deadline by approximately three weeks, from March 7, 2023 to March 31, 2023, to allow potential bidders a meaningful opportunity to perform due diligence, meet with management, and finalize offers. Given the feedback received from bidders in Phase I, the extension of three weeks is reasonable and will better achieve the purpose of the SISP, which is to maximize value for all stakeholders.

27. The corresponding increase in DIP financing is necessary for the company to continue as a going concern while the SISP is under way. If Springer were to cease operations, it is unlikely that any bidders with an interest in the operations would submit a final bid in Phase II. A shutdown in operations would mean the loss of employees, the loss of customer projects, and would make restarting the business challenging, if not impossible. The only option available in a shutdown scenario is a liquidation.

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<sup>15</sup> See the Grant Affidavit, paras. 12-23.

28. It is reasonable to try to avoid a liquidation while a sale process is underway, while there are LOIs in hand, and additional potential interested bidders. A wholesale loss of employment means that employees will likely relocate away from Northern Ontario to find new employment, with the corresponding impacts on the community and local economy. Springer's customer base is international and brings accretive value to the Northern Ontario economy. The loss of international customers in a shutdown scenario means a significant decrease in new economic activity to the region.

29. Overall, any prejudice caused by the three weeks' extension sought and marginal increase to the DIP facility is greatly outweighed by the potential benefits of maintaining the going-concern operation of the business and allowing interested parties reasonable time to finalize bids.

30. The Monitor supports the sought extension of the Phase II bid deadline.

31. Accordingly, the Court should grant the sought extension of the Phase II bid deadline to March 31, 2023.

**b. The Court should extend the Stay Period to April 14, 2023**

32. Section 11.02(3) of the CCAA provides that the Court may extend the Stay Period if circumstances exist that make the extension appropriate, and if Springer has acted and is acting in good faith and with due diligence.

33. Those criteria are met in this case. Springer is acting with due diligence, in good faith, and in the best interest of stakeholders. Among other things, Springer is conducting the SISF under the

supervision of the Monitor and in accordance with the Sale Process terms and the Sale Process Order.<sup>16</sup>

34. Further, since the Filing Date, Springer has undertaken a review of its operations, maintained a strong pipeline of customer projects, and is working toward developing a uniform operating protocol. Among other things, Springer intends to solicit a Director of Maintenance and Operations at the appropriate time, having regard to the results of the SISP, including the potential synergies of any proposed purchaser.<sup>17</sup>

35. The two-week extension of the Stay Period is intended to allow a limited amount of additional time for the Monitor to negotiate and work with Phase II bidders with a view to improving and finalizing all binding bids received.

36. For all the reasons above, the requested extension of the Stay Period should be granted.

**c. The Court should approve the Increased DIP**

37. The factors that a Court will consider in determining whether to amend an existing interim financing facility and charge is set out in Section 11.2(4) of the CCAA:

- a. the period during which the Applicants are expected to be subject to CCAA proceedings;
- b. how the Applicants' business and financial affairs are to be managed during the proceedings;
- c. whether the Applicants' management has the confidence of its major creditors;

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<sup>16</sup> See the Grant Affidavit, paras. 12-23.

<sup>17</sup> See the Grant Affidavit, paras. 4, 5 and 9-11.

- d. whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the Applicants;
- e. the nature and value of the Applicants' property;
- f. whether any creditor would be materially prejudiced as a result of the security or charge, and whether the Monitor supports the charge.<sup>18</sup>

38. The Court found that those criteria were satisfied when it approved the \$1,100,000 DIP Facility and DIP Lender's Charge. The Court also approved the Commitment Letter, which provided for maximum funding of \$1,500,000.

39. Springer seeks an increase of \$200,000, or approximately 18 percent, to fund its ongoing operations while the SISP is underway. The alternative, a shutdown of operations, is neither beneficial to Springer nor its creditors as a liquidation will not maximize value for stakeholders under the circumstances. A shutdown and liquidation entails the loss of employment from the region, the loss of international customers and new revenues to the region, and the likelihood that any outstanding accounts receivable will not be collectible. In short, it is not reasonable to shut down operations while the SISP is underway and the finish line in view.

40. The additional DIP amount reflects the Applicants' projected interim financing needs for the period until April 14, 2023, in accordance with the Updated Cashflow prepared with the assistance of the Monitor.

41. Springer's financing needs will peak at \$1,300,000 the week ending April 1, 2023. From and after that time, Springer is projected to pay down the DIP Facility beginning the week ending

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<sup>18</sup> See *Just Energy Group Inc. et al.*, [2021 ONSC 7630](#) (Koehnen J.) ("**Just Energy**"), para. 35, and *Laurentian University of Sudbury*, [2021 ONSC 3545](#) (Morawetz C.J.) ("**Laurentian**"), paras. 39, 40.

April 1, 2023. Accordingly, the balance of the DIP Facility is projected to be reduced from \$1,300,00 to \$815,000 by the week ending April 15, 2023. Any prejudice caused by the increased DIP financing will be more than offset by Springer's completion of customer contracts and collection of accounts receivable.<sup>19</sup>

42. Springer continues to manage its business and financial affairs in the normal course, and to conduct the SISP, under the supervision of and with the assistance of the Monitor. Permitting an increase in the DIP facility will signal Springer's continued operation and will engender stability and confidence of creditors, employees, suppliers and customers.<sup>20</sup>

43. DIP financing is routinely approved even if it potentially prejudices some creditors, as long as the prejudice is outweighed by the benefit to all stakeholders.<sup>21</sup> No creditor would be materially prejudiced by the increased DIP Lender's Charge given the relatively small increase and the attendant benefits, including the opportunity to realize on receivables and the pay down of the DIP facility in April. The interim financing is the only way in which Springer can continue operating during the restructuring period, which is for the benefit of its general body of creditors and other stakeholders.<sup>22</sup>

44. It remains a condition of all advances under the DIP Facility that they be secured by the DIP Lender's Charge, subject only to the Administration Charge. Such a requirement on the part of the DIP Lender is reasonable in the circumstances of the Applicants' insolvency.

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<sup>19</sup> Grant Affidavit, paras. 29, 30.

<sup>20</sup> See *Canwest Global Communications Corp. (Re)*, [2009 CanLII 55114 \(ON SC\)](#) (Pepall J.), ("*Canwest 2009*"), para. 33, and *Re: Mobilicity Group*, [2013 ONSC 6167](#) (Newbould J.) ("*Mobilicity*"), para. 31.

<sup>21</sup> *AbitibiBowater inc. (Arrangement relatif à)*, [2009 QCCS 6453](#) (Gascon J. (as he then was)), para. 16.

<sup>22</sup> See *Miniso International Hong Kong Limited v Migu Investments Inc.*, [2019 BCSC 1234](#) (Fitzpatrick J.) ("*Miniso*"), paras. 88-90.

45. The Monitor is supportive of the increased DIP facility. The Increased DIP is fair, reasonable, in the best interest of stakeholders, and carefully limited to amounts truly necessary in the circumstances, in accordance with the Updated Cashflow. It is therefore appropriate for this Court to approve the Increased DIP to protect the going-concern business and allow Springer to continue to work towards a viable plan of arrangement, which is in the best interest of all stakeholders including secured and unsecured creditors, suppliers, customers, and the local Northern Ontario community.<sup>23</sup>

**d. The Court should approve the KERP and order the KERP Charge**

46. The Court has jurisdiction under Section 11 of the CCAA to approve the KERP and KERP Charge. Courts have considered the following criteria and principles in determining whether to approve a KERP:

- a. the importance of the employees covered by the KERP and the difficulty of replacing them;<sup>24</sup>
- b. the risk that key employees seek other employment, and the detrimental effects of key employees departing;<sup>25</sup>

<sup>23</sup> See *Federal Gypsum Company (Re)*, [2007 NSSC 347](#) (MacAdam J.), para. 39; *Federal Gypsum Company (Re)*, [2007 NSSC 384](#) (MacAdam J.), paras. 40, 42; *Lydian International Limited (Re)*, [2020 ONSC 4006](#) (Morawetz C.J.), paras. 65-68; *Laurentian*, paras. 33-44; and *Just Energy*, para. 35. See also generally *Canwest 2009*, paras. 31-36; *Mobilicity*, paras. 24-41; *Miniso*, paras. 73-90; *Clover Leaf Holdings Company, Re.*, [2019 ONSC 6966](#) (Hailey J.), paras. 20-23; and *Mountain Equipment Co-Operative (Re)*, [2020 BCSC 1586](#) (Fitzpatrick J.), paras. 44-61.

<sup>24</sup> See *Grant Forest Products Inc. (Re)*, [2009 CanLII 42046 \(ON SC\)](#) (Newbould J.) (“*Grant Forest*”), paras. 9, 11, 12; *Arclin Canada Ltd. (Re)*, [2009 CanLII 55109 \(ON SC\)](#) (Hoy J.) (“*Arclin*”), paras. 7, 12, 13; *Canwest 2009*, para. 49; *Canwest Publishing Inc.*, [2010 ONSC 222](#) (Pepall J.) (“*Canwest 2010*”), para. 60, 61; *Timminco Limited (Re)*, [2012 ONSC 506](#) (Morawetz J.) (“*Timminco*”), para. 72; *Cinram International Inc. (Re)*, [2012 ONSC 3767](#) (Morawetz J.) (“*Cinram*”), paras. 37, 91-93; *U.S. Steel Canada Inc. (Re)*, [2014 ONSC 6145](#) (Wilton-Siegel J.) (“*US Steel 2014*”), paras. 28, 29; *Re Essar Steel Algoma Inc. et al.*, [2015 ONSC 7656](#) (Newbould J.) (“*Essar Steel*”), para. 11; *Walter Energy Canada Holdings, Inc. (Re)*, [2016 BCSC 107](#) (Fitzpatrick J.) (“*Walter Energy*”), para. 59; *U.S. Steel Canada Inc. (Re)*, [2016 ONSC 5215](#) (Wilton-Siegel J.) (“*US Steel 2016*”), paras. 18, 19; *Aralez Pharmaceuticals Inc. (Re)*, [2018 ONSC 6980](#) (Dunphy J.) (“*Aralez*”), paras. 25, 38-44; *1057863 B.C. Ltd. (Re)*, [2020 BCSC 1359](#) (Fitzpatrick J.) (“*105’ Ltd.*”), para. 108; *Just Energy*, para. 10, 14, 15; and *Cannapiece Group Inc v Marzili*, [2022 ONSC 6379](#) (Penny J.) (“*Cannapiece*”), para. 18.

<sup>25</sup> See *Grant Forest*, paras. 11, 14; *Arclin*, para. 7; *Canwest 2009*, para. 49; *Canwest 2010*, para. 61; *Timminco*, para. 75; *Cinram*, paras. 37, 91-93; *US Steel 2014*, para. 30; *Essar Steel*, para. 11; *Walter Energy*, paras. 59, 61;

- c. the process through which the proposed KERP was designed; and<sup>26</sup>
- d. the reasonableness of the KERP terms and the court's deference to reasonable business judgment and the court officer's report.<sup>27</sup>

47. Springer has identified key employees who are key to its going-concern operations, its restructuring efforts, the ongoing sale process, and the transition period following the implementation of a transaction. The employees covered by the KERP are essential due to their accreditation as licensed aircraft engineers, direct responsibility to work on customer projects, as well as to act as team leads on various projects. The loss of these employees would make it challenging if not impossible for Springer to continue work on customer projects.<sup>28</sup>

48. The dedicated assistance of the key employees is critical for the stability of the proceedings and to maximize value for stakeholders. These employees are not easily replaced, as they are likely to relocate away from Northern Ontario for alternate employment, and it has been challenging to attract new employees. Springer operates in a complex and highly regulated business environment, and in a geographically remote area.<sup>29</sup> This was one reason that Springer avoided layoffs during the COVID-19 shutdowns to avoid losing skilled workers. Springer's risk of losing key employees

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*US Steel 2016*, paras. 20, 21; *Aralez*, paras. 38-44; *105' Ltd.*, paras. 109, 110; *Just Energy*, paras. 11, 19-21; and *Cannapiece*, para. 18.

<sup>26</sup> See *Grant Forest*, paras. 17, 18; *Canwest 2009*, para. 50; *Timminco*, paras. 72, 73; *Cinram*, paras. 37, 91-93; *US Steel 2014*, para. 31; *Essar Steel*, para. 11; *Walter Energy*, para. 59; *US Steel 2016*, para. 22; *Aralez*, paras. 31-37; *105' Ltd.*, para. 110; *Just Energy*, para. 17; *Cannapiece*, para. 18.

<sup>27</sup> *Grant Forest*, paras. 9, 11, 18, 21, 22; *Canwest 2009*, para. 50; *Canwest 2010*, paras. 61, 62; *Arclin*, paras. 8, 11; *Timminco*, para. 74; *Cinram*, para. 37, 91-93; *Walter Energy*, para. 59; *US Steel 2014*, para. 32; *Essar Steel*, para. 11; *US Steel 2016*, para. 23; *Aralez*, paras. 31-37; and *Cannapiece*, para. 18.

<sup>28</sup> See the Grant Affidavit, paras. 39-41.

<sup>29</sup> See spec. *Essar Steel*, paras. 11(iv), 18.

is now exacerbated by the fact that it is undergoing a restructuring proceeding.<sup>30</sup> The loss of employees has affected Springer's operations at a time when its stability is paramount.<sup>31</sup>

49. The proposed KERP was designed by Springer with the assistance of and in extensive consultation with the Monitor. Such process was thorough, fair and reasonable.

50. The proposed KERP contemplates paying key employees a bonus totalling 10% of their annual salary on the earlier of April 14, 2023 and the completion of the SISP, provided that employees meet certain requirements, including maintaining certain levels of performance.<sup>32</sup>

51. The KERP Charge is proposed to rank third among the Court-ordered Charges and to be capped at a maximum amount of \$70,000. The cost of the KERP is nominal under the circumstances and is outweighed by the benefit of employee retention and maintaining the operations as a going concern.<sup>33</sup>

52. At this time, Springer retains sufficient employees to complete the current work in process, with the KERP incentivizing employees to remain with Springer through the earlier of completion of the SISP and April 15, 2023. It is anticipated that after that time, with a viable transaction and/or restructuring plan, employees will be afforded longer-term stability and employment.

**e. The Court should make a temporary sealing order with respect to the terms of the KERP**

53. Springer seeks a sealing order with respect to the terms of the KERP until further Order of the Court. The KERP terms include particulars of the individual employees' employment,

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<sup>30</sup> See *Just Energy*, para. 11.

<sup>31</sup> See the Grant Affidavit, paras. 37-41.

<sup>32</sup> See *Essar Steel*, paras. 11(iv), 18.

<sup>33</sup> Grant Affidavit, paras. 36, 43.



including their names, wages and positions. The employees themselves have not consented to public disclosure of their personal information. It is appropriate for that personal information to be sealed.<sup>34</sup>

54. The Court has jurisdiction to grant sealing orders under s. 137(2) of the CJA.<sup>35</sup> In deciding whether to grant a sealing order, the Supreme Court of Canada in *Sherman Estate* held that Courts must consider whether: (i) Court openness poses a serious risk to an important public interest; (ii) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and (iii) as a matter of proportionality, the benefits of the order outweigh its negative effects.<sup>36</sup>

55. The Courts have regularly recognized that sealing orders with respect to KERP terms meet the *Sherman Estate* test.<sup>37</sup> As explained by this Court recently in *Just Energy*:

All 3 factors are satisfied here. The documents the applicants seek to seal contain the names of the KERP recipients and the amounts each will receive. Publicly disclosing employee compensation violates the privacy interest of those employees. The employees themselves have not initiated any Court proceeding that would require production of that information. Broad publication of confidential income data could create risks for employee retention in this and other CCAA proceedings.

... The limitation on the open Courts principle is minimal. The order is proportional. It benefits in protecting privacy interests of non-party employees outweigh the very limited impact on the open Courts principle.<sup>38</sup>

56. The same principles apply here. There is an important public policy interest in protecting the privacy of non-party employees particularly in the context of insolvency proceedings. There is

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<sup>34</sup> See the Grant Affidavit, paras. 52-54.

<sup>35</sup> *Courts of Justice Act*, [R.S.O. 1990, c. C.43](#), s. 137(2).

<sup>36</sup> *Sherman Estate v Donovan*, [2021 SCC 25](#), para. 38.

<sup>37</sup> See, *inter alia*, *Danier Leather Inc. (Re)*, [2016 ONSC 1044](#) (Penny J.) (“*Danier Leather*”), paras. 79-86; *Essar Steel*, paras. 20-26; and *Just Energy*, paras. 26-29.

<sup>38</sup> *Just Energy*, paras. 27-29.

also an important public interest in the ability of Canadian companies to offer key employee retention plans in insolvency proceedings without prejudicing their key employees' legitimate privacy and economic concerns, which would be detrimental to them and go against the rationale for the retention plan. The publication of the terms of the KERP and the name of the employees covered by the KERP during Springer's restructuring proceedings would pose a serious risk to those important public interests. The temporary sealing order sought is necessary because there are no reasonable alternative measures that could prevent the such risk.

57. The KERP contains commercially sensitive information as well as personal information relating to certain of Springer's employees. It would be detrimental to Springer's restructuring efforts and to those employees' privacy interests if this information became public. In such circumstances, the sealing order minimally limits the open-courts principle.

## **II. RELIEF REQUESTED**

58. The Applicants therefore seek an Order in the form appended as Tab 3 of the Motion Record.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 21<sup>st</sup> day of February, 2023.

*Reconstruct LLP*

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**RECONSTRUCT LLP**  
Lawyers for the Applicants

## **SCHEDULE "A"**

### **List of Authorities**

1.	<i>Just Energy Group Inc. et al.</i> , <a href="#">2021 ONSC 7630</a> (Koehnen J.)
2.	<i>Laurentian University of Sudbury</i> , <a href="#">2021 ONSC 3545</a> (Morawetz C.J.)
3.	<i>Canwest Global Communications Corp. (Re)</i> , <a href="#">2009 CanLII 55114 (ON SC)</a> (Pepall J.)
4.	<i>Re: Mobilicity Group</i> , <a href="#">2013 ONSC 6167</a> (Newbould J.)
5.	<i>AbitibiBowater inc. (Arrangement relatif à)</i> , <a href="#">2009 QCCS 6453</a> (Gascon J. (as he then was))
6.	<i>Miniso International Hong Kong Limited v Migu Investments Inc.</i> , <a href="#">2019 BCSC 1234</a> (Fitzpatrick J.)
7.	<i>Federal Gypsum Company (Re)</i> , <a href="#">2007 NSSC 347</a> (MacAdam J.)
8.	<i>Federal Gypsum Company (Re)</i> , <a href="#">2007 NSSC 384</a> (MacAdam J.)
9.	<i>Lydian International Limited (Re)</i> , <a href="#">2020 ONSC 4006</a> (Morawetz C.J.),
10.	<i>Clover Leaf Holdings Company, Re.</i> , <a href="#">2019 ONSC 6966</a> (Hailey J.),
11.	<i>Mountain Equipment Co-Operative (Re)</i> , <a href="#">2020 BCSC 1586</a> (Fitzpatrick J.)
12.	<i>Grant Forest Products Inc. (Re)</i> , <a href="#">2009 CanLII 42046 (ON SC)</a> (Newbould J.)
13.	<i>Arclin Canada Ltd. (Re)</i> , <a href="#">2009 CanLII 55109 (ON SC)</a> (Hoy J.)
14.	<i>Canwest Publishing Inc.</i> , <a href="#">2010 ONSC 222</a> (Pepall J.)
15.	<i>Timminco Limited (Re)</i> , <a href="#">2012 ONSC 506</a> (Morawetz J.)
16.	<i>Cinram International Inc. (Re)</i> , <a href="#">2012 ONSC 3767</a> (Morawetz J.)
17.	<i>U.S. Steel Canada Inc. (Re)</i> , <a href="#">2014 ONSC 6145</a> (Wilton-Siegel J.)
18.	<i>Re Essar Steel Algoma Inc. et al.</i> , <a href="#">2015 ONSC 7656</a> (Newbould J.)
19.	<i>Walter Energy Canada Holdings, Inc. (Re)</i> , <a href="#">2016 BCSC 107</a> (Fitzpatrick J.)
20.	<i>U.S. Steel Canada Inc. (Re)</i> , <a href="#">2016 ONSC 5215</a> (Wilton-Siegel J.)
21.	<i>Aralez Pharmaceuticals Inc. (Re)</i> , <a href="#">2018 ONSC 6980</a> (Dunphy J.)
22.	<i>1057863 B.C. Ltd. (Re)</i> , <a href="#">2020 BCSC 1359</a> (Fitzpatrick J.)

23.	<i>Cannapiece Group Inc v Marzili</i> , <a href="#">2022 ONSC 6379</a> (Penny J.)
24.	<i>Sherman Estate v Donovan</i> , <a href="#">2021 SCC 25</a>
25.	<i>Danier Leather Inc. (Re)</i> , <a href="#">2016 ONSC 1044</a> (Penny J.)

## **SCHEDULE "B"**

### **Statutory Authorities**

*Companies' Creditors Arrangement Act*, [R.S.C., 1985, c. C-36](#):

#### **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.

#### **Stays, etc. — other than initial application**

**11.02 (2)** A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

- (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

#### **Burden of proof on application**

**(3)** The court shall not make the order unless

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

#### **Restriction**

**(4)** Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

#### **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.

*Courts of Justice Act*, [R.S.O. 1990, c. C.43](#):

**Sealing Documents**

**137 (2)** A Court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

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**IN THE MATTER OF A PLAN OF COMPROMISE OR  
ARRANGEMENT OF SPRINGER AEROSPACE HOLDINGS  
LIMITED AND 1138969 ONTARIO INC.**

**Court File No. CV-22-00690657-00CL**

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**

Proceedings commenced at Toronto

**FACTUM OF THE APPLICANTS**  
(extension of stay period and Phase II Bid  
Deadline; approval of increased DIP financing  
and DIP charge; approval of KERP and  
KERP charge)

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