GOWLINGS

P.O. Box 30, Suite 2300
550 Burrard Street
Vancouver, BC
Canada V6C 2B5
Telephone (604) 683-6498
Facsimile (604) 683-3558
www.gowlings.com

Scott R. Andersen
Direct (604) 891-2289
Direct Fax (604) 443-5624
scott.andersen@gowlings.com
File No. V35356

November 3, 2009

VIA FAX

Bennett Jones LLP
Barristers and Solicitors
4500, 855 - 2nd Street SW
Calgary, Alberta T2P 4K7

Attention: Ken Lenz

Dear Sirs :

Re: Shire International Real Estate Investments Ltd. et al ("Shire")
Alberta Court of Appeal Action No. 0901-0286AC

Enclosed for service is the following in connection with the above noted appeal:

1. unfiled motion for leave to appeal;
2. unfiled motion for a stay; and
3. our memorandum of argument in connection with our stay application.

We intend to file these pleadings in the Court of Appeal today. Please admit service of the enclosed documents by signing and returning the copy of this letter enclosed for that purpose.

Sincerely,

Gowling Lafleur Henderson LLP

Scott Andersen

Scott R. Andersen
SRA:/dgb
Enc.

cc: All Counsel (See Attached Service List) VIA EMAIL

cc: John McLean

cc: Investit Financial Inc. Attn: Patricia Pollitt and Mark Pollitt

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SERVICE OF THIS LETTER AND ENCLOSURE(S) IS ACKNOWLEDGED
this .... day of ...., 20.....

....
Solicitor for

Scott R. Andersen
SRA:/dgb
Enc.

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scott.andersen@gowlings.com

Facsimile

To: Ken Lenz
Company: Bennett Jones LLP
City/Country: Calgary
Fax Number: 1-403-265-7219
Phone Number: 1-403-298-3317

Date: November 3, 2009
Re: Shire International Real Estate Investments Ltd. et al ("Shire")
Alberta Court of Appeal Action No. 0901-0286AC
Total Pages: (including cover)
File Number: V35356
CopyTrak #: 6050

Please see the attached.

If there is a problem with transmission or all pages are not received, please call for retransmission.

Appeal No.0901-0286AC
Q.B. Action No. 0901-11866
Registry: Calgary

IN THE COURT OF APPEAL OF ALBERTA

IN THE MATTER OF THE ***COMPANIES' CREDITORS ARRANGEMENT ACT***, R.S.C. 1985, c. C-36, AS AMENDED, THE ***JUDICATURE ACT***, R.S.A. 2000, c. J-2, AS AMENDED AND THE ***BUSINESS CORPORATIONS ACT***, R.S.A. 2000, C. B-9, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **SHIRE INTERNATIONAL REAL ESTATE INVESTMENTS LTD., SHIRE CAPITAL LTD., HALAMA GARDENS LLC, SHIRE ASSET MANAGEMENT LTD., WINN RIVER RESORT LTD., FORT MCMONEY PROPERTIES II LTD., HALAMA GARDENS LTD., MAPLES AND WHITE SANDS INVESTMENT LTD., FORT MCMONEY PROPERTIES LTD., CHEMAINUS PROPERTIES LTD., SKAHA LAKE DEVELOPMENT LTD., TSEHUM HARBOUR LTD., BEARSPAW AT 144TH AVENUE LTD., BEARSPAW AT 144TH EQUITIES LTD., BEARSPAW AT 144TH BONDS INC., TSEHUM HARBOUR EQUITIES LTD., TSEHUM HARBOUR BONDS LTD**., **ORILLIA INVESTMENTS LTD**., **0726028 B.C. LTD., 0675816 B.C. LTD.** and **BOSUN'S HOLDINGS LTD.**

(the "CCAA Applicants")

BETWEEN:

INVESTIT FINANCIAL INC.

Appellant (Respondent)

AND:

SHIRE INTERNATIONAL REAL ESTATE INVESTMENTS LTD., SHIRE CAPITAL LTD., HALAMA GARDENS LLC, SHIRE ASSET MANAGEMENT LTD., WINN RIVER RESORT LTD., FORT MCMONEY PROPERTIES II LTD., HALAMA GARDENS LTD., MAPLES AND WHITE SANDS INVESTMENT LTD., FORT MCMONEY PROPERTIES LTD., CHEMAINUS PROPERTIES LTD., SKAHA LAKE DEVELOPMENT LTD., TSEHUM HARBOUR LTD., BEARSPAW AT 144TH AVENUE LTD., BEARSPAW AT 144TH EQUITIES LTD., BEARSPAW AT 144TH BONDS INC., TSEHUM HARBOUR EQUITIES LTD., TSEHUM HARBOUR BONDS LTD., **ORILLIA INVESTMENTS LTD**., **0726028 B.C. LTD., 0675816 B.C. LTD.** and **BOSUN'S HOLDINGS LTD.**

Respondents (Applicants)

<u>ARGUMENT OF THE APPLICANT INVESTIT FINANCIAL INC.</u>

(On motion for stay of order made October 8th by the Honourable Justice LoVecchio)

1. The orders from which leave to appeal is sought:

(a) authorized an extension of the debtor-in-possession financing to $2.5 million (the "**DIP Facility**"), which financing is secured by a charge on all the debtors' Property, as that terms is defined in the Initial Order, that ranks in priority ahead of the secured lenders;

(b) appointed a Receiver pursuant to the *Judicature Act* and *Business Corporation Act* on the application of the CCAA Applicants;

(c) authorized the Receiver to draw down on the DIP Facility created in the CCAA proceedings to pay, *inter alia,* the legal fees and disbursements of Borden Lander Gervais LLP, counsel for certain investors; and

(d) created a Receiver Charge in the amount of $250,000 on all the debtors' property to secure, *inter alia*, the payment of the receiver's fees and those of its legal counsel, which charge ranks in priority ahead of the secured lenders.

2. An appeal was filed on October 27, 2009. The application for leave to appeal is scheduled for hearing on December 1, 2009. It is anticipated that the next come back hearing before the Honourable Madam Justice Kent will be on December 3, 2009.

3. This is an application for a stay pending the leave application and, if leave is granted, pending the determination of the appeal. The stay is necessary to preserve the subject matter of the appeal. If no stay is granted, much of the subject matter of the appeal may be rendered nugatory.

PART I. Statement of Facts

4. The 21 CCAA Applicants are all companies involved in the business of acquiring lands to be developed by third parties. Apparently, the business model was that Shire International Real Estate Investments Ltd. ("**Shire**") would locate and secure a potential property for acquisition by payment of a deposit for the purchase of the lands. It would then finance the purchase of the property by a combination of monies lent to it by mortgage companies such as Investit Financing Inc. ("**Investit**") as well as by monies raised from investors pursuant to information circulars. Apparently more than $65 million was raised from over 2800 investors in this fashion and in excess of $19 million from mortgagees.

Affidavit of C. Couch sworn on August 7, 2009, ¶4 and 7 (AB, T**ab 1**)

5. A project company 40% owned by Shire was supposed to be used for each project. Notwithstanding the existence of those project companies (the other 20 applicants not including Shire), the group was apparently managed as a whole with funds being requisitioned between projects as Ms. Couch and the management saw fit.

Affidavit of C. Couch sworn on August 7, 2009, ¶9 and 19 (AB, **Tab 1**)

6. The Initial CCAA Order was made on August 10, 2009. The filing was apparently precipitated by an investigation by the Alberta Securities Commission that resulted in Cease Trade Orders against Shire as well as a class action alleging unjust enrichment, breach of contract, breach of trust, breach of fiduciary duty, conversion and conspiracy. As a result of these proceedings, the CCAA Applicants could no longer raise funds and thus could no longer execute their business model.

Affidavit of C. Couch sworn on August 7, 2009, ¶15-16 (AB, **Tab 1**)

7. As a result of the manner in which the companies and their respective assets had been managed, the "restructuring" efforts to date have consisted primary of an investigation conducted by the Monitor/Receiver and a legal analysis conducted by counsel for the CCAA Applicants to determine: (a) the source and use of funds by Shire and the project companies; (b) the potential stakeholders of each company; (c) the balance of intercompany receivables; and (d) the assets, their encumbrances and their ownership.

Monitors Third Report, ¶240 (RB, **Tab 4**)

8. The requirement in section 3 of the CCAA that the applicant have indebtedness of at least $5 million was presented in respect of the Shire Group as a whole and not in respect of each applicant company.

Affidavit of C. Couch sworn on August 7, 2009, ¶28(AB, **Tab 1**)

9. The justification for the DIP Charge originally put forward was as follows:

> On the basis that Shire, within the last year, paid approximately $70,000,000 for property on which there is approximately $40,00,000 of secured debt, I do not believe that granting a super-priority DIP financing in the amount required will prejudice secured creditors. To the extent that there is such prejudice, I believe that that prejudice is adequately addressed by allowing those creditors the opportunity to appear in court to argue their particular circumstances.

Affidavit of C. Couch sworn on August 7, 2009, ¶39 (AB, **Tab 1**)

10. Ms. Couch proposed that fairness concerns were addressed by the suggestion of significant equity coupled with the ability to be released if the facts so warranted.

11. The Monitor's Third Report presented a table at page 35 paragraph 58 (the **"Table"**) that indicated that the Shire Group had equity of approximately $16.9 million in its properties. This calculation was based upon "purchase price/appraised value" of the respective properties, less the amount owing on third party mortgage, less the amount owing on mortgage units. A copy of the Table is reproduced below.

Shire Group
Property Summary

	Project analysis				Investors		
Project	Purchase price/appraised value (note 1)	Third party mortgages	Mortgage Units	Purchase price less mortgages	Class B Preferred Bonds	Mortgage Units	Total
	a	b	c	a + b + c	d	e	d+e
Bearspaw	9,000,000	(8,100,000)	-	900,000	20,239,300	-	20,239,300
Chemainus	780,000	-	-	780,000	6,571,300	-	6,571,300
Ft McMoney	7,000,000	(1,900,000)	-	5,100,000	7,762,403	-	7,762,403
Ft McMoney II	9,600,000	-	(6,490,000)	3,110,000	-	6,490,000	6,490,000
Halama Gardens	-	-	-	-	2,216,644	-	2,216,644
Hawaii Fund	-	-	-	-	1,396,500	-	1,396,500
Orillia	2,900,000	(1,900,000)	-	1,000,000	390,100	-	390,100
Shire Capital	-	-	-	-	-	-	-
Skaha Lake	2,500,000		-	2,500,000	8,423,593	-	8,423,593
Tsehum Harbour	3,500,000	(2,900,000)	-	600,000	4,614,349	-	4,614,349
MWS	3,000,000	-	(11,024,900)	-	-	11,024,900	11,024,900
Project Companies	38,280,000	(14,800,000)	(17,514,900)	13,990,000	51,614,189	17,514,900	69,129,089
Shire	6,344,000	(3,635,000)	-	2,709,000			
Total	44,624,000	(18,435,000)	(17,514,900)	16,699,000	51,614,189	17,514,900	69,129,089

Note 1 - Bearspaw estimated value is the mid point in the estimated value as at September 15, 2009 determined by Tony Omura
- Fort McMoney market value as at September 9, 2008 determined by Tony Omura appraisal dated October 10, 2008.
- Fort McMoney II based on conditional purchase and sale agreement

Monitor's Third Report (RB, **Tab 4)**

12. The Monitor cautioned against relying on the Table noting that "the above information is based on the Applicants' books and records and is for illustrative purposes".

Monitor's Third Report, ¶60 (RB, **Tab 4)**

13. In their submissions, the CCAA Applicants suggested that the information in the Table was "in most cases ... the appraised value" (Page 18, line 18-21). In fact, most of the values in the first column of the Table are the purchase price and not the appraised value. The CCAA Applicants correctly conceded that purchase prices would overstate the actual value of the properties (Page 4, lines 35-37).

Transcript of Hearing, (RB, **Tab 9)**

(a) **Bearspaw.** The Table states that there is $900,000 of equity in the Bearspaw lands. There is likely none. The amount owing on the first and second mortgages is approximately $8.5 million. Investit has obtained two recent appraisals that conclude the property is worth between $5.9 and 7.4 million.

Affidavit of M. Pollit sworn August 31, 2008 (AB, **Tab 5**);
Affidavit of R. Cullis, sworn August 28, 2009 (AB, **Tab 3**);
Affidavit of R. Cullis, sworn September 30, 2009 (AB, **Tab 9**);
Affidavit of D. Simes, sworn September 30, 2009 (AB, **Tab 10**)

(b) **Chemainus.** The Table states that there is $780,000 in equity in the Chemainus lands. The property is unencumbered and the value ascribed to it in the Table is its <u>purchase price of February 7, 2006.</u>

Monitor's Third Report, Exhibit 2 (AB, **Tab 8**)

(c) **Ft McMoney**. The Table states there is $5.1 million in equity in Ft McMoney (the Saline Creek lands). The value ascribed to it in the Table is $7 million which is apparently based upon an appraisal dated September 9, 2008. <u>The appraisal is not current and has not been produced</u>. The lands were purchased in December of 2005 for $3.5 million or half of the value ascribed to them in the Table.

Monitor's Third Report, Exhibit 2 (AB, **Tab 8**)

(d) **Ft McMoney II.** The Table states there is $3.1 million in equity in the Ft McMoney II lands (109-119 Manning). <u>This is based upon a conditional offer to purchase that may never close</u>. The offer is subject to an engineering report, environmental report, geotechnical report and a traffic study with subjects not having to be removed until November 15, 2009.

Monitor's Third Report, Exhibit 2 (AB, **Tab 8**)

(e) **Orilla.** The Table states that there is $1 million in equity in the Orilla lands. There likely is none. <u>The value of the property is based on its purchase price of $2.9 million on August 31, 2006</u>. The amount owing to the mortgagee is $1.9 million. As counsel for the mortgagee of that property indicated in the hearing below, it was at the time of the Initial Order, offered for sale in foreclosure proceedings. In those proceedings an appraisal was conducted showing a value of $1.7 million and <u>the only offers received to date are for $1.4 million.</u>

Transcript of Hearing, page 30-31 (RB, **Tab 9**)
Affidavit of G. Piccin sworn on August 10, 2009 (AB, **Tab 2**)

(f) **Skaha Lake**. The Table states that there is \$2.5 million in equity in the Skaha Lake Lands. The lands are unencumbered. <u>The value ascribed to it in the Table is its purchase price of May 31, 2006.</u>

Monitor's Third Report, Exhibit 2 (RB, **Tab 4**)

(g) **Tsehun Harbour**. The Table states that there is \$600,000 in equity in the Tshehun Harbour lands. The amount shown to be owing to the mortgagees is \$2.9 million. <u>The value ascribed to it in the Table is the price in the Share Purchase Agreement dated July 31, 2008</u>.

Monitor's Third Report, Exhibit 2 (RB, T**ab 4**)

(h) **Shire**. The Table states that there is \$2.7 million in equity in the Shire lands. The amount shown to be owing to mortgagees is \$3.64 million. <u>There is no information provided as to the basis for the value ascribed to those lands in the Table</u>.

Monitor's Third Report, Exhibit 2 (RB, T**ab 4**)

14. Information has been requested from the Receiver/Monitor so that Investit/Rompson could consider applying to substitute itself as the DIP lender if there was in fact equity to secure such a loan based on a charge that did not prime secured lenders. The Receiver/Monitor has refused to provide the information requested.

Affidavit of L. Grillandini sworn November 2, 2009 (AB, **Tab 11**)

15. There is no evidence that the CCAA Applicants ever sought a DIP lender on those terms, being a charge that did not prime secured lenders.

<u>PART II. JURISDICTION TO HEAR THIS APPLICATION</u>

Rules of Court, Alta. Reg. 390/1968

> 508(1) Subject to subrule (3), an appeal does not operate as a stay of enforcement or of proceedings under the decision appealed from **unless the Court of Queen's Bench stays enforcement** or proceedings of the decision pending an appeal.
>
> ...
>
> (3) if an application under subrule (1) to the Judge Appeal from is granted, refused, made but not heard, <u>or is impractical</u>, **a judge of the Court of Appeal may de novo** stay any enforcement or proceedings of the decision being appealed.
>
> 516 A Judge [of the Court of Appeal] may make any Order in Chambers with respect to any matters incidental to an Appeal which the Court could make, either *ex parte* or

on such notice as he may direct, and any such Order may be set aside or varied by a Judge if the Order was obtained *ex parte*.

Rules of Court, Alta. Reg. 390/1968, **Tab A** hereto, Rules 508, 516

16. Justice LoVecchio is not available to hear this motion.

PART III. ARGUMENT AND GROUNDS UPON WHICH RELIEF SHOULD BE GRANTED

17. The appropriate test for a stay, as repeatedly adopted by this Honourable Court, and as set forth in *RJR McDonald Inc.* v. *Canada (*A.G.) [1994] 1 S.C.R. 311, is the tripartite test, namely:

(a) Does the appeal raise a serious question to be tried;

(b) Will irreparable harm be suffered if a stay is not granted; and

(c) Does the balance of convenience favour the granting of a stay (put differently, which party would suffer greater harm from the granting or the refusal of the stay).

RJR-McDonald Inc. v. *Canada* (A.J.) [1994] 1 S.C.R. 311 (**Tab B** hereto).

18. For the reasons set out below, the Applicant submits the test is satisfied.

(a) Serious Issue on Appeal (Appeal neither Frivolous nor Vexatious)

19. The first branch of the test requires that the appeal raises a serious or arguable issue. This is a low threshold. It is satisfied if the appeal is neither frivolous nor vexatious.

- *RJR McDonald Inc.* v. *Canada* [1994] 1 S.C.R. 311, at ¶44 (T**ab B** hereto)
- *Dornan* v *Dornan Estate,* 2002 ABCA 64, per Russell, JA at ¶23 (**Tab C** hereto)
- *Polansky Electronic Ltd.* v. *AGT Ltd.,* 2000 ABCA 46, (**Tab D** hereto) at ¶11, cited with approval in *Integral Energy* v. *Schenker Canada* 2001 ABCA 215 (**Tab E** hereto), at ¶14

20. As a matter of receivership law, there is no jurisdiction to finance a receivership by a charge on assets that ranks ahead of secured creditors in these circumstances.

Robert F. Kowal Investments Ltd. v. *Deeder Electric Ltd.*, (1975), 21 C.B.R. (N.S.) 201 (Ont. C.A.), **Tab F** hereto.

21. The justification in CCAA proceedings to prime secured creditors is premised on it facilitating the survival of the debtor as a going concern. There is no justification for priming for a liquidation of assets in a receivership.

United Used Auto & Truck Parts Ltd., Re (1999), 12 C.B.R. (4th) 144 (B.C.S.C.) (**Tab G** hereto) at ¶21

22. On October 8th when the Receiver was appointed, any limited prospect of a going concern restructuring was eliminated. From that point forward, the proceeding was to be an orderly liquidation of the debtors' assets.

23. The sole objective of the continuation of the CCAA proceedings appears to be to finance the liquidation by priming secured creditors, which is an unprecedented and inappropriate use of the CCAA. Ironically, it also serves to continue the very practice for which the debtor has been criticized – using the assets of one company for the benefit of the others.

24. In its submissions, the CCAA Applicants indicated that they were borrowing the structure from Concrete Equities' CCAA/receivership proceedings. However, the receivership in that case was not funded by a DIP Charge (indeed there was no debtor-in-possession financing or charge). That receivership was funded by a Receiver's Borrowings Charge that ranked subsequent in priority to "any first mortgage on the respective Applicant's or Limited Partnership's property".

- Transcript of Hearing (RB, **Tab 9**), Submissions by counsel for the CCAA Applicants, page 11, lines 18-19 – "This – this structure basically has been borrowed from Concrete Equities. It's the same structure as is there...".
- Receivership Order made by the Honourable Madam Justice Romaine on July 29, 2009 in Alberta Court of Queen's Bench Action No. 0901-11048, ¶20, **Tab H** hereto
- CCAA Initial Order made by the Honourable Madam Justice Romaine on July 29, 2009 in Alberta Court of Queen's Bench Action No. 0901-11048, **Tab I** hereto

25. Finally, in addition to the jurisdictional issue, the Court incorrectly placed the onus on the secured creditors to disprove the alleged $16.9 million in equity. The onus to establish the value of the properties held by the CCAA Applicants rested with them and if the burden was not discharged, as Investit says it clearly wasn't, the financing should had to be refused.

- Transcript of Hearing (RB, **Tab 9)**, pages 33 line 20-37
- *United Used Auto & Truck Parts Ltd., Re (1999),* 12 C.B.R. (4th) 144 (B.C.S.C.) (**Tab G** hereto) at ¶29

26. In light of the issues raised in the Leave Application, it is respectfully submitted the Applicant has clearly established that the grounds of its appeal are serious and arguable, and are neither frivolous nor vexatious, and that accordingly the Applicant has met the first leg of the tripartite test.

(b) Irreparable Harm

27. As noted by the Alberta Court of Appeal, "*harm to an Applicant is deemed irreparable when it cannot be remedied if the appeal were to succeed*" and it "*cannot be quantified in monetary terms and that cannot be cured*".

Knox v. *Conservative Party of Canada,* 2007 ABCA 143 (**Tab J** hereto) at ¶9

28. This branch of the test is satisfied if there is the *potential* for irreparable harm. The fact that the DIP Charge has not yet been allocated is irrelevant.

Deloitte Haskins & Sells v. *Coopers & Lybrand Inc.*, (1996), 44 C.B.R. (4th) 57 (Alta. C.A.) (**Tab K** hereto) at ¶17

29. Where the appeal goes to the jurisdiction of the Court to make the order appealed from, harm will be irreparable if the proceedings are permitted to continue until the appeal is heard and decided.

Lloyd v. *Imperial Oil,* 2000 ABCA 89 (**Tab L** hereto) at ¶16-17

30. This Court has held that a loss of priority (in the case at hand the discharge of a Certificate of Lis Pendens) constitutes irreparable harm. Indeed, the Court in that case noted that "*the Appellants say their appeal would be rendered nugatory if the CLP is discharged in the interim. I agree. <u>This is a strong argument in favour of the stay</u>.*"

395432 Alberta Ltd. v. *Broadcast Hill Holdings Ltd.* 2003 ABCA 54 (**Tab M** hereto) at ¶30

31. This Honourable Court has rendered a number of decisions finding harm to be irreparable when the appeal would be rendered nugatory if the stay not granted, and proceeded to grant a stay.

- *Lloyd* v. *Imperial Oil,* 2000 ABCA 89 (**Tab L** hereto) at ¶15-18
- *Integral Energy* v. *Schenker Canada,* 2001 ABCA 215 (**Tab E** hereto) at ¶18-19
- *Dreco Energy Services* v. *Wenzel Downhole,* 2008 ABCA 434 (**Tab N** hereto) at ¶12

32. For example, Justice Wittmann, JA in the above case of *Lloyd* v. *Imperial Oil,* quoted with approval Justice Kerans' comments as to his practice in granting stays when it can be shown that relief sought would be nugatory if a stay was not allowed and there was no harm to the respondent, and granted a stay, commenting as follows:

> "The main thrust of the irreparable harm argument is the risk that, if leave is granted, and the applicant has filed a statement of defence, the Supreme Court will declare the appeal moot and not decide it because the applicant has by filing a statement of defence attorned to the jurisdiction of the Alberta Court. <u>Put in another way, the appeal will become nugatory.</u> The applicant relies on the statement of Kerans, JA in *Triple Five Corp. v. United Western Communications Ltd.*, [1994] A.J. No. 278 (C.A.), where he said:

> This conundrum has always made application for stay difficult for me. Where it can be shown that the relief sought would be nugatory if a stay was not allowed and there is no harm to the respondent, I have always granted a stay unless I could say that there was no reasonable possibility of success on the appeal...

... If the applicant is correct, there will be irreparable harm. ...

... I find that the applicant has shown irreparable harm."

Lloyd v. *Imperial Oil* 2000 ABCA 89 (**Tab L** hereto) at ¶15-18

(c) Balance of Convenience

33. In determining balance of convenience, the Court is required to determine which party would suffer greater harm from the granting or refusal of a stay.

Dornan v. *Dornan Estate* 2002 ABCA 64 (**Tab C** hereto) at ¶27

Irreparable Harm to Investit

34. For the reasons given above, the Applicant will suffer unquantifiable and irreparable harm if the debtor-in-possession financing is extended and drawn down to later be allocated to the assets.

Lack of Harm to the CCAA Applicants

35. By contrast, there is no operating business whose "lights must be kept on". There is no reason that the forensic accounting investigation, legal due diligence and request for proposal process cannot be delayed for three weeks until the leave to appeal application is heard. The process can be stood down until the leave application is determined.

36. Investit would be prepared to proceed with its appeal on an expedited basis as soon as practically possible if leave to appeal is granted.

PART IV. Relief Sought

In view of the foregoing, the Applicant respectfully requests that an Order be granted:

(a) Staying the enforcement of paragraph 4 of the Order made by the Honourable Mr. Justice LoVecchio on October 8, 2009, which amended and substituted \$2,500,000 for \$1,000,000 in paragraph 31 of the Initial Order, pending the outcome of the leave application appeal and if leave is granted, pending the determination of the appeal or until such further and other date as this Court may deem just and appropriate;

(b) Abridging the time for service of this application and deeming service to be good and sufficient;and

(c) Awarding costs of this application to the Applicant.

DATED at the City of Calgary, in the Province of Alberta, this 3rd day of November, 2009.

GOWLING LAFLEUR HENDERSON LLP

Per: ______________________________

Colin Brousson and Scott Andersen

Solicitors for the Appellant
(Respondent) Investit Financial Inc.

TO: **CLERK OF THE COURT**

AND TO: **BENNETT JONES LLP, SOLICITORS FOR THE RESPONDENTS (APPLICANTS)**

AND TO: **COUNSEL AS PER ATTACHED SERVICE LIST**

Appeal No. 0901-0286AC

Q.B. No 0901-11866

IN THE COURT OF APPEAL OF ALBERTA

IN THE MATTER OF THE ***COMPANIES' CREDITORS ARRANGEMENT ACT***, R.S.C. 1985, c. C-36, AS AMENDED, THE ***JUDICATURE ACT***, R.S.A. 2000, c. J-2, AS AMENDED AND THE ***BUSINESS CORPORATIONS ACT***, R.S.A. 2000, C. B-9, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **SHIRE INTERNATIONAL REAL ESTATE INVESTMENTS LTD., SHIRE CAPITAL LTD., HALAMA GARDENS LLC, SHIRE ASSET MANAGEMENT LTD., WINN RIVER RESORT LTD., FORT MCMONEY PROPERTIES II LTD., HALAMA GARDENS LTD., MAPLES AND WHITE SANDS INVESTMENT LTD., FORT MCMONEY PROPERTIES LTD., CHEMAINUS PROPERTIES LTD., SKAHA LAKE DEVELOPMENT LTD., TSEHUM HARBOUR LTD., BEARSPAW AT 144TH AVENUE LTD., BEARSPAW AT 144TH EQUITIES LTD., BEARSPAW AT 144TH BONDS INC., TSEHUM HARBOUR EQUITIES LTD., TSEHUM HARBOUR BONDS LTD., ORILLIA INVESTMENTS LTD., 0726028 B.C. LTD., 0675816 B.C. LTD.** and **BOSUN'S HOLDINGS LTD.**

(the "CCAA Applicants")

BETWEEN:

INVESTIT FINANCIAL INC.

Respondent/Appellant

- AND -

SHIRE INTERNATIONAL REAL ESTATE INVESTMENTS LTD., et al

Applicants/Respondents

MEMORANDUM OF ARGUMENT
(On Motion for Stay)

Appellant(s) or counsel for the Appellant(s):

Colin Brousson & Scott R. Andersen

Gowling Lafleur Henderson LLP
Barristers & Solicitors
P.O. Box 30, Suite 2300
550 Burrard Street
Vancouver, BC V6C 2B5
Telephone Number: (604) 683-6498
Fax Number: (604) 683-3558

Matter v35356

Appeal No.0901-0286AC
Q.B. Action No. 0901-11866
Registry: Calgary

IN THE COURT OF APPEAL OF ALBERTA

IN THE MATTER OF THE ***COMPANIES' CREDITORS ARRANGEMENT ACT***, R.S.C. 1985, c. C-36, AS AMENDED, THE ***JUDICATURE ACT***, R.S.A. 2000, c. J-2, AS AMENDED AND THE ***BUSINESS CORPORATIONS ACT***, R.S.A. 2000, C. B-9, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **SHIRE INTERNATIONAL REAL ESTATE INVESTMENTS LTD., SHIRE CAPITAL LTD., HALAMA GARDENS LLC, SHIRE ASSET MANAGEMENT LTD., WINN RIVER RESORT LTD., FORT MCMONEY PROPERTIES II LTD., HALAMA GARDENS LTD., MAPLES AND WHITE SANDS INVESTMENT LTD., FORT MCMONEY PROPERTIES LTD., CHEMAINUS PROPERTIES LTD., SKAHA LAKE DEVELOPMENT LTD., TSEHUM HARBOUR LTD., BEARSPAW AT 144TH AVENUE LTD., BEARSPAW AT 144TH EQUITIES LTD., BEARSPAW AT 144TH BONDS INC., TSEHUM HARBOUR EQUITIES LTD., TSEHUM HARBOUR BONDS LTD**., **ORILLIA INVESTMENTS LTD**., **0726028 B.C. LTD., 0675816 B.C. LTD.** and **BOSUN'S HOLDINGS LTD.**

(the "CCAA Applicants")

BETWEEN:

INVESTIT FINANCIAL INC.

Appellant (Respondent)

AND:

SHIRE INTERNATIONAL REAL ESTATE INVESTMENTS LTD., SHIRE CAPITAL LTD., HALAMA GARDENS LLC, SHIRE ASSET MANAGEMENT LTD., WINN RIVER RESORT LTD., FORT MCMONEY PROPERTIES II LTD., HALAMA GARDENS LTD., MAPLES AND WHITE SANDS INVESTMENT LTD., FORT MCMONEY PROPERTIES LTD., CHEMAINUS PROPERTIES LTD., SKAHA LAKE DEVELOPMENT LTD., TSEHUM HARBOUR LTD., BEARSPAW AT 144TH AVENUE LTD., BEARSPAW AT 144TH EQUITIES LTD., BEARSPAW AT 144TH BONDS INC., TSEHUM HARBOUR EQUITIES LTD., TSEHUM HARBOUR BONDS LTD., **ORILLIA INVESTMENTS LTD**., **0726028 B.C. LTD., 0675816 B.C. LTD.** and **BOSUN'S HOLDINGS LTD.**

Respondents (Applicants)

NOTICE OF MOTION

TAKE NOTICE that a motion will be made on behalf of the Appellant (Respondent) Investit Financial Inv. ("**Investit**") before a single Judge in chambers, at the Court of Appeal, on November 4, 2009, in her/his capacity as a Judge of superior jurisdiction, at the Court of Appeal building, 2600, 450 1st

Street SW T2P 5H1, at the hour of 9:30 am in the forenoon, or so soon thereafter as counsel may be heard for an Order:

1. Staying the enforcement of paragraph 4 of the Order made by the Honourable Mr. Justice LoVecchio on October 8, 2009, which amended and substituted $2,500,000 for $1,000,000 in paragraph 31 of the Initial Order, pending the outcome of the leave application appeal and if leave is granted, pending the determination of the appeal or until such further and other date as this Court may deem just and appropriate;

2. Abridging the time for service of this application and deeming service to be good and sufficient;

3. Directing that costs of such application be payable by the Respondents (Applicants);and

4. Such further and other relief as this Honourable Court deems just and appropriate.

AND FURTHER TAKE NOTICE the grounds upon which this application is brought are as follows:

1. The orders from which leave to appeal is sought:

   (a) authorized an extension of the debtor-in-possession financing to $2.5 million (the "**DIP Facility**"), which financing is secured by a charge on all the debtors' Property, as that terms is defined in the Initial Order, that ranks in priority ahead of the secured lenders;

   (b) appointed a Receiver pursuant to the *Judicature Act* and *Business Corporation Act* on the application of the CCAA Applicants;

   (c) authorized the Receiver to draw down on the DIP Facility created in the CCAA proceedings to pay, *inter alia,* the legal fees and disbursements of Borden Lander Gervais LLP, counsel for certain investors;

   (d) created a Receiver's Charge in the amount of $250,000 on all the debtors' property to secure, *inter alia*, the payment of the receiver's fees and those of its legal counsel, which charge ranks in priority ahead of the secured lenders ,

2. An appeal was filed on October 27, 2009. The application for leave to appeal is scheduled for hearing on December 1, 2009. It is anticipated that the next come back hearing before the Honourable Madam Justice Kent will be on December 3, 2009.

3. The appeal raises a serious issue to be tried, and is neither frivolous nor vexatious. The order made rests on the court's CCAA jurisdiction, yet the Court failed to apply the appropriate test in extending the stay of proceedings. This proceeding is now effectively a receivership. The applicable receivership law does not permit the Court to finance the receivership by way of charge in priority to the interests of secured creditors, if those creditors opposed to the motion as they did in this instance.

4. The balance of convenience favours granting the stay.

5. Investit will suffer irreparable harm if a stay is not granted preventing the debtor-in-possession lender from relying on the DIP Charge to advance up to an additional $1 million.

   (a) Ms. Couch has deposed that the DIP Facility will be drawn down unless a stay is ordered (see paragraph 8 of her Affidavit sworn October 28, 2009). As a result of the orders made below, the DIP Charge is a charge on the Bearspaw Property (as that term is defined in paragraph 64 of the Monitor's Third Report) that ranks in priority ahead of Investit's mortgage and any monies drawn thereon in circumstances where, on evidence filed by Investit, there is already a shortfall on its security such the DIP Charge constitutes irreparable harm.

   (b) The appeal challenges the court's jurisdiction to order the charge and if the stay is refused the appeal will largely become moot and the DIP Charge *de facto* upheld in circumstances where Investit says there was no jurisdiction to make the order appealed from.

6. Conversely, the CCAA Applicants will not suffer irreparable harm if the DIP Facility is not extended until at least the hearing on December 1st for leave to appeal.

   (a) The DIP Facility is not being used to keep the business operating as a going concern. Its proposed use is to fund a forensic accounting investigation being undertaken by the Receiver for the benefit of parties other than Investit and the other secured creditors. This exercise can be deferred for three weeks until the application for leave to appeal is heard.

   (b) The CCAA Applicants cannot rely on any alleged equity in their other properties. Had they wished to do so, the CCAA Applicants ought to have adduced reliable evidence of the value of those lands by way of updated appraisals. They failed to do so and even the Monitor/Receiver cautioned against relying on the figures provided by the CCAA Applicants (see paragraph 60 of the Monitor's 3rd Report). If there was such equity, the CCAA Applicants ought to have found a lender willing to lend against that equity with their security to rank subsequent in priority to Investit. If no lender was prepared to lend against the alleged equity, it supports that there is in fact no equity. If no efforts were undertaken to find such a lender, the CCAA Applicants cannot assert that the priority sought was necessary in the circumstances and consequently the balance of convenience cannot favour maintaining that order in light of the clear prejudice to Investit.

AND FURTHER TAKE NOTICE in support of this application reference will be had to those materials contained in the Document Binder of the Applicants and the Document Binder of the Respondents and such further and other materials as Counsel deems advisable and this Honourable Court may permit.

AND FURTHER TAKE NOTICE that in support of the within application the Appellant (Respondent) shall rely upon Rules 516, 508(3) and 548 of the Alberta *Rules of Court*, and **DATED** at the City of Calgary, in the Province of Alberta, this 2nd day of November, 2009.

DATED at the City of Calgary, in the Province of Alberta, this 3rd day of November, 2009.

Time estimated for oral argument
(including reply) on this motion:
30 minutes

GOWLING LAFLEUR HENDERSON LLP

Per: ______________________________

Colin Brousson and Scott Andersen
Solicitors for the Appellant (Respondent)
Investit Financial Inc.

TO: The Registrar

AND TO: Bennett Jones LLP, Solicitors for the CCAA Applicants, Applicants/Respondents

AND TO: McCarthy Tétrault LLP, Solicitors for Ernst & Young Inc.

AND TO: Fraser Milner Casgrain LLP, Solicitors for Echo Merchant Fund II Limited Partnership

AND TO: The parties on the attached service list

Appeal No. 0901-0286AC
Q.B. No 0901-11866

IN THE COURT OF APPEAL OF ALBERTA

IN THE MATTER OF THE ***COMPANIES' CREDITORS ARRANGEMENT ACT***, R.S.C. 1985, c. C-36, AS AMENDED, THE ***JUDICATURE ACT***, R.S.A. 2000, c. J-2, AS AMENDED AND THE ***BUSINESS CORPORATIONS ACT***, R.S.A. 2000, C. B-9, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **SHIRE INTERNATIONAL REAL ESTATE INVESTMENTS LTD., SHIRE CAPITAL LTD., HALAMA GARDENS LLC, SHIRE ASSET MANAGEMENT LTD., WINN RIVER RESORT LTD., FORT MCMONEY PROPERTIES II LTD., HALAMA GARDENS LTD., MAPLES AND WHITE SANDS INVESTMENT LTD., FORT MCMONEY PROPERTIES LTD., CHEMAINUS PROPERTIES LTD., SKAHA LAKE DEVELOPMENT LTD., TSEHUM HARBOUR LTD., BEARSPAW AT 144TH AVENUE LTD., BEARSPAW AT 144TH EQUITIES LTD., BEARSPAW AT 144TH BONDS INC., TSEHUM HARBOUR EQUITIES LTD., TSEHUM HARBOUR BONDS LTD., ORILLIA INVESTMENTS LTD., 0726028 B.C. LTD., 0675816 B.C. LTD.** and **BOSUN'S HOLDINGS LTD.**

(the "CCAA Applicants")

BETWEEN:

INVESTIT FINANCIAL INC.

Respondent/Appellant

- AND -

SHIRE INTERNATIONAL REAL ESTATE INVESTMENTS LTD., et al

Applicants/Respondents

NOTICE OF MOTION

Appellant(s) or counsel for the Appellant(s):

Colin Brousson & Scott R. Andersen
Gowling Lafleur Henderson LLP
Barristers & Solicitors
P.O. Box 30, Suite 2300
550 Burrard Street
Vancouver, BC V6C 2B5
Telephone Number: (604) 683-6498
Fax Number: (604) 683-3558

Matter v35356

Notice to the Respondent:

A respondent who fails to comply with the requirements of the Alberta Rules of Court and the Court of Appeal Consolidated Practice Directions, within the prescribed time, will not be allowed to present oral argument on the application, nor be entitled to costs of the application, unless otherwise ordered. Failure to appear may also lead to an order or judgment being made against the respondent in their absence.

Unless otherwise ordered at the hearing, the maximum time for oral argument (including reply) will be 15 minutes per separately-represented party; except for applications for leave to appeal where the maximum time allowed will be 30 minutes per separately-represented party.

Appeal No.0901-0286AC
Q.B. Action No. 0901-11866
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IN THE COURT OF APPEAL OF ALBERTA

IN THE MATTER OF THE ***COMPANIES' CREDITORS ARRANGEMENT ACT***, R.S.C. 1985, c. C-36, AS AMENDED, THE ***JUDICATURE ACT***, R.S.A. 2000, c. J-2, AS AMENDED AND THE ***BUSINESS CORPORATIONS ACT***, R.S.A. 2000, C. B-9, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **SHIRE INTERNATIONAL REAL ESTATE INVESTMENTS LTD., SHIRE CAPITAL LTD., HALAMA GARDENS LLC, SHIRE ASSET MANAGEMENT LTD., WINN RIVER RESORT LTD., FORT MCMONEY PROPERTIES II LTD., HALAMA GARDENS LTD., MAPLES AND WHITE SANDS INVESTMENT LTD., FORT MCMONEY PROPERTIES LTD., CHEMAINUS PROPERTIES LTD., SKAHA LAKE DEVELOPMENT LTD., TSEHUM HARBOUR LTD., BEARSPAW AT 144TH AVENUE LTD., BEARSPAW AT 144TH EQUITIES LTD., BEARSPAW AT 144TH BONDS INC., TSEHUM HARBOUR EQUITIES LTD., TSEHUM HARBOUR BONDS LTD**., **ORILLIA INVESTMENTS LTD**., **0726028 B.C. LTD., 0675816 B.C. LTD.** and **BOSUN'S HOLDINGS LTD.**

(the "CCAA Applicants")

BETWEEN:

INVESTIT FINANCIAL INC.

Appellant (Respondent)

AND:

SHIRE INTERNATIONAL REAL ESTATE INVESTMENTS LTD., SHIRE CAPITAL LTD., HALAMA GARDENS LLC, SHIRE ASSET MANAGEMENT LTD., WINN RIVER RESORT LTD., FORT MCMONEY PROPERTIES II LTD., HALAMA GARDENS LTD., MAPLES AND WHITE SANDS INVESTMENT LTD., FORT MCMONEY PROPERTIES LTD., CHEMAINUS PROPERTIES LTD., SKAHA LAKE DEVELOPMENT LTD., TSEHUM HARBOUR LTD., BEARSPAW AT 144TH AVENUE LTD., BEARSPAW AT 144TH EQUITIES LTD., BEARSPAW AT 144TH BONDS INC., TSEHUM HARBOUR EQUITIES LTD., TSEHUM HARBOUR BONDS LTD., **ORILLIA INVESTMENTS LTD**., **0726028 B.C. LTD., 0675816 B.C. LTD.** and **BOSUN'S HOLDINGS LTD.**

Respondents (Applicants)

NOTICE OF MOTION

TAKE NOTICE THAT an application will be made on behalf of the Applicant Investit Financial Inc. ("**Investit**") before the presiding Justice in Chambers at the Court of Appeal at TransCanada Pipelines Tower, 2600, 450-1st Street in the City of Calgary, in the Province of Alberta, on December 1, 2009 at 9:30am, for an order pursuant to sections 13 and 14 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "**CCAA**") granting leave to appeal from three orders of the Honourable Mr. Justice LoVecchio each pronounced on October 8, 2009.

FURTHER TAKE NOTICE THAT Investit relies on the following grounds in support of this application:

1. that, in extending the stay of proceeding created by the Initial Order to December 8, 2009, the learned chambers judge erred in law by failing to apply the test set out in subsection 11(6) of the CCAA by continuing the stay where circumstances did not exist to make the order appropriate;

2. that, in continuing and extending the debtor-in-possession financing and further by securing that financing by a charge ranking in priority ahead of Investit and other secured creditors, the learned trial judge erred in law by:

   (a) failing to apply the applicable test and considerations relevant to such applications;

   (b) authorizing debtor in possession financing for an inappropriate purpose, being to fund a receivership initiated under the *Judicature Act* and the *Business Corporations Act*;

3. that, in appointing Ernst & Young Inc. (the "**Receiver**") as receiver and manager of the CCAA Applicants and their property, the learned judge erred in law by:

   (a) staying the enforcement proceedings of creditors ranking in priority ahead of the CCAA Applicants who sought the appointment of Ernst & Young Inc.;

   (b) creating the Receiver's Charge that ranks in priority ahead of Investit and other secured creditors;

   (c) permitting the Receiver to borrow pursuant to the DIP Charge and thus fund the receivership thereby;

4. that, in dismissing paragraph one of Investit's Notice of Motion to lift the stay of proceedings as against it, the learned chambers judge erred by failing to balance the interests of all affected parties;

5. that, in dismissing paragraph two of Investit's Notice of Motion to exclude the DIP Charge from attaching to those lands subject to a mortgage in favour of Investit, the learned chambers judge erred in law by failing to allocate the DIP Charge to unencumbered property whose value was sufficient to secure all of the court order charges created in the below proceeding; and

6. such further and other grounds as Counsel may advise and this Honourable Court may consider.

AND FURTHER TAKE NOTICE THAT in support of such application will be read, in whole or in part, materials that were before the Honourable Mr. Justice LoVecchio and such further and other materials as Counsel may advise and this Honourable Court may permit.

DATED at the City of Calgary, in the Province of Alberta, this 2nd day of November, 2009.

Time estimated for oral argument
(including reply) on this motion:
30 minutes

Gowling Lafleur Henderson LLP

____
John I. McLean and Scott R. Andersen,
Counsel for Investit Financial Inc.
(Applicant/Appellant)

TO:	The Registrar
AND TO:	Bennett Jones LLP, Solicitors for the CCAA Applicants, Applicants/Respondents
AND TO:	McCarthy Tétrault LLP, Solicitors for Ernst & Young Inc.
AND TO:	Fraser Milner Casgrain LLP, Solicitors for Echo Merchant Fund II Limited Partnership
AND TO:	The parties on the attached service list

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Appeal No. 0901-0286AC
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IN THE COURT OF APPEAL OF ALBERTA

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(the "CCAA Applicants")

BETWEEN:

INVESTIT FINANCIAL INC.

Respondent/Appellant

- AND -

SHIRE INTERNATIONAL REAL ESTATE INVESTMENTS LTD., et al

Applicants/Respondents

NOTICE OF MOTION

Appellant(s) or counsel for the appellant(s):

John I. McLean & Scott R. Andersen
Gowling Lafleur Henderson LLP
Barristers & Solicitors
P.O. Box 30, Suite 2300
550 Burrard Street
Vancouver, BC V6C 2B5
Telephone Number: (604) 683-6498
Fax Number: (604) 683-3558

Matter v35356