Court File No. CV-21-656040-00CL

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 LAURENTIAN UNIVERSITY OF SUDBURY

FACTUM OF THE MONITOR
(Appeal of Thorneloe University)

November 9, 2022

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FACTUM OF THE MONITOR

PART I - OVERVIEW

1. On May 31st, 2021, the Honourable Chief Justice Morawetz granted an order in the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") proceeding of Laurentian University of Sudbury ("**Laurentian**") approving a claims process to identify, determine and resolve claims of creditors of Laurentian (the "**Amended and Restated Claims Process Order**").

2. In accordance with the claims process established through the Amended and Restated Claims Process Order, on July 30, 2021[1], Thorneloe University (the "**Thorneloe**") submitted a Proof of Claim to the Court-appointed Monitor, Ernst & Young Inc. (the "**Monitor**") asserting a claim against Laurentian in the amount of approximately $16.6 million (as amended, the "**Claim**").

[1] Thorneloe University's Proof of Claim dated July 30, 2021 was amended by letter dated December 17, 2021 to reduce the loss of academic and commercial value portion of its claim from $11,479,624 to $9,800,000.

As described in greater detail below, Thorneloe was formerly a federated university with Laurentian and alleges that Laurentian's disclaimer of the federated university relationship caused Thorneloe to suffer significant economic losses.

3. On May 25, 2022, the Monitor issued a Notice of Revision or Disallowance disallowing a portion of the Claim. On June 8, 2022, counsel for Thorneloe delivered a Dispute Notice to the Monitor. In accordance with paragraph 36 of the Amended and Restated Claims Process Order, the Monitor referred the disputed portion of the Claim for resolution to Mr. Niels Ortved, a Claims Officer appointed by Order dated December 20, 2021 (the "**Claims Officer**"). On September 8, 2022, the Claims Officer released his decision upholding the Monitor's revision. Thorneloe appeals that decision to this Court. The Monitor submits this factum in support of the Claims Officer's decision.

4. Central to the Claims Officer's damages assessment is his finding that Thorneloe was not profitable and not likely to be profitable. This was a factual determination made after reviewing the evidence, including Thorneloe's historical financial statements. This assessment of damages is subject to a very high level of deference on appellate review. For the reasons that follow, it is the Monitor's view that the Claims Officer did not err in his assessment of damages.

5. The Claims Officer correctly concluded that Thorneloe was not entitled to a claim based on the lost profit theory of loss quantification, after applying the relevant Canadian law with respect to unprofitable contracts. The appropriate theory of loss quantification to apply in any given case is a discretionary decision that is to be afforded deference by this Court.

6. The Claims Officer was also entitled to reject the Farber Report (as defined below) based on its patently flawed analysis. The Monitor, a sophisticated financial services firm and

independent Court-officer, described significant criticisms of the methodology employed and the conclusions reached in the Farber Report. The Claims Officer was entitled to accept these criticisms and Thorneloe is unable to demonstrate that the Claims Officer made a palpable and overriding error in doing so. The probative value of, and weight to be given, to the Farber Report is within the purview of the Claims Officer to assess. Having rejected the Farber Report, the Claims Officer properly and necessarily concluded that Thorneloe failed to prove its Claim.

7. It is the Monitor's view that the Claims Officer did not err and submits that this Court should uphold the Claims Officer's decision not to award damages to Thorneloe in respect of its Claim to loss of academic and commercial value.

PART II - BACKGROUND

A. Thorneloe

8. Thorneloe is a corporation incorporated under the *An Act to Incorporate Thorneloe University*, S.O. 1960-1961, c. 135, as amended. Laurentian and Thorneloe entered into federation with each other pursuant to an agreement dated 1962 (the "**Federation Agreement**"). The Federation Agreement formalized the relationship between Laurentian and Thorneloe.[2]

9. Prior to the CCAA proceeding, Laurentian operated within a federated structure whereby it had contractual affiliations with three independent universities: Thorneloe, the University of Sudbury ("**UoS**") and Huntington University ("**Huntington**", and together with UoS and Thorneloe, the "**Former Federated Universities**"). In accordance with the Federation Agreement,

[2] Decision of Claims Officer W. Niels Ortved, September 8, 2022 at para. 11 [Claims Officer's Decision].

Laurentian's students were permitted to take elective courses and enrol in programs offered by each of the Former Federated Universities.[3]

10. The terms of the Federation Agreements with each of the Former Federated Universities were substantially similar and each included the following key terms:

(a) each of the Former Federated Universities agreed to suspend its degree-conferring powers (with certain limited exceptions) in favour of Laurentian;

(b) Laurentian agreed to apportion between itself and the Former Federated Universities, as agreed upon by the parties, tuition and grants received by Laurentian, in respect of students who enrolled in a program or took elective courses offered by one of the Former Federated Universities; and

(c) Laurentian was required to allocate and reserve land within its campus to permit each of the Former Federated Universities to construct buildings.[4]

11. In accordance with the Federation Agreement, Laurentian and Thorneloe (in addition to the other Former Federated Universities) entered into a series of agreements to address the allocation of tuition collected by Laurentian, operating grants, and certain fees for administrative services provided by Laurentian to Thorneloe.[5]

12. On May 10, 2019, Laurentian delivered to Thorneloe a notice (the "**Financial Distribution Notice**") to amend and supersede certain financial terms related to the allocation of tuition fees,

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[3] Claims Officer's Decision at paras. 10-11.
[4] Claims Officer's Decision at paras. 11-12.
[5] Claims Officer's Decision at para. 13.

grant funding, and administrative services by and among the parties. The Financial Distribution Notice was intended to align the financial relationship of Laurentian and the Former Federated Universities with a new university funding model introduced by the Province of Ontario. Pursuant to the Financial Distribution Notice, Laurentian retained 15% of the per student funding for courses provided to students through Thorneloe.[6]

B. The Disclaimer

13. On April 1, 2021, Laurentian disclaimed the Federation Agreement and the Financial Distribution Notice with an effective date of May 1, 2021, pursuant to s. 32 of the CCAA (the "**Disclaimer**").[7]

14. Thorneloe and UoS each moved to have their respective Notices of Disclaimer set aside pursuant to s. 32(2) of the CCAA.[8]

15. The motions by Thorneloe and UoS were dismissed by the Court on May 2, 2021.[9] In its reasons, the Court held that the Notices of Disclaimer were central to Laurentian's restructuring and that the potential demise of Laurentian would be an implication of disallowing the Notices of Disclaimer.[10] The Court also rejected the argument that Laurentian acted in bad faith by issuing the Notices of Disclaimer.[11] The Court acknowledged that upholding the Notices of Disclaimer could lead to the cessation of operations at Thorneloe but held that the impact this could have on

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[6] Claims Officer's Decision at para. 14.
[7] Claims Officer's Decision at para. 15.
[8] Claims Officer's Decision at para. 16.
[9] *Laurentian University of Sudbury*, 2021 ONSC 3272 [*Thorneloe Disclaimer Decision*]; *Laurentian University v. Sudbury University*, 2021 ONSC 3392 [*UoS Disclaimer Decision*].
[10] *Thorneloe Disclaimer Decision*, *supra* note 9 at paras. 52 and 75; Claims Officer's Decision at para. 17.
[11] *Thorneloe Disclaimer Decision, supra* note 9 at para. 72; Claims Officer's Decision at para. 17.

Thorneloe's faculty, employees and students is significantly less than if the Notices of Disclaimer were set aside with the result that Laurentian and Thorneloe are both forced to suspend or cease operations.[12]

16. Following the Disclaimer, Thorneloe ceased all academic operations, except in relation to its Theology program.[13] Thorneloe had been the smallest of the three former members of the Laurentian federation, employing a workforce of 28 persons, including 7 full-time faculty members, 12 sessional faculty members, 6 staff and 3 casual staff. As a result of the Disclaimer, Thorneloe's faculty and staff were reduced to four persons.[14]

C. The Proof of Claim

17. On July 30, 2021, Thorneloe filed a Proof of Claim with the Monitor totalling $14,879,456.[15] Thorneloe amended its Proof of Claim on December 17, 2021 by reducing the loss to academic and commercial value portion of its claim from $11,479,624 to $9,800,000.[16]

18. Thorneloe's Claim was made up of the following components:

(a) pre- and post-filing receivables in the amount of $524,783;

(b) return of Thorneloe's surplus RHBP contributions in the amount of $23,000;

(c) disclaimer costs in the amount of $14,331,673, comprised of:

i. loss to academic and commercial value in the amount of $9,800,000;

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[12] *Thorneloe Disclaimer Decision*, *supra* note 9 at para. 77; Claims Officer's Decision at para. 17.
[13] Claims Officer's Decision at para. 18.
[14] Claims Officer's Decision at para. 18.
[15] Claims Officer's Decision at para. 4.
[16] Claims Officer's Decision at para. 5.

ii. severance payments in the amount of $1,481,673;

iii. pension plan wind-up deficiency in the amount of $600,000;

iv. separation costs in the amount of $100,000;

v. professional fees in the amount of $1,850,000; and

vi. insolvency filing costs, in the amount of $500,000.[17]

19. In support of its Claim, Thorneloe provided a valuation report (the "**Farber Report**") dated October 2021 prepared by Farber Corporate Finance Inc.[18] At the Monitor's request, Thorneloe also provided its annual financial statements from 2018/19 to 2021.

D. The Notice of Revision or Disallowance

20. On May 25, 2022, the Monitor issued a Notice of Revision or Disallowance ("**NORD**") allowing some aspects of Thorneloe's Claim.[19] Importantly, the Monitor allowed in full certain portions of Thorneloe's disclaimer costs claim that it incurred out-of-pocket; namely, Thorneloe's severance payments claim, in the amount of $1,481,673, and Thorneloe's separation costs claim, in the amount of $100,000.[20] In the Monitor's opinion, Thorneloe's claim to these one-time out-of-pocket costs that it would not have incurred had the Federation Agreement not been disclaimed are of a materially different nature than its loss to academic and commercial value claim.

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[17] Claims Officer's Decision at para. 20.
[18] Claims Officer's Decision at para. 43.
[19] Claims Officer's Decision at paras. 6 and 20.
[20] Claims Officer's Decision at para. 20.

21. The Monitor allowed in part Thorneloe's claim to pre- and post-filing receivables owing to Thorneloe.[21] Thorneloe submitted a claim in the amount of $524,783, which the Monitor allowed in the amount of $341,187.93.[22] The Monitor, in consultation with Laurentian, reviewed Laurentian's records and determined that Laurentian owed Thorneloe this amount related to the pre-filing period pursuant to the Financial Distribution Notice. The Monitor disallowed in full the remaining portions of Thorneloe's disclaimer costs claim and Thorneloe's claim for the return of Thorneloe's surplus RHBP contributions.[23]

E. The Dispute Notice

22. On June 8, 2022, counsel for Thorneloe delivered a Dispute Notice to the Monitor.[24] The Dispute Notice did not dispute the Monitor's disallowance of Thorneloe's claim in respect of the RHBP, or its claims in respect of the pension plan wind up deficiency and insolvency filing costs components of its disclaimer loss claim. In the Dispute Notice, Thorneloe only disputed the Monitor's disallowance of the following components of its Claim and in the following amounts:

(a) pre- and post-filing receivables owing to Thorneloe in the amount of $183,595.07;

(b) loss to academic and commercial value, in the amount of $9,800,000; and

(c) professional fees, in the amount of $1,850,000.

23. The Monitor conducted settlement discussions with Thorneloe on several occasions and in writing. Following several failed attempts to consensually resolve Thorneloe's Claim, the Monitor

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[21] Claims Officer's Decision at para. 20.
[22] Claims Officer's Decision at para. 20.
[23] Claims Officer's Decision at para. 20.
[24] Claims Officer's Decision at para. 7.

referred the Claim to Mr. Ortved for resolution in accordance with the Amended and Restated Claims Process Order.

F. The Claims Officer's Decision

24. Thorneloe did not pursue its dispute with respect to pre- and post-filing receivables owing to Thorneloe before the Claims Officer. The only issues that remained for adjudication before the Claims Officer were the Monitor's disallowance of Thorneloe's Claims to: (a) loss to academic and commercial value in the amount of $9,800,000; and (b) professional fees in the amount of $1,850,000.

25. The Claims Officer released his decision on September 8, 2022 upholding the Monitor's disallowance of Thorneloe's Claims to loss of academic and commercial value and professional fees. The viability of Thorneloe's business value Claim relied on two essential bases: (a) the applicable damage assessment principles, and (b) the Farber Report.[25] Significantly, the Claims Officer made a factual finding that Thorneloe was not profitable prior to the Disclaimer and that its results would not have improved in subsequent years had there been no Disclaimer.[26]

26. On the proper interpretation of s. 32(7) of the CCAA, the Claims Officer accepted that "a party with a claim arising under s. 32(7) of the CCAA is entitled to no greater claim than a party would be entitled to for breach of contract in the ordinary course".[27] Regarding the principles applicable to the assessment of damages, the Claims Officer concluded that the wording of s. 32(7) engages the same principles of damage assessment as are customarily applied for breach of

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[25] Claims Officer's Decision at para. 57.
[26] Claims Officer's Decision at para. 66.
[27] Claims Officer's Decision at paras. 28 and 32.

contract.[28] The Claims Officer held that the customary remedy for breach of contract is compensation measured in expectation damages, also known as lost profits.[29] Expectation damages should put the claimant in the position that it would have been in had the contract been performed.[30]

27. In the case of an unprofitable contract, where the non-breaching party makes a claim based on the expectation measure of damages, if the breaching party can show that the non-breaching party would have incurred a loss had it completed the contract, only nominal damages are owed.[31] There cannot be a claim for lost profits where the non-breaching party would not have earned any profits.[32] Contract damages are limited by the principle that a non-breaching party is not entitled to be put into a better position than it would have been in had the contract been performed.[33]

28. The Claims Officer rejected Thorneloe's argument that the Claims Officer should deviate from assessing its Claim based on the customary expectation measure of damages and should instead assess its Claim based on the alleged commercial value of Thorneloe's unprofitable business even if the expectation for Thorneloe's business is continued future unprofitability.[34] In support of its argument, Thorneloe relied on *McLachlan v. CIBC*[35] and *Ronald Elwyn Lister Ltd. v. Dayton Tire Canada Ltd.*[36] The Claims Officer found these cases inapplicable on the basis that,

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[28] Claims Officer's Decision at para. 40.
[29] Claims Officer's Decision at paras. 34 and 40.
[30] Claims Officer's Decision at paras. 34 and 40.
[31] Claims Officer's Decision at paras. 38 and 40.
[32] Claims Officer's Decision at paras. 38 and 40.
[33] Claims Officer's Decision at paras. 39-40.
[34] Claims Officer's Decision at paras. 62-64.
[35] *McLachlan v Canadian Imperial Bank of Commerce*, 1989 CarswellBC 331 (BCCA) [*McLachlan*].
[36] *Ronald Elwyn Lister Ltd. v Dayton Tire Canada Ltd.*, 1985 CarswellOnt 1034 (ONCA) [*Lister*].

unlike Thorneloe, the businesses in those cases were going concerns with prospects of future profits.[37]

29. Applying the customary legal principles relevant to damage assessment outlined above to the fact that Thorneloe was incurring losses and expected to continue incurring losses from the Federation Agreement, the Claims Officer came to the invariable conclusion that Thorneloe was not entitled to damages for Laurentian's breach of contract.[38]

30. The Claims Officer also considered whether the evidence tendered by Thorneloe supported the alleged $9.8 million academic and commercial valuation of its business. The Claims Officer did not accept the evidence proffered by Thorneloe in support of its Claim to loss of academic and commercial value. Specifically, the Claims Officer rejected the Farber Report, stating "I am not persuaded that the Farber Report is a reliable measure of Thorneloe's academic and commercial value prior to the Disclaimer".[39]

31. The Claims Officer noted that "the Monitor spelled out significant criticisms of the methodology employed and the conclusions reached in the [Farber] Report in the NORD" and "the response on the part of [Thorneloe] has not been to address those criticisms, but to take the position that the Farber Report has not been challenged with a responding report or on cross-examination".[40] The Claims Officer rejected Thorneloe's position that the Claims Officer was obliged to fully accept the Farber Report in the absence of a responding report or cross-

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[37] Claims Officer's Decision at para. 64.
[38] Claims Officer's Decision at para. 84.
[39] Claims Officer's Decision at para. 61.
[40] Claims Officer's Decision at paras. 59-60.

examination, regardless of whether the methodology employed and the conclusions reached in the Farber Report were patently flawed.[41]

32. Having found as a fact that Thorneloe had not been profitable prior to the Disclaimer and that Thorneloe's financial results would not likely have improved in subsequent years had there been no Disclaimer, and having properly refused to accept the conclusions in the Farber Report, the Claims Officer concluded that Thorneloe had not met its burden to prove its Claim.[42] On September 19, 2022, Thorneloe appealed the Claims Officer's denial of the loss to business value portion of its Claim.

33. For the reasons that follow, the Monitor respectfully submits that this Court should dismiss the Thorneloe appeal and uphold the Claims Officer's findings.

PART III - LAW AND ANALYSIS

G. Standard of Review

34. In *Target Canada*, this Court held that the determinations of claims officers in an insolvency proceeding are subject to the standard of review applicable to ordinary civil appeals, meaning this Court should accord substantial deference to the Claims Officer.[43] The fact that the decision of the Claims Officer was based on a paper record does not obviate the need for deference.[44] The appropriate standard of review for the appeal of the decision of the Claims Officer is as follows:[45]

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[41] Claims Officer's Decision at para. 60.
[42] Claims Officer's Decision at para. 66.
[43] *Target Canada Co. (Re)*, 2017 ONSC 2595 at para. 12 [*Target Canada*], Book of Authorities of the Monitor, Tab 1.
[44] *Algoma Steel Inc. v. Union Gast Ltd.* (2003) 63 O.R. (3d) 78 at paras. 16-17 (CA).
[45] *8640025 Canada Inc. (Re)*, 2018 BCCA 93 at para. 55, citing *Tiercon Industries Inc.* (2009) 62 C.B.R. (5th) 90 (ONSC), Book of Authorities of the Monitor, Tab 2, *aff'd* 2010 ONCA 666.

(a) *Pure questions of law*: the standard of review is correctness.

(b) *Questions of fact*: the standard of review is that such findings are not to be reversed unless it can be established that the decision maker made a palpable and overriding error.

(c) *Questions of mixed fact and law*: the standard of review, is that, in the absence of an "extricable" legal error or a palpable and overriding error, a finding of the decision maker should not be interfered with.

(d) *Assessment of damages*: a damage assessment should not be overturned unless it is based upon a wrong principle of law or the damage is so inordinately high or low that it must be an erroneous estimate of damages.

H. The Claims Officer Applied the Correct Damages Assessment Principles

i. The Claims Officer was Entitled to Assess Damages Based on Lost Profits

35. Thorneloe argues that in assessing its damages, the Claims Officer erred in law by preferring the Monitor's suggested approach – based on Thorneloe's expected lost profits – rather than Thorneloe's loss of business value theory. Thorneloe submits that its breach of contract claim should be assessed, not on the well-established expectation or reliance measure of damages, but based on the lost commercial value to Thorneloe's business because the Disclaimer had the effect of harming or destroying its business.

36. The flawed approach and assumptions used in the Farber Report did not address the central question of determining the damages suffered by Thorneloe as a result of the Disclaimer. Instead, the Farber Report presented a visibly flawed approach not based on the economic reality of Thorneloe. This flawed approach sought to present a value for the business, the majority of which

was the assets they retained, and the operational value based on the revenue earned versus the actual operating cash flow, which in all recent periods was negative.

37. This is not an error of law. The Claims Officer carefully reviewed the evidence and, based on his factual findings and the circumstances of this case, concluded that the appropriate method to value damages is the typical approach based on lost profits. The assessment of damages, including the appropriate loss quantification theory in any given case, is within the sole jurisdiction of the trier of fact – in this case, the Claims Officer – and attracts considerable deference from this Court sitting on appeal.[46] The Claims Officer made a discretionary decision and, in exercising his discretion, concluded that the lost profits approach was the preferable approach to take in this case.

ii. The Claims Officer Correctly Applied the Law regarding Unprofitable Contracts

38. The Claims Officer's damages assessment was intertwined with his finding that the Federation Agreement was an unprofitable contract. The Claims Officer made a factual finding that the evidence demonstrated that Thorneloe was not profitable, and was not likely to be profitable in the future if the Federation Agreement continued.

39. The following chart illustrates Thorneloe's consolidated profitability from 2018 to 2021. Thorneloe's consolidated profitability is comprised of its General Fund, Capital Fund and Restricted Fund. The General Fund represents Thorneloe's general operations, the Capital Fund represents the amortization of Thorneloe's capital assets, and the Restricted Fund represents funds established for specific purposes, mainly investments and donations.

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[46] *Ramdath v. George Brown College of Applied Arts and Technology*, 2015 ONCA 921 at para. 104.

Summary of Thorneloe's Consolidated Profitability (2018 to 2021)

	General Fund	Capital Fund	Restricted Fund	Consolidated
2018	(77,777)	(122,646)	157,676	**(42,747)**
2019	(57,493)	(129,552)	584,096	**397,051**
2020[47]	(614,263)	(133,452)	(163,997)	**(911,712)**
2021	(1,156,821)	(132,304)	1,203,538	**(85,587)**

40. Thorneloe's financial statements demonstrate that its financial performance across its entire business had been supported by the Restricted Fund, made up primarily of investments and donations. Thorneloe had only experienced consolidated profitability in 2019 due to large relative investment income and donations in the Restricted Fund.

41. Thorneloe's business was made up of its: (a) academic operations; (b) residence operations; and (c) investments. While Thorneloe's overall financial position had been deteriorating and it experienced net losses in its most recent years, the Monitor's position is that the only relevant financial results are those that relate to Thorneloe's operations (General Fund), excluding residence and investment income.

42. In the Monitor's respectful submission, the Disclaimer had no impact on Thorneloe's residence operations or investments. Thorneloe still retains possession of its $6.7 million of investments, thus the inclusion of them as a head of damage is inappropriate. Additionally, the Disclaimer does not prevent Thorneloe from continuing the operation of its residence and, in fact, Thorneloe has continued to operate its residence. There has not been any evidence provided to

[47] The COVID-19 global pandemic did not impact Canada until March 2020. Given that the fiscal and academic year was substantially complete by this point, the financial results for Thorneloe's year ended April 30, 2020 would not have been materially impacted by the COVID-19 global pandemic.

support a decrease in the profitability of Thorneloe's residence operations being caused by the Disclaimer.

43. The Financial Statements did not disclose the breakdown of residence expenses and as such, the Monitor adjusted only the General Fund to exclude the investment income. A closer review of the performance of Thorneloe's general operations (excluding investment income) from the last four years reveals that they had remained unprofitable in all four of those years:

Thorneloe's Net Cash Flow from Operations (excluding Investment Income) 2018 to 2021

	General Fund Profitability	**Less: Investment Income**	**Net Cash Flow from Operations**
2018	(77,777)	(12,749)	**(90,526)**
2019	(57,493)	(16,811)	**(74,304)**
2020	(614,263)	(25,030)	**(639,293)**
2021	(1,156,821)	(2,089)	**(1,158,910)**

44. The evidence demonstrates that the continued performance of the Federation Agreement would have resulted in a net loss to Thorneloe. Thorneloe's claim to loss of cash flow must be based on net cash flows (i.e. revenues net of expenses). It is not enough for Thorneloe to demonstrate that it lost revenue in order to satisfy a claim for expectation damages. Based on the evidence, any suggestion that Thorneloe would have incurred profits in the future is highly speculative and cannot form the basis of a claim for lost profits.[48]

45. The Claims Officer accepted case law which establishes that a non-breaching party is not entitled to be put into a better (financial) position than it would have been in had the contract been

[48] *Maghun v. Richardson Securities of Can. Ltd.* (1986), 34 D.L.R. (4th) 524 (ONCA); *J&B Engineering v. Smith*, 2007 CarswellOnt 8633 at para. 30 (ONSC), Book of Authorities of the Monitor, Tab 3.

performed.[49] Therefore, a party is not entitled to a claim for expectation damages based on a breach of contract where it was not expected to generate any profits. This principle applies to a business valuation approach – which is predicated on a "forgone cash flow". As the authority relied upon by Thorneloe recognizes:

> There are similarities between a business value and lost cash flow approach; for instance, a projected/estimated stream of "forgone cash flow" is the foundation upon which either calculation is based. Indeed, a lost cash flow approach may be seen as a subset of the business value approach.[50]

46. Thorneloe's lack of profitability and lack of any reasonable expectation of future profitability meant that Laurentian's Disclaimer had not resulted in any "forgone net income" – any revenue decreases caused by the Disclaimer were offset by corresponding reductions in expenses. Accordingly, Thorneloe is not entitled to a claim for lost profits or lost business value.

47. Thorneloe has not cited any authority where a party has been provided a claim for lost business value in circumstances where their business was unprofitable, was not expected to be profitable, and where there was no other tortious conduct.

48. An article[51] relied upon by Thorneloe in support of its business value approach refers to the Ontario Court of Appeal case *Agribrands Purina Canada Inc. v. Kasamekas*[52], where damages were assessed based on that company's business value. Damages were assessed based on the going concern value of the business by taking the net profit of what the business would have earned in a

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[49] *PreMD Inc. v. Ogilvy Renault LLP*, 2013 ONCA 412 at para. 70; *Sunshine Vacation Villas v. Hudson's Bay Co.*, 13 D.L.R. (4th) 93 (BCCA).
[50] Farley J Cohen & Prem M Lobo, "Business value as a measure of loss in litigation contexts: Reflecting business 'reality' over hypothetical 'fantasy'" (2011) 30:1 Adv J 3 at 7-8, Book of Authorities of the Monitor, Tab 5.
[51] Ephraim Stulberg, "Adding up the Damage: Lost Profits vs. Business Value", *The Lawyer's Weekly* 34:35 (30 January 2015) (QL), Book of Authorities of the Monitor, Tab 6.
[52] *Agribrands Purina Canada Inc. v. Kasamekas*, 2011 ONCA 460 [*Agribrands*].

certain year and applying a three times earnings multiple to that figure. Had there been no net profit (as is the case for Thorneloe), then this formulation would have yielded a $0 valuation. Therefore, for a business valuation approach to have any utility, it requires a finding that the business is profitable and expected to be profitable into the future. The Claims Officer found that Thorneloe was unprofitable and not likely to be profitable into the future, and therefore the Claims Officer did not err by concluding that Thorneloe is not entitled to a claim.

49. In support of its claim, Thorneloe also refers to a U.S. decision[53] in which the U.S. Court endorses an approach for assessing damages that is based on "extrapolating the value of a business as an ongoing entity from the company's past earnings". This decision does not assist Thorneloe. Apart from the fact that it is a decision from a different jurisdiction that is not binding on the Court, in that decision, the U.S. Court assesses business value based on the company's past earnings. This is similar to the approach taken in *Agribrands*, described above, and based on the facts of this case, would similarly yield a $0 valuation because Thorneloe was unprofitable.

50. In both *McLachlan* and *Lister*, the Courts' decisions to award damages was rooted in their obligations to defer to the findings of the decision-makers at first instance that concluded, in both cases, that the companies in question were reasonably expected to generate a profit in the future. Those are <u>not</u> the facts in this case. In this case, the Claims Officer reviewed the evidence and concluded that Thorneloe was not reasonably expected to generate a profit in the future.

51. Following the approach taken in *McLachlan* or *Lister*, this Court should defer to the finding of the Claims Officer that Thorneloe was not expected to generate a profit in the future. In these

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[53] *Indu Craft v Bank of Baroda,* 47 F3d 490, 1995 US App LEXIS 2193 at 7, Book of Authorities of the Monitor, Tab 4.

circumstances, the governing case law demonstrates that Thorneloe is not entitled to any claim for damages on that basis.

52. Contrary to Thorneloe's argument at paragraph 38 of its factum, there is no basis to suggest that the above principles do not apply, or apply with modification, to not-for-profit corporations. It is trite that not-for-profit corporations are bound by ordinary contract principles. Parties to unprofitable contracts are entitled to reliance damages and the Monitor accepted Thorneloe's Claim to appropriate out-of-pocket expenses it would not have incurred but-for the Disclaimer.

53. Since performance of the disclaimed contracts would have resulted in a net loss for Thorneloe, Thorneloe is not entitled to any damages as a result of the Disclaimer other than expenses incurred only as a result of the Disclaimer, which the Monitor accepted as a proper claim.

iii. Thorneloe Cannot Rely on a Business Value Approach because it Failed to Demonstrate that it Mitigated its Losses

54. A claim for lost business value requires, as a prerequisite, that the loss of business be permanent. The authority[54] relied upon by Thorneloe states "[t]he permanence of the loss in question is an important criterion to justify the use of a business value approach in a loss quantification context". As to what is meant by "permanence", the article explains:

> ***Inability to fully mitigate loss of business or cash flow***
> What is implicit in the "permanence" criterion discussed above is the assumption that the business in question is unable to fully mitigate its lost business or cash flow. Stated another way, in order to be able to claim "business value" as a measure of loss, a plaintiff usually needs to demonstrate that it was unable to recapture or replace lost business, or restart business operations, or somehow alleviate its "permanent" loss.
>
> [Emphasis added.]

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[54] Farley J Cohen & Prem M Lobo, "Business value as a measure of loss in litigation contexts: Reflecting business 'reality' over hypothetical 'fantasy'" (2011) 30:1 Adv J 3 at 4-5, Book of Authorities of the Monitor, Tab 5.

55. Similar to the Monitor's position before the Claims Officer, Thorneloe has not discharged its burden of demonstrating why it has not, or cannot, mitigate its losses. The Monitor's approach in valuing Thorneloe's Claim was consistent with similarly situated claimants. However, other claimants in a similar situation to Thorneloe proposed that full mitigation of their losses was possible within a reasonable period of time.[55]

I. The Claims Officer Properly Rejected the Farber Report

56. In support of Thorneloe's $9.8 million claim to loss of academic and commercial value arising from the Disclaimer, Thorneloe proffered the Farber Report. The Farber Report opines that Thorneloe's enterprise value consists of two components: (a) an "operating enterprise value" in the range of approximately $2.8 million to $3.3 million; and (b) total non-operating assets (effectively cash and cash equivalents) of approximately $6.7 million.

57. The Monitor identified significant flaws within the methodology applied and the conclusions reached in the Farber Report. The Claims Officer recognized that Thorneloe made the tactical decision not to address those criticisms, but to take the position that the Claims Officer cannot reject the Farber Report in the absence of a competing expert report or cross-examination (which arguments Thorneloe has not pursued on this appeal).

58. It is Thorneloe's burden to prove its Claim.[56] The Monitor may rely entirely upon identifying significant deficiencies in Thorneloe's evidence and is not required to proffer its own expert report. In any event, a CCAA claims process is not a formal civil trial. The adjudication of claims within a claims process demands expedience and cost efficiency, and necessarily warrants

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[55] For a more detailed discussion of Thorneloe's failure to mitigate, see paras. 64-65, below.
[56] *U.S. Steel Canada Inc., Re*, 2016 ONSC 569 at para. 140.

a more flexible approach to the rules of evidence. The Claims Officer is trusted with the broad discretion to set rules for adjudication that are consistent with the principles underlying CCAA claims processes.[57]

59. Thorneloe has not demonstrated that the Claims Officer committed a palpable and overriding error in his decision to reject the Farber Report. The Claims Officer was entitled to reject the Farber Report for several reasons. The Claims Officer's assessment and ultimate rejection of the Farber Report is an evidentiary determination and is entitled to significant deference from this Court. Having rejected the Farber Report, the Claims Officer was entitled (and obliged) to conclude, as he did, that Thorneloe had not met its burden to prove its Claim.

60. The Monitor's NORD clearly set out the reasons why the Monitor rejected the position set forth in the Farber Report. The Monitor was not required to proffer its own evidence; it was entitled to scrutinize Thorneloe's evidence and accept or reject it, and advance its view before the Claims Officer based on Thorneloe's patently flawed analysis. The Monitor is part of a multi-disciplinary professional services firm providing a wide range of services which include business valuation services by "Chartered Business Valuators" that regularly provide expert or independent advice and the Claims Officer was entitled to agree with the Monitor's criticisms of the Farber Report.[58]

61. The Claims Officer was correct to reject the Farber Report because the Farber Report is based on hypothetical assumptions and factual inaccuracies that do not reflect Thorneloe's

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[57] The Claims Process Order states: "the Claims Officer shall be empowered to determine the process in which evidence may be brought before him or her as well as any other procedural matters which may arise in respect of the determination of any disputed Claim"; the Claims Officer Order states that the Claims Officer may "determine the procedure for adjudication of any disputed Claims … and any Claims Officer hearings shall be conducted as determined by the applicable Claims Officer".
[58] Claims Officer's Decision at para. 59.

financial reality or the damages they suffered as a result of the Disclaimer. The Farber Report necessarily implies Thorneloe is a profitable entity and does not reflect the actual historical financial results.

62. Furthermore, the Farber Report ascribes a value to Thorneloe's business based on a revenue multiplier. The Farber Report does not consider Thorneloe's net cash flows; that is, revenues net of expenses. A revenue multiplier is not appropriate because Thorneloe's operations were inefficient and it was incurring substantial expenses. In the Monitor's opinion, which the Claims Officer accepted, any valuation of Thorneloe should be based on net cash flow. Because Thorneloe's net cash flow is reasonably expected to continue to be negative, it is not entitled to a claim to loss of academic and commercial value.

63. Additionally, the Disclaimer has not caused any loss to Thorneloe's cash and cash equivalents of $6.7 million, which the Farber Report also characterizes as a loss caused by the Disclaimer even though Thorneloe still has those funds. The Farber Report's inclusion of assets such as cash and investments that remain under Thorneloe's control and are clearly unimpacted by the Disclaimer as alleged damages is plainly mistaken.

64. Lastly, Thorneloe's claim is also limited by its "duty to mitigate". Mitigation measures limit the losses recoverable to those that Thorneloe, acting reasonably, could not have avoided. Thorneloe is required to take reasonable steps to avoid the consequences of the Disclaimer.[59]

65. Thorneloe ostensibly still owns the intellectual property of its courses that Thorneloe developed. Thorneloe has avenues to mitigate its losses, such as selling this intellectual property

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[59] *Southcott Estates Inc. v. Toronto Catholic District School Board*, 2012 SCC 51 at paras. 23-25.

and continuing to operate its residence. This supports the conclusion that Thorneloe's business is not currently worth $0, as implicitly contended by the Farber Report, and that its damages claim must be reduced by its failure to minimize its losses. By comparison, the other similarly situated claimants contend that they are able to mitigate their losses. Thorneloe has not satisfactorily explained why it has not or cannot mitigate its losses nor seemingly taken any steps to realize upon the programs that they assert are of value.

PART IV - RELIEF SOUGHT

66. For the foregoing reasons, it is the Monitor's respectful submission that Thorneloe's appeal should be dismissed and Thorneloe's Claim to loss of academic and commercial value should be disallowed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9th day of November, 2022.

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SCHEDULE "A" – LIST OF AUTHORITIES

Case Law

1. *Laurentian University of Sudbury*, 2021 ONSC 3272
2. *Laurentian University v. Sudbury University*, 2021 ONSC 3392
3. *McLachlan v Canadian Imperial Bank of Commerce*, 1989 CarswellBC 331 (BCCA)
4. *Ronald Elwyn Lister Ltd. v Dayton Tire Canada Ltd*., 1985 CarswellOnt 1034 (ONCA)
5. *Target Canada Co. (Re)*, 2017 ONSC 2595
6. *Algoma Steel Inc. v. Union Gast Ltd.* (2003) 63 O.R. (3d) 78 (CA)
7. *8640025 Canada Inc. (Re)*, 2018 BCCA 93
8. *Tiercon Industries Inc.* (2009) 62 C.B.R. (5th) 90 (ONSC) *aff'd* 2010 ONCA 666
9. *Ramdath v. George Brown College of Applied Arts and Technology*, 2015 ONCA 921
10. *Maghun v. Richardson Securities of Can. Ltd.* (1986), 34 D.L.R. (4th) 524 (ONCA)
11. *J&B Engineering v. Smith*, 2007 CarswellOnt 8633 (ONSC)
12. *PreMD Inc. v. Ogilvy Renault LLP*, 2013 ONCA 412
13. *Sunshine Vacation Villas Ltd. v. Hudson's Bay Co.*, 13 D.L.R. (4th) 93 (BCCA)
14. *Agribrands Purina Canada Inc. v. Kasamekas*, 2011 ONCA 460
15. *Indu Craft v Bank of Baroda*, 47 F3d 490, 1995 US App LEXIS 2193 at 7
16. *U.S. Steel Canada Inc., Re*, 2016 ONSC 569
17. *Southcott Estates Inc. v. Toronto Catholic District School Board*, 2012 SCC 51

Legislation

1. *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36
2. *An Act to Incorporate Thorneloe University*, S.O. 1960-1961, c. 135

Secondary Sources

1. Farley J Cohen & Prem M Lobo, "Business value as a measure of loss in litigation contexts: Reflecting business 'reality' over hypothetical 'fantasy'" (2011) 30:1 Adv J 3
2. Ephraim Stulberg, "Adding up the Damage: Lost Profits vs. Business Value", *The Lawyer's Weekly* 34:35 (30 January 2015) (QL)

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 LAURENTIAN UNIVERSITY OF SUDBURY

Court File No. CV-21-656040-00CL

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(COMMERCIAL LIST)

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