SUPERIOR COURT OF JUSTICE

COUNSEL SLIP

COURT FILE NO.: CV-23-00701377-00CL **DATE: Friday, August 25, 2023**

NO. ON LIST: 2

TITLE OF PROCEEDING: SWARMIO MEDIA HOLDINGS INC. et al

BEFORE JUSTICE: JUSTICE CAVANAGH

PARTICIPANT INFORMATION

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ENDORSEMENT OF JUSTICE CAVANAGH:

On June 21, 2023, Swarmio Media Holdings Inc. (“Swarmio Parent”), Swarmio Inc. (“Swarmio OpCo”) and Swarmio Media Inc. (“Swarmio Media”) (together, the “Applicants” or the “Company”) brought an application pursuant to the *Companies’ Creditors Arrangement Act*. 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 Applicants and the Monitor implemented the SISP in accordance with its terms. Only two parties submitted a bid by the bid deadline. One bid was from the DIP Lender for the assets and operations of the Swarmio OpCo (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 it determined that the consideration provided for was not feasible as it had not been formulated.

On July 25, 2023, the Monitor received the OpCo Bid. The key terms of the OpCo Bid are set out in the Monitor's Second Report. The terms include that approximately $3.2 million in amounts owing to the Applicants' various creditors will be assumed in the proposed transaction.

The Applicants and the Monitor explain that the proposed transaction set out in the OpCo Bid 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. The Applicants' 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. Certain of these contracts prohibit assignment without prior consent of the applicable counterparty. The cost to formally transition critical customer contracts in multiple foreign jurisdictions is high. Given the Company's liquidity constraints, there are no resources available for a lengthy process which might have allowed the Company to secure consent for assigning its various material contracts. Commencing such a process to obtain assignments may create risks to the value of the business because of the nature of the customers. The enforcement of an assignment order would likely require commencement of recognition proceedings in multiple foreign jurisdictions, as these contracts are governed by foreign laws, typically in the Middle East, Asia, and North African regions. Any interruption to these customer relationships would be destructive to the value of the Applicants and their ability to continue operating as a going concern. Any such interruption would also render the proposed transaction unacceptable to the purchaser.

I have reviewed the motion materials and I heard submissions from counsel for the Applicants and counsel for the Monitor. No one appeared today to oppose the requested orders.

I am satisfied that the proposed transaction (through a reverse vesting order) should be approved. In this respect, I am satisfied that the factors identified in *Harte Gold (Re)*, 2022 ONSC 653, including at para. 38, support the Applicants' motion. The Monitor, in its Second Report, recommends approval of this transaction in circumstances where it will allow for the continued operation of the Applicants' business and greater value to creditors and stakeholders compared to a liquidation of the Applicants' business. The proposed transaction was the only offer received for the going concern sale of the Applicants' business in the SISP. No stakeholder is worse off under the proposed transaction than under any other viable alternative. I am satisfied that the proposed transaction is the best alternative available in the circumstances.

I am satisfied that the proposed releases are, in the circumstances, fair and not overly broad, and follow the limitations imposed by the CCAA.

I am satisfied that the limited sealing order that is requested satisfies the three-part test in *Sherman Estate v. Donovan*, 2021 SCC 25, at para. 38.

I add the following paragraph to my endorsement, for greater certainty, at the request of the OSC.

Nothing in the Orders shall affect the Ontario Securities Commission's ("OSC") rights and ability to pursue any investigation, take any action, exercise any discretion or commence any proceeding in respect of the Applicants under the *Securities Act (Ontario)*, RSO 1990, c. S.5 (the "Securities Act") or *Commodity Futures Act*, R.S.O. 1990,

c. C.20 (the “CFA”) other than in connection with the enforcement of a payment ordered by the OSC prior to the date of the Initial Order dated June 21, 2023 (the “Filing Date”). In addition, nothing in the Orders shall release any claims by the OSC which may be advanced pursuant to the Securities Act or CFA against the Released Parties (as defined in the CCAA Termination Order) other than the Monitor and its Counsel, who shall continue to benefit fully from the releases provided for in paragraph 7 of the CCAA Termination Order. For greater certainty nothing in these Orders is intended to or shall: (i) encroach on the jurisdiction of the OSC in the matter of regulating the conduct of market participants other than in connection with the enforcement of a payment ordered by the OSC prior to the Filing Date; or (ii) vary or amend paragraphs 44 and 45 of the Amended and Restated Initial Order dated June 30, 2023 pertaining to Relief from Reporting Obligations. Further, nothing in this Order shall constitute or be construed as an admission by the OSC that the court has jurisdiction over matters that are within the exclusive jurisdiction of the OSC under the Securities Act and CFA.

Orders to issue in forms of Orders signed by me today.

Digitally signed by
Peter Cavanagh