Court File No.: CV-23-00701377-00CL

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 SWARMIO MEDIA HOLDINGS INC., SWARMIO INC., AND SWARMIO MEDIA INC.

Applicants

FACTUM OF THE APPLICANTS

August 23, 2023

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PART I - INTRODUCTION

1. On June 21, 2023, Swarmio Media Holdings Inc. ("**Swarmio Parent**"), Swarmio Inc. ("**Swarmio OpCo**") and Swarmio Media Inc. ("**Swarmio Media**", together with Swarmio Parent and Swarmio OpCo, the "**Swarmio Group**", the "**Company**" or the "**Applicants**") brought an application pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c-C. 36, as amended (the "**CCAA**").

2. This motion marks the most significant step in these proceedings. The Monitor administered a court-approved sale process resulting in the DIP Lender's credit bid being the successful bid. The proposed transaction, if approved, maintains the Company as a going concern and preserves employment. The proceeding has achieved the fundamental objectives of the CCAA. It avoids the social and economic losses resulting from liquidation, and both preserved and maximized the value of the Company's assets.

3. This Factum is filed in support of the Applicants' motion for the following orders:

(a) an order, among other things, approving a sale agreement between Swarmio Inc. and the DIP Lender (Triaxcess Limited) (in such capacity, the "**Purchaser**") pursuant to a "reverse vesting" order substantially in the form of the draft order at **Tab** "**3**" to the Motion Record; and

(b) an order (the "**Termination Order**"), substantially in the form of the draft order at **Tab** "**4**" to the Motion Record, among other things:

(i) terminating the CCAA Proceedings once the Monitor files a Termination and Discharge Certificate,

(ii) releasing the Company's officers and directors, the Monitor and their respective advisors, approving the Second Report of the Monitor (the "**Releases**"), and

(iii) extending the stay of proceedings until the earlier of November 24, 2023 and the date that the Monitor files the Termination and Discharge Certificate.

PART II - SUMMARY OF FACTS

A. Background To CCAA Proceedings

4. The key facts that gave rise to these CCAA proceedings are set out in the affidavits of Vijai Karthigesu dated June 20, 2023 ("**First Karthigesu Affidavit**"), filed.[1]

[1] A copy of the First Karthigesu Affidavit is at Exhibit A to the Affidavit of Vijai Karthigesu sworn August 15, 2023 (the "**Third Karthigesu Affidavit**"), Tab 2A to the Motion Record of the Applicants dated August 15, 2023 (the "**Motion Record**").

5. All capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the First Karthigesu Affidavit. Mr. Karthigesu is a director and Chief Executive Officer of the Company.

6. The Swarmio Group is an early stage, pre-revenue technology and media company focused on the gaming sector. The Company is insolvent and unable to raise the capital necessary to fund its development. It has exhausted its liquidity and has not made payroll.[2]

7. Before bringing its application under the CCAA, the Company pursued numerous strategic alternatives over the last year and a half with no success. The Company required the breathing room afforded by the CCAA to obtain interim financing, develop and implement a sale process, and identify a value-maximizing transaction for the going-concern sale of the business.[3]

8. On June 21, 2023, this Court granted the Initial Order. On June 30, 2023, this Court approved a sale and investment solicitation process ("**SISP**") in respect of the Applicants' assets and business. The SISP is now complete.

9. The Company and the Monitor implemented the SISP in accordance with its terms. The Monitor provided 81 potential bidders the teaser letter and non-disclosure agreement. 6 potential bidders signed the non-disclosure agreement, and the Monitor provided them access to the virtual data room.

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[2] First Karthigesu Affidavit, at Exhibit A to the Third Karthigesu Affidavit, Tab 2A to the Motion Record.
[3] First Karthigesu Affidavit at para 6, at Exhibit A to the Third Karthigesu Affidavit, Tab 2A to the Motion Record.

10. Only two parties submitted a bid by the bid deadline. One bid was from the DIP Lender for the assets and operations of Swarmio OpCo and Swarmio Media (the "**OpCo Bid**"). The second bid was for the public, parent shell company, Swarmio Parent (the "**PubCo Bid**"). The OpCo Bid was the only bid received for the assets and operations of Swarmio OpCo and Swarmio Media in the SISP. The Monitor and its advisors assessed the PubCo Bid and determined that the consideration provided for in the PubCo Bid was not feasible as it has not been formulated.[4]

B. Purchase Agreement and Proposed Transaction

11. On July 25, 2023, the Monitor received the OpCo Bid. The proposed Purchase Agreement provides for the following consideration:[5]

(a) the release of the Swarmio Group from all amounts outstanding and obligations payable to the DIP Lender pursuant to the DIP Facility (including all accrued and unpaid interest and related fees/costs);

(b) the payment to the Monitor of any unused portion of the DIP Facility; and

(c) the assumed liabilities, including, but not limited to, any amounts owing under the Administration Charge, liabilities to terminated employees and wage arrears for continuing employees (approximately $1.1 million), certain critical vendor payments, and certain

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[4] Third Karthigesu Affidavit at para 19, Tab 2 to the Motion Record; Monitor's Second Report at para 32. The Applicants and the Monitor continue to explore options to realize value from Swarmio Parent's corporate shell.

[5] Third Karthigesu Affidavit at para 21, Tab 2 to the Motion Record.

secured and unsecured loans to Swarmio OpCo in the total amount of approximately $2.2 million.

12. The key terms of the OpCo Bid are further detailed in the Monitor's Second Report and in the Third Karthigesu Affidavit. A copy of the Purchase Agreement (redacted to remove names of individuals included in the schedules) is at Exhibit "D" to the Third Karthigesu Affidavit.

C. Necessity of Proposed Transaction Structure

13. The proposed transaction set out in the OpCo Bid (the "**Transaction**") requires a reverse vesting order to ensure an efficient operational transition of the Swarmio Group's assets and business, including tax losses, and material customer contracts in the Philippines, Malaysia, Tunisia, UAE, and Sri Lanka, among other jurisdictions.[6]

14. The Company's business relies on material customer contracts with large, global telecommunications companies and gaming publishers all of which are governed by the laws of foreign jurisdictions. Importantly, certain of these contracts prohibit assignment without prior consent of the applicable counterparty.[7]

15. The cost to formally transition critical customer contracts in multiple foreign jurisdictions is high.[8] Given the Company's liquidity constraints, there are no resources available for a lengthy process which might have allowed the Company to secure consents for assigning

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[6] Third Karthigesu Affidavit at para 30, Tab 2 to the Motion Record.

[7] Third Karthigesu Affidavit at para 31, Tab 2 to the Motion Record; Affidavit of Roy Haddad sworn August 17, 2023 ("**Purchaser Affidavit**") at paras 2(c)-(d).

[8] Second Report of the Monitor at para 40(g).

its various material contracts. And commencing such a process to obtain assignments may create risks to the valve of the business because of the nature of the customers.[9] Moreover, the enforcement of an assignment order would likely require commencement of recognition proceedings in multiple foreign jurisdictions, as these key contracts are governed by foreign laws, typically in the Middle East, Asia and North African regions.[10] Any interruption to these customer relationships would be destructive to the value of the Company and its ability to continue operating as a going concern. Any such interruption will also render the proposed Transaction unacceptable to the Purchaser.[11]

16. In addition, as at March 31, 2022, Swarmio OpCo had over $12.6 million in tax losses, which are intended to be preserved through the Transaction.[12]

17. The Purchaser has sought a "reverse vesting" structure in respect of the Transaction. The Purchaser believes that any other structure would create sufficient deal risk that might render it unfeasible for the Purchaser to complete the Transaction, despite the commitment already made by the Purchaser in respect of the DIP loan.[13]

PART III - STATEMENT OF ISSUES

18. This factum addresses the following issues:

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[9] Purchaser Affidavit at para 2.

[10] Third Karthigesu Affidavit at para 32, Tab 2 to the Motion Record.

[11] Third Karthigesu Affidavit at para 32, Tab 2 to the Motion Record; Purchaser Affidavit at para 2.

[12] Third Karthigesu Affidavit at para 33, Tab 2 to the Motion Record.

[13] Purchaser Affidavit at para 1(d).

(a) whether the proposed Transaction and "Reverse Vesting Order" should be approved;

(b) whether the Releases should be approved;

(c) whether the sealing order should be granted; and

(d) whether the Termination Order should be granted.

PART IV - LAW AND ARGUMENT

A. The Transaction and the "Reverse" Vesting Order Should be Approved

a. Jurisdiction to Approve a Reverse Vesting Transaction

19. The Court's jurisdiction to approve a "reverse" vesting transaction is found in section 11 of the CCAA, which provides that the Court may make any order considered appropriate in the circumstances.[14]

20. The Court's authority in this regard must be exercised in furtherance of the remedial objectives of the CCAA, not only in terms of what the order will achieve, but also by the means by which it employs to that end.[15] These objectives include providing for timely, impartial resolution of a debtor's insolvency; preserving and maximizing the value of a debtor's assets; ensuring fair and equitable treatment of the claims against a debtor;

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[14] *Companies' Creditors Arrangement Act*, RSC 1985, c. C-36 ss. 11 and 36; *Harte Gold Corp. (Re)*, 2022 ONSC 653 at paras 36-37.

[15] *Quest University Canada (Re)*, 2020 BCSC 1883 at para 41; *Century Services Ltd. v. Canada (Attorney General)*, 2010 SCC 60 at para. 70.

protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of a restructuring or liquidating the debtor company.[16]

21. The CCAA generally prioritizes "avoiding the social and economic losses resulting from liquidation of an insolvent company".[17] Importantly, these objectives are not to be achieved simply in the most expedient manner and without due regard to the interests of stakeholders that are affected in that process; rather, any restructuring is best achieved when "all stakeholders are treated as advantageously and fairly as the circumstances permit."[18]

22. As described by the Supreme Court of Canada, Courts have long recognized that the jurisdiction granted by section 11 of the CCAA is only constrained by the restrictions set out in the CCAA itself, and the requirement that the order made be "appropriate in the circumstances".[19]

23. Section 36 of the CCAA, which provides for the approval of a sale of a debtor company's assets out of the ordinary course of business, is also applicable, with necessary modifications, to a Court's consideration of a reverse vesting transaction.[20] Section 36 of the CCAA grants the Court broad discretion to consider and, if appropriate, grant relief that represents an innovative solution to any challenges in a proceeding; while the ability of a

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[16] *9354-9186 Québec inc. v. Callidus Capital Corp.,* 2020 SCC 10 at para 40; *Harte Gold Corp. (Re)*, 2022 ONSC 653 at para 32.

[17] *9354-9186 Québec inc. v. Callidus Capital Corp.,* 2020 SCC 10 at para 41

[18] *Century Services Ltd. v. Canada (Attorney General)*, 2010 SCC 60 at para. 70.

[19] *9354-9186 Québec inc. v. Callidus Capital Corp.,* 2020 SCC 10 at para 67.

[20] *Harte Gold Corp. (Re)*, 2022 ONSC 653 at para 37.

CCAA court to be innovative and creative is not boundless, as always, the Court must exercise its discretion with a view to the statutory objectives and purposes of the CCAA.[21]

b. Test for Approval of "Reverse" Vesting Orders and Guidance From Recent Jurisprudence

24. In *Harte Gold,* Justice Penny held that courts must be diligent in ensuring that the restructuring is fair and reasonable, having regard to the objectives and statutory constraints of the CCAA.[22] In the context of considering whether to approve a reverse vesting order, the Court in *Harte Gold* articulated the following considerations:[23]

> (a) Why is the reverse vesting order necessary in this case?
>
> (b) Does the reverse vesting order structure produce an economic result at least as favourable as any other viable alternative?
>
> (c) Is any stakeholder worse off under the reverse vesting order structure than they would have been under any other viable alternative? and
>
> (d) Does the consideration being paid for the debtor's business reflect the importance and value of intangible assets being preserved under the reverse vesting structure?

25. In applying these considerations to determine whether to grant a reverse vesting order in *Harte Gold*, the Court noted in particular that the debtor company had "contracts that will be retained under the [proposed purchase agreement]" and that the "RVO Transaction structure will avoid potentially significant delays and costs associated with having to seek consent to assignment from contract counter-parties or, if consents could not be obtained,

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[21] *Quest University Canada (Re)*, 2020 BCSC 1883 at paras 153-154.

[22] *Harte Gold Corp. (Re)*, 2022 ONSC 653 at para 38.

[23] *Harte Gold Corp. (Re)*, 2022 ONSC 653 at para 38.

orders assigning such contracts under s. 11.3 of the CCAA."[24] Other courts have also considered as a factor potential delays or costs associated with the assignment of contracts, which would be required in a traditional vesting order structure.[25]

26. In *Just Energy*, Justice McEwen noted that a review of the jurisprudence demonstrates that courts have approved reverse vesting orders in circumstances where, among others, "the debtor is a party to certain key agreements that would be similarly difficult or impossible to assign to a purchaser", and "where maintaining the existing legal entities would preserve certain tax attributes that would otherwise be lost in a traditional vesting order transaction".[26]

27. Courts have also taken into account the proposed purchasers' positions when considering whether a reverse vesting order is appropriate. In *Acerus Pharmaceuticals*, the Court noted that the purchaser in that case was not prepared to take the risk nor invest the time and money to go through an application process for the transfer of existing licences which were critical to the debtor company's business.[27] This was similarly considered by Justice Penny in *Hart Golde*; in that case, it was noted that the purchaser declined to *both* fund the ongoing operations and the CCAA process, *and* undertake a process of application to relevant government agencies for transfer of the necessary licences and permits.[28]

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[24] *Harte Gold Corp. (Re),* 2022 ONSC 653 at para 75.

[25] *Arrangement relatif à Blackrock Metals Inc.,* 2022 QCCS 2828 at para 114.

[26] *Just Energy Group Inc. et. al. v. Morgan Stanley Capital Group Inc. et. al.,* 2022 ONSC 6354 at para 34.

[27] *Acerus Pharmaceuticals Corporation (Re),* 2023 ONSC 3314 at para 13.

[28] *Harte Gold Corp. (Re),* 2022 ONSC 653 at para 73.

c. Sale of Assets Outside Ordinary Course of Business

28. When authorizing a sale of a debtor company's assets outside of the ordinary course of business, subsection 36(3) of the CCAA requires the court to consider the following non-exhaustive factors. These factors were held by the Court in *Harte Gold* to be applicable to the consideration of a reverse vesting transaction:[29]

(a) whether the process leading up to the proposed sale was reasonable in the circumstances;

(b) whether the monitor approved the process leading up to the proposed sale;

(c) whether the monitor filed a report stating that in its opinion the proposed sale would be more beneficial to creditors than a sale or disposition under a bankruptcy;

(d) the effects of the proposed sale on the creditors and other interested parties;

(e) the extent to which creditors were consulted; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.[30]

d. Related Party Considerations

29. A sale of a debtor company's assets outside of the ordinary course of business to a related party is expressly contemplated by subsection 36(4) of the CCAA.[31] Where such a sale is proposed, this section provides that in addition to considering the factors in subsection 36(3), this Court must be satisfied that:

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[29] *Harte Gold Corp. (Re)*, 2022 ONSC 653 at para 63.

[30] CCAA, s. 36.

[31] *Quest University Canada (Re)*, 2020 BCSC 1883 at paras 158.

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

e. The Proposed Transaction Should be Approved

30. The Swarmio Group's business is highly technical and specialized.[32] Its business is almost entirely comprised of intangible assets. Its most important assets are material customer contracts with parties across various international jurisdictions, and which are governed by foreign laws.

31. The SISP has unequivocally demonstrated that there is no realizable value in the Swarmio Group's business or assets beyond that reflected in the proposed Transaction. The Monitor is supportive of its approval and is of the view that the Purchase Agreement and Transaction before the Court is the best available transaction in the circumstances, and is in the best interest of the stakeholders of the Swarmio Group.

32. For the reasons that follow, the proposed Transaction meets the required criteria in section 36 of the CCAA (including the related-party considerations). Among other things:

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[32] First Karthigesu Affidavit at para 90; Exhibit "A" to the Third Karthigesu Affidavit, Tab 2A to the Motion Record.

(a) the SISP was well structured, particularly in light of the comprehensive pre-filing marketing undertaken by the Company.[33] The Monitor implemented the court-approved SISP in accordance with its terms. The market was broadly canvassed in an attempt to identify a value-maximizing transaction for the going-concern sale of the business;

(b) the Monitor was consulted on the Transaction and has articulated the reasons for its support of the Transaction in its Second Report; the Monitor recommends this Court's approval of the Transaction because, among other things, it avoids undue disruption to the Company's business, avoids adversely affecting the Company's employees, and promotes an efficient means of transferring the business and maintaining a going-concern operation;[34]

(c) the Monitor has filed a report stating that in its opinion the consideration provided for in the Purchase Agreement is higher than the estimated liquidation value of the assets of Swarmio OpCo and Swarmio Media, and that there would be no financial recovery to the creditors whose claims are being assumed in the proposed Transaction in a liquidation scenario;[35]

(d) the proposed Transaction is the only transaction that has emerged to rescue the Swarmio Group following the completion of the Court-approved SISP. The Purchase

[33] Second Karthigesu Affidavit at paras 11-12.

[34] Second Report of the Monitor at para 40.

[35] Second Report of the Monitor at para 40(c). This is particularly relevant in relation to the assumed employee liabilities, who would only experience limited recovery under applicable statutes.

Agreement before the Court is the best offer that the Purchaser is prepared to make in the circumstances;

(e) in accordance with section 36(4) of the CCAA, the Applicants, in consultation with the Monitor, canvassed their restructuring alternatives in good faith and reasonably determined that the proposed Transaction presented the only viable alternative capable of assuring a going-concern result. The proposed Purchase Agreement is the only bid received in the SISP.

33. For the following reasons, the considerations articulated by the Court in *Harte Gold* also militate in favour of the approval of the Purchase Agreement and the Transaction.

<u>Why is the reverse vesting order necessary?</u>

34. The reverse vesting order is necessary to avoid the uncertainty, delays, and costs associated with seeking consents to assignments (or, if necessary, assignment orders) in respect of the critical contracts with telecommunications providers and gaming publishers. The Purchaser has required a reverse vesting structure in order to avoid business interruption and to ensure that the transfer of the business as a going concern is completed without any disruption to key business relationships; as such, a reverse vesting order is a condition to the Purchase Agreement. The Purchaser has also confirmed the potential of significant deal risk if such a structure is not approved.

35. The evidence before the Court is that a transfer of the Applicants' business through a traditional vesting order may threaten the continuity of the business. In addition, the

Monitor has shared its view that the cost to formally transition critical customer contracts in multiple foreign jurisdictions is likely to be high.[36]

36. The Purchaser, similar to the purchaser in *Harte Gold*, has taken the position that it will not fund ongoing operations and the CCAA process in its capacity as the DIP Lender, and also undertake any process of seeking assignment from various counterparties located in various jurisdictions and/or obtaining assignment orders in respect of the various material contracts of the Company. The Purchaser has elected not to assume the risk and uncertainty associated with the possible delays and costs of such a process. The reverse vesting structure will enable the Transaction to be completed efficiently and expeditiously, without exposure to these risks, delays and costs.

<u>Does the reverse vesting structure produce an economic result at least as favourable as any other viable alternative?</u>

37. The proposed Transaction is the best alternative available in the circumstances. As the Monitor notes in its Second Report, the approval of a transaction to allow for the continued operation of the Swarmio Group's business and greater value to creditors and stakeholders compared to a liquidation of the Swarmio Group.[37] The proposed Transaction was the only offer received for the going concern sale of the Swarmio Group's business in the SISP.

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[36] Second Report of the Monitor at para 40(g).

[37] Second Report of the Monitor at paras 40(c) and 50.

Is any stakeholder worse off under the reverse vesting structure than under any other viable alternative?

38. The Purchaser has confirmed that there is significant deal risk absent a reverse vesting transaction, and that absent such a structure, the transaction may be unfeasible for the Purchaser, even considering the financial commitment made by the Purchaser in its capacity as the DIP Lender.[38] No stakeholder is worse off under the Transaction than under any other viable alternative.

Does the consideration reflect the importance and value of the intangible assets being preserved under the RVO structure?

39. The evidence is that the Purchaser is paying more for the Swarmio Group's business than it is worth in a bankruptcy.[39] The concern reflected in this factor, as articulated by Justice Penny, is whether a purchaser making a credit bid might be getting "something for nothing".[40]

40. The results of the SISP demonstrate that no other potential purchaser was willing to bid or pay more than the value proposed in the Purchase Agreement. The Monitor is also satisfied that the consideration is fair in the circumstances.

[38] Purchaser Affidavit at para 1(d).

[39] Second Report of the Monitor at paras 40(c) and 50.

[40] *Harte Gold Corp. (Re)*, 2022 ONSC 653 at para 67.

<u>The proposed Transaction furthers the objectives of the CCAA</u>

41. Simply put, a reverse vesting order facilitates the seamless continuity of the Applicants' business operations, by preserving the Company's structure of operations, maintaining the current key contracts, and preserving the economic activity and customer arrangements without interruption. It is required by the Purchaser and supported by the Monitor. It is a requirement under the Transaction that the Swarmio Group remain a viable entity to continue its operations and, in particular, provide its gaming software services to telecommunications companies and gaming publishers. That is a significant component of the Transaction and the value that the Purchaser is prepared to pay under the Transaction.

42. The Transaction represents the only viable going-concern result for the Swarmio Group and its creditors and other stakeholders.

43. In the circumstances, it is respectfully submitted that the reverse vesting order sought is consistent with the requirements and objectives of the CCAA, and should be approved.

B. The Releases should be approved

44. The Applicants seek a Release which includes the present and former directors and officers of the Swarmio Group, and the Monitor and its legal counsel. The proposed Release covers all present and future claims against the Released Parties based upon any fact, matter of occurrence in respect of the Transaction or the Company and its assets, business or affairs, except any claim for fraud or willful misconduct or any claim that is not permitted to be released under s. 5.1(2) of the CCAA.

45. When determining whether it is appropriate to grant such releases under section 11 of the CCAA courts have drawn on the well-established factors for approving releases under plans of compromise or arrangement. When modified in cases where there is no plan of compromise or arrangement, these factors include whether:[41]

(a) the claims to be released are rationally connected to the restructuring;

(b) the restructuring can succeed without the releases;

(c) the parties to be released contributed to the restructuring;

(d) the releases benefit the debtor as well as its creditors generally;

(e) the debtor's creditors have knowledge of the nature and effect of the releases; and

(f) the releases are fair, reasonable and not overly-broad.

46. No one factor is determinative.[42]

47. Applied here, the factors support the proposed Releases:

(a) The Released Parties made and continue to make significant contributions to the restructuring. This includes, among other things, maintaining customer relationships and ensuring that key partnerships remained aligned with the Swarmio Group following completion of the SISP.[43]

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[41] *Lydian International Limited (Re)*, 2020 ONSC 4006 at para 54; *Re Green Relief*, 2020 BCSC 318 at para 27.

[42] *Lydian International Limited (Re)*, 2020 ONSC 4006 at para 54.

[43] Third Karthigesu Affidavit at para 42, Tab 2 to the Motion Record.

(b) During the CCAA proceeding, certain of the directors and officers of the Company only received one third of their typical salary to support the Company's cash flows with the available DIP Facility;[44]

(c) The Releases are essential to and rationally connected to the restructuring; the Releases are required by the Purchaser as a condition precedent to the Transaction. Certain of the directors and officers entered into stay agreements with the Company which recognized the directors' critical role in ensuring the Company continues to operate in the ordinary course without interruption, and did not provide for any additional compensation to the directors for their work during the CCAA proceeding. It is a requirement of these agreements that the Applicants seek the Releases from this Court;[45]

(d) The Releases benefit the debtor as well as its creditors generally; they allow the critical participants in the Swarmio Group's restructuring to achieve finality and allow for the conclusion of the CCAA proceeding in the most efficient manner possible. It protects the Applicants from potential contribution and indemnity costs;

(e) The Releases are fair, reasonable and not overly-broad; the terms of the Releases being proposed follow the limitations imposed by the CCAA, and would not extend to any claims against directors and officers based on allegations of misrepresentations made by directors to creditors, or of wrongful and oppressive conduct by directors; and

[44] Third Karthigesu Affidavit at para 42, Tab 2 to the Motion Record.
[45] Third Karthigesu Affidavit at para 42, Tab 2 to the Motion Record.

(f) The Releases were disclosed in the Applicants' motion materials served on the service list in advance of this motion and the Monitor supports the granting of the Releases.

C. The sealing order should be granted

48. The Applicants ask that the confidential appendices to the Monitor's Second Report be sealed. The Court may seal confidential documents under section 137(2) of the *Courts of Justice Act* (the "**CJA**").[46] Section 137(2) of the CJA provides "a court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record."

49. In *Sherman Estate v. Donovan*, the Supreme Court of Canada established a three-part test for a sealing order: [47]

(a) court openness poses a serious risk to an important public interest;

(b) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and

(c) as a matter of proportionality, the benefits of the order outweigh its negative effects.

50. Citing *Sierra Club of Canada v. Canada (Minister of Finance)*, the Supreme Court of Canada reasoned in *Sherman Estate* that a general commercial interest in preserving confidential information is an important interest because of its public character.

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[46] *Courts of Justice Act*, R.S.O. 1990, c. C. 43, s. 137.

[47] *Sherman Estate v Donavan*, 2021 SCC 25 at para 38.

51. Here, the important public interest to be protected is the ability for companies in an insolvency proceeding to protect the economic interests of stakeholders by keeping the SISP documents, including the CIM and SISP Summary, confidential until the transaction closes. This is important because if the information were to become public it would harm a further sale process in the event the proposed Transaction does not close. A sealing order in respect of the unredacted Purchase Agreement is also sought to protect the personal information of certain individuals contained in a schedule to the agreement.

52. The sealing order sought is narrow, proportional, and time limited. The Applicants are only seeking to seal the confidential appendices from the public record pending a closing of the Transaction or until further order of the Court.

D. The Termination Order

53. As part of the CCAA Termination Order, the Applicants seek an extension of the stay of proceedings up to the earlier of November 24, 2023 or the time of the filing of the Termination and Discharge Certificate.

54. The Court may grant an extension of the stay of proceedings where the Court is satisfied that (a) circumstances exist that make the order appropriate; and (b) that the Applicants have acted, and are continuing to act, in good faith and with due diligence.[48] The Termination and Discharge Certificate will be filed upon completion of the proposed

[48] CCAA, s. 11.02(2)-(3).

Transaction and any other matters required to complete these proceedings to the satisfaction of the Monitor.

55. The following factors support the extension of the stay of proceedings:

(a) the Applicants have acted and continue to act in good faith and with due diligence throughout these CCAA proceedings, including in completing the SISP, identifying a value-maximizing transaction, and finalizing the terms of the Proposed Transaction with the proposed Purchaser;

(b) the extension of the stay is required to implement the Transaction;

(c) it is anticipated that the Applicants will have sufficient liquidity to fund the ongoing operating costs during the requested extension period;

(d) the Monitor supports the extension of the stay; and

(e) no creditor will be materially prejudiced as a result of the stay extension.

56. Following completion of the proposed Transaction, these CCAA proceedings will have achieved their purpose. At such time, the Applicants are seeking to terminate these CCAA proceedings and to discharge the Monitor. Upon service and filing of the Termination and Discharge Certificate, the Monitor will have completed its responsibilities as Monitor in these CCAA proceedings.

PART V - ORDER REQUESTED

57. The Applicants respectfully request that this Honourable Court grant the relief provided for in the draft Orders at **Tabs** “**3**” and “**4**” to the Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23rd day of August, 2023

Miller Thomson LLP

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SCHEDULE "A"
LIST OF AUTHORITIES

1. *Harte Gold Corp. (Re)*, 2022 ONSC 653
2. *Quest University Canada (Re)*, 2020 BCSC 1883
3. *Century Services Ltd. v. Canada (Attorney General)*, 2010 SCC 60
4. *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10
5. *Arrangement relatif à Blackrock Metals Inc.*, 2022 QCCS 2828
6. *Just Energy Group Inc. et. al. v. Morgan Stanley Capital Group Inc. et. al.*, 2022 ONSC 6354
7. *Acerus Pharmaceuticals Corporation (Re)*, 2023 ONSC 3314
8. *Re Green Relief Inc.*, 2020 ONSC 6837
9. *Lydian International Limited (Re)*, 2020 ONSC 4006
10. *Sherman Estate v Donavan*, 2021 SCC 25

SCHEDULE "B"
RELEVANT STATUTES

***Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended**

General power of court

11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

Restriction on disposition of business assets

36 (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

:Notice to creditors

(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Factors to be considered

(3) In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

Additional factors — related persons

(4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

> **(a)** good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and
>
> **(b)** the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

Related persons

(5) For the purpose of subsection (4), a person who is related to the company includes

> **(a)** a director or officer of the company;
>
> **(b)** a person who has or has had, directly or indirectly, control in fact of the company; and
>
> **(c)** a person who is related to a person described in paragraph (a) or (b).

Assets may be disposed of free and clear

(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

Restriction — employers

(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(5)(a) and (6)(a) if the court had sanctioned the compromise or arrangement.

Restriction — intellectual property

(8) If, on the day on which an order is made under this Act in respect of the company, the company is a party to an agreement that grants to another party a right to use intellectual property that is included in a sale or disposition authorized under subsection (6), that sale or disposition does not affect that other party's right to use the intellectual property — including the other party's right to enforce an exclusive use — during the term of the agreement, including any period for which the other party extends the agreement as of right, as long as the other party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

Courts of Justice Act, R.S.O. 1990, c. C.43, as amended

Vesting orders

100 A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed

Documents public

137 (1) On payment of the prescribed fee, a person is entitled to see any document filed in a civil proceeding in a court, unless an Act or an order of the court provides otherwise.

Sealing documents

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

Court lists public

(3) On payment of the prescribed fee, a person is entitled to see any list maintained by a court of civil proceedings commenced or judgments entered.

Copies

(4) On payment of the prescribed fee, a person is entitled to a copy of any document the person is entitled to see.

Wage Earner Protection Program Act, SC 2005, c 47, s 1, s 5

Prescribed criteria — other proceedings

(5) On application by any person, a court may, in proceedings under Division I of Part III of the *Bankruptcy and Insolvency Act* or under the *Companies' Creditors Arrangement Act*, determine that the former employer meets the criteria prescribed by regulation.

Wage Earner Protection Program Regulations, SOR/2008-222, s 3.2

Proceedings Under Bankruptcy and Insolvency Act or Companies' Creditors Arrangement Act

3.2 For the purposes of subsection 5(5) of the Act, a court may determine whether the former employer is the former employer all of whose employees in Canada have been terminated other than any retained to wind down its business operations.

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

Court File No.: CV-23-00701377-00CL

Applicants

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at TORONTO

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