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FAX COVER SHEET

Date: February 25, 2019

TO	COMPANY	FAX	TELEPHONE
Alex Ilchenko	Pallett Valo LLP	905-273-6920	905-273-3022 ext 203

FROM: CATHERINE FRANCIS

PAGES: 16 (including this cover sheet)
Original placed on file

RE: In the matter of the bankruptcy of Curriculum Services Canada
 Court file no. 31-2360759

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MESSAGE:

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February 25, 2019

VIA FACSIMILE (905-273-6920)

Alex Ilchenko
Pallett Valo LLP
Lawyers & Trade-mark Agents
77 City Centre Drive
West Tower, Suite 300
Mississauga, ON L5B 1M5

Dear Mr. Ilchenko:

**Re: In the matter of the bankruptcy of Curriculum Services Canada
Estate No. 31-2360759**

Please find attached our Notice of Appeal and Appellant's Certificate respecting evidence with respect to the above-noted matter which we are serving on you pursuant to *Bankruptcy and Insolvency Act* and the *Rules of Civil Procedure*.

Yours truly,

MINDEN GROSS LLP

Per:

Del. Catherine Francis
CF:kf
Encls.

#3577545 | 4019296

Court File No.: 13-2360759
Court of Appeal no.

COURT OF APPEAL FOR ONTARIO

IN THE MATTER OF THE BANKRUPTCY OF
Curriculum Services Canada/Services Des Programmes D'Etudes Canada
of the City of Toronto
in the Province of Ontario

NOTICE OF APPEAL

The APPELLANT, MEDALLION CORPORATION as authorized agents for 280 Richard Street West Limited (the Appellant or the "Landlord"), applies for leave to appeal, if required, and appeals to the Court of Appeal from the Order of the Honourable Madam Justice Chiappetta dated February 15, 2019, made at Toronto, Ontario.

THE APPELLANT ASKS that the Order of the Honourable Madam Justice Chiappetta dismissing the Appellant's appeal from disallowance be set aside and an Order be granted as follows:

1. Allowing the Appellant's appeal from disallowance of its claim in the estate of the Bankrupt, in the amount of:
 - a. The balance of its claim for three months' accelerated rent in the amount \$50,289.28;

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- b. Its claim for contractual damages in the amount of \$203,442.37, calculated in accordance with the formula contained in the lease between the Appellant and Curriculum Services Canada/Services Des Programmes D'Etudes Canada ("Curriculum" or the "Bankrupt").
2. Its costs of this appeal and the appeal from disallowance out of the estate of the Bankrupt;
3. Such further and other relief as to this Honourable Court may seem just.

THE GROUNDS OF APPEAL are as follows:

1. The Appellant/Landlord is the owner of premises at 150 John Street West, Toronto, Ontario, Suite 600 (the "Premises").
2. The Bankrupt was the tenant of the Premises under a Lease dated May 26, 2017 (the "Lease").
3. The Lease was for 8,322 square feet of space for a term of ten years, six months, commencing on July 1, 2017 and expiring on December 31, 2027, with basic rent payable as set out in the Lease.
4. In addition to basic rent, the Tenant was required to pay Additional Rent as defined in the Lease.
5. Section 16 of the Lease deals with Defaults and Remedies. Sections 16.1 of the Lease provides in part as follows:

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If any of the following shall occur:

...

(f) Tenant, any assignee or a subtenant of all or substantially all of the Premises makes an assignment for the benefit of creditors or becomes bankrupt or insolvent or takes the benefit of any statute for bankrupt or insolvent debtors or makes any proposal, assignment, arrangement or compromise with its creditors or Tenant sells all or substantially all of its personal property at the Premises other than in the ordinary course of business (and other than in connection with a Transfer requiring Landlord's consent and approved in writing by Landlord), or steps are taken or action or proceedings commenced by any person for the dissolution, winding up or other termination of Tenant's existence or liquidation of its assets (collectively called a "Bankruptcy");

(g) a trustee, receiver, receiver-manager, manager, agent or other like person shall be appointed in respect of the assets or business of Tenant or any other occupant of the Premises;

...

then, without prejudice to and in addition to any other rights or remedies to which Landlord is entitled hereunder or at law, the then current and the next three (3) months' Rent shall be forthwith due and payable and Landlord shall have the following rights and remedies, all of which are cumulative and not alternative, namely:

(i) to terminate this Lease in respect of the whole or any part of the Premises by written notice to Tenant (it being understood that actual possession shall not be required to effect a termination of this Lease and that written notice, alone shall be sufficient); if this Lease is terminated in respect of part of the Premises, this Lease shall be deemed to be amended by the appropriate amendments, and proportionate adjustments in respect of Rent and any other appropriate adjustments shall be made;

...

(v) to obtain damages from Tenant including, without limitation, if this Lease is terminated by Landlord, all deficiencies between all amounts which would have been payable by Tenant for what would have been the balance of the Term, but for such termination, and all net amounts actually received by Landlord for such period of time;

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(vi) to suspend or cease to supply any utilities, services, heating, ventilating, air conditioning and humidity control to the Premises, all without liability of Landlord for any damages, including indirect or consequential damages, caused thereby;

(vii) to obtain the Termination Payment from Tenant;

(viii) if this Lease is terminated due to the default of Tenant, or if it is disclaimed, repudiated or terminated in any insolvency proceedings related to Tenant (collectively "Termination"), to obtain payment from Tenant of the value of all tenant inducements which were received by Tenant pursuant to the terms of this Lease, the agreement to enter into this Lease or otherwise, including, without limitation, the amount equal to the value of any leasehold improvement allowance, tenant inducement payment, rent free periods, lease takeover, Leasehold Improvements or any other work for Tenant's benefit completed at Landlord's cost or any moving allowance, which value shall be multiplied by a fraction, the numerator of which shall be the number of months from the date of Termination to the date which would have been the natural expiry of this Lease but for such Termination, and the denominator of which shall be the total number of months of the Term as originally agreed upon.

6. On March 28, 2018, Curriculum filed an Assignment for the General Benefit of Creditors (the "Assignment"). The Bankrupt's Statement of Affairs dated March 28, 2018, in which she swore that Curriculum had assets totalling \$1,903,563.87 and liabilities totalling \$5,605,253.28, for a deficiency of \$3,701,689.41. The Statement of Affairs was commissioned by Daniel Weisz of RSM Canada Limited.

7. The single largest liability shown on the Statement of Affairs was Curriculum's liability to the Landlord, which was reflected as follows:

- (a) Unsecured claim: \$3,986,725.25
- (b) Preferred claim: \$100,558.59

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8. On March 29, 2018, pursuant to the Assignment, Curriculum became bankrupt. RSM Canada Inc. was appointed as Trustee.
9. On April 20, 2018, the Landlord filed a Proof of Claim with the Trustee for an unsecured claim in the amount of \$4,028,111.23 and a preferred claim in the amount of \$100,558.59 in accordance with its rights under the Lease.
10. On April 23, 2018, the Trustee issued a Notice of Disclaimer of the Lease.
11. Following the Disclaimer, the Landlord successfully mitigated its damages by re-leasing the Premises.
12. The Trustee did not request any information from the Landlord or advise that it was considering disallowing the Landlord's claim.
13. On September 19, 2018, the Trustee issued a Notice of Partial Disallowance of Claim pursuant to subsection 135(3) of the BIA (the "Disallowance"), allowing the Landlord's preferred claim in the amount of \$24,571.00 and disallowing the Landlord's unsecured claim in its entirety on the following bases:
 - (a) The Trustee's realization on the assets of the Premises totalled only \$24,571.00, thus the Landlord's preferred claim is limited to \$24,571.00;
 - (b) Under the provisions of the BIA and the Ontario *Commercial Tenancies Act* RSO 1990, c L.7 (the "CTA"), a landlord cannot claim damages under a lease which has been disclaimed;

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- (c) The Lease lacks an acceleration provision that accelerates rent for the remaining term of the Lease.

14. Section 38 of the CTA does not restrict the landlord's preferential claim for accelerated rent to amounts realized from the property on the premises under lease.

15. Section 38(1) of the CTA provides as follows:

Lien of landlord in bankruptcy, etc.

38. (1) In case of an assignment for the general benefit of creditors, or an order being made for the winding up of an incorporated company, or where a receiving order in bankruptcy or authorized assignment has been made by or against a tenant, the preferential lien of the landlord for rent is restricted to the arrears of rent due during the period of three months next preceding, and for three months following the execution of the assignment, and from thence so long as the assignee retains possession of the premises, but any payment to be made to the landlord in respect of accelerated rent shall be credited against the amount payable by the person who is assignee, liquidator or trustee for the period of the person's occupation.

16. Section 136(1)(f) of the BIA restricts the priority claim of lessors as follows:

(f) the lessor for arrears of rent for a period of three months immediately preceding the bankruptcy and accelerated rent for a period not exceeding three months following the bankruptcy if entitled to accelerated rent under the lease, but the total amount so payable shall not exceed the realization from the property on the premises under lease, and any payment made on account of accelerated rent shall be credited against the amount payable by the trustee for occupation rent;

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17. However, section 136(3) of the BIA provides:

Balance of claim

(3) A creditor whose rights are restricted by this section is entitled to rank as an unsecured creditor for any balance of claim due him.

18. Accordingly, the Appellant is entitled to an unsecured claim for the balance of its claim for accelerated rent under the CTA.

19. In addition, neither the BIA nor the CTA prohibit a landlord from filing an unsecured contractual claim for damages arising from breach of a lease, including bankruptcy of the tenant.

20. The Supreme Court of Canada explicitly recognized in *Highway Properties Ltd. v. Kelly Douglas & Co.* 1971 CanLII 123 (SCC) that leases are both contracts and give rise to an interest in land. Under general contract law principles, a landlord is entitled to file an unsecured proof of claim for damages arising from the tenant's breach of the lease.

21. Under the plain wording of the Lease:

- (a) The Assignment was an event of default;
- (b) Pursuant to the default, the Landlord is entitled to (among other things):
- (c) Damages, including all deficiencies between amounts which would have been payable by Tenant for what would have been the balance

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of the Term, but for such termination, and all net amounts actually received by Landlord for such period of time;

- (d) The Termination Payment from Tenant; and/or
- (e) The value of all tenant inducements which were received by Tenant pursuant to the Lease, including the value of any leasehold improvement allowance, tenant inducement payment, rent free periods, lease takeover, Leasehold Improvements or any other work for Tenant's benefit completed at Landlord's cost.

22. The Notice of Disclaimer was a further event of default under the Lease, entitling the Landlord to a claim for contractual damages as set out in the Lease.

23. As a result of its mitigation, the Landlord confined its unsecured claim to:

- (a) The balance of its claim for accelerated rent, pursuant to the provisions of the BIA;
- (b) Recovery of tenant inducements, calculated pursuant to the formula set out in the Lease.

24. The Trustee has not disputed the Landlord's calculation of its contractual damages.

25. Madam Justice Chiappetta erred at law in, among other things:

- (a) Failing to address or consider the Landlord's right to three months' accelerated rent under the Lease, the CTA and the BIA;

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- (b) Failing to address or consider the Landlord's contractual right to damages arising from the Disclaimer, calculated under the Lease;
- (c) Following and applying case law that has been explicitly and/or implicitly overruled by the Supreme Court of Canada;
- (d) Following case law that was not binding on her;
- (e) Treating the Landlord's contractual claim for damages as a claim for "rent" under the Lease;
- (f) Failing to address or apply the clear terms of the BIA to permit the Landlord to file a proof of claim for contractual damages in the estate;

26. Sections 135 and 136 of the BIA.

27. Such further and other grounds as counsel may advise and this Honourable Court permits.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS:

1. The Appellant submits that this appeal is to the Court of Appeal, as the appeal arises out of an order of a judge under the *Bankruptcy and Insolvency Act* and the property involved in the appeal exceeds in value ten thousand dollar and the appeal involves matters of general importance to the practice in bankruptcy/insolvency matters or to the administration of justice as a whole.

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2. The Appellant relies on Sections 193(c), and (e) of the *Bankruptcy and Insolvency Act*, RSC 1995, c. B-3, as amended.

February 25, 2019

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IN THE MATTER OF THE BANKRUPTCY OF
Curriculum Services Canada/Services Des Programmes D'Etudes Canada
of the City of Toronto, in the Province of Ontario

Estate No. 31-2360759

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

Proceeding commenced at Toronto

NOTICE OF APPEAL

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Court File No.: 13-2360759
Court of Appeal no. C

COURT OF APPEAL FOR ONTARIO

IN THE MATTER OF THE BANKRUPTCY OF
Curriculum Services Canada/Services Des Programmes D'Etudes Canada
of the City of Toronto
in the Province of Ontario

APPELLANT'S CERTIFICATE

The APPELLANT certifies that the following evidence is required for the Appeal, in the Appellant's opinion:

1. Exhibit numbers: N/A
2. Materials filed before the Honourable Madam Justice Chiappetta, including:
 - (a) Motion Record of Medallion Corporation as authorized agents for 280 Richmond Street West Limited dated October 17, 2018, including:
 - (i) Notice of Appeal from Disallowance of Claim dated October 17, 2018;
 - (ii) Affidavit of Joseph Cacciola sworn October 16, 2018 and the exhibits thereto

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3. The oral evidence of - N/A.

February 25, 2019

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IN THE MATTER OF THE BANKRUPTCY OF
Curriculum Services Canada/Services Des Programmes D'Etudes Canada
of the City of Toronto, in the Province of Ontario

Estate No. 31-2360759
C

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

Proceeding commenced at Toronto

APPELLANT'S CERTIFICATE

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